STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 23, Title 27 of the Environmental Conservation Law ("ECL") and Parts 420-425 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by the

TOWN OF VIRGIL,

Respondent.

RULING ON MOTION TO DISMISS AND CROSS-MOTION TO DISMISS AFFIRMATIVE DEFENSES

Case No. R7-20031106-128

PROCEEDINGS

In a notice of hearing and complaint dated September 21, 2007, staff of the New York State Department of Environmental Conservation ("Department") alleged that respondent, the Town of Virgil (the "Town" or "Respondent"), violated Article 23, Title 27 of the Environmental Conservation Law ("ECL") and Parts 420-425 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("6 NYCRR") by failing to reclaim a mine known as the Osbeck Gravel Pit (the "Mine"). The Mine is located due east of New York State Route 13 in the Town of Cortlandville, Cortland County, New York. In the complaint, Department Staff asked the Commissioner to order the Town to reclaim the Mine, and to impose a $35,000 penalty.

The Town served a timely answer to the complaint on October 16, 2007. In the answer, the Town denied that it was responsible for reclaiming the Mine, and asserted six affirmative defenses. Pursuant to Section 622.9 of 6 NYCRR, on October 26, 2007, Department Staff filed a statement of readiness with the Department's Office of Hearings and Mediation Services ("OHMS"). The matter was assigned to administrative law judge ("ALJ") Maria E. Villa.

By letter dated October 27, 2007, the ALJ requested that the parties confer and advise as to their availability for a hearing. In correspondence dated November 5, 2007, Patrick M. Snyder, Esq., the Town's special counsel, notified Department Staff and the ALJ that the Town planned to file a motion to dismiss the complaint.

The ALJ set a schedule for submissions, and the Town filed its motion on November 29, 2007. Department Staff filed a timely reply on December 20, 2007, and cross-moved to dismiss the Town's affirmative defenses. The Town filed a timely reply to the cross-motion on January 11, 2008.

In support of its motion, the Town submitted two affidavits: the affidavit of James J. Murphy, Jr., the Town's Supervisor, sworn to November 27, 2007 (the "Murphy Affidavit"), and the affidavit of Patrick M. Snyder, Esq., sworn to November 28, 2007 (the "Snyder Affidavit"). The Town also submitted a memorandum of law.

Department Staff's submissions in opposition to the motion and in support of its cross-motion to dismiss the Town's affirmative defenses included the affirmation of Margaret A. Sheen, Esq., sworn to December 18, 2007 (the "Sheen Affirmation"); the affidavit of Matthew J. Podniesinski, Mined Land Specialist II, sworn to December 17, 2007 (the "Podniesinski Affidavit"); the affidavit of Joseph S. Moskiewicz, Jr., sworn to December 12, 2007 (the "Moskiewicz Affidavit"); and a memorandum of law.

In response to Department Staff's cross-motion, the Town submitted the reply affidavit of Patrick M. Snyder, Esq. (the "Snyder Reply Affidavit"), sworn to January 8, 2008, and a January 9, 2008 memorandum of law.

UNDISPUTED FACTS

Based upon the submissions on the motion, the following facts are not in dispute:

1. The sand and gravel mine which is the subject of this proceeding is known as the Osbeck Gravel Pit. The Mine is located outside the Town of Virgil, due east of New York State Route 13, in the Town of Cortlandville, Cortland County, New York.

2. Department Staff served a complaint on December 14, 2007, asserting that the Town violated ECL Article 23, Title 27, and Parts 420-425 of 6 NYCRR by failing to reclaim the Mine.

3. The Town obtained a mining permit in the mid to late 1970s. On June 30, 1981, that permit expired and the Town did not apply for a renewal of the permit.

DISCUSSION AND RULING

Department Staff's complaint alleged that the Town failed to reclaim the Mine, in violation of Article 23, Title 27, of the ECL, and Parts 420-425 of 6 NYCRR. According to Department Staff, the Town obtained a mining permit in 1979. The complaint asserted that the permit expired on June 30, 1981, and the Town never applied for a renewal. Department Staff contended that beginning on June 30, 1981, and continuously thereafter, the Town "failed to conduct ongoing reclamation immediately upon the cessation of mining and has failed to reclaim the Mine within two years of the cessation of mining at the Osbeck Gravel Pit." Complaint, at ¶ 19. In the complaint, Department Staff requested that the Commissioner order the Town to reclaim the Mine, and impose a civil penalty of $35,000.

In its answer, the Town asserted that it was not responsible for reclamation, and in paragraphs 5 through 10 of its answer, raised six affirmative defenses, specifically:

"5. The complaint fails to state a claim or cause of action against the Town of Virgil.

6. The complaint is untimely in that it is barred by the applicable statue of limitations. The claims accrued approximately 24 years ago.

7. The complaint is untimely in that it is barred by the doctrine of laches.

8. The complaint must be dismissed because it has failed to name necessary parties, including parties who mined at the site and owners of the property. The Town of Virgil has no legal authority to enter the property.

9. The complaint must be dismissed because it is a violation of due process.

10. The complaint must be dismissed because it was not served upon the respondent in the manner provided under the CPLR [New York Civil Practice Law and Rules]."

Answer, ¶¶ 5-10.

The grounds for the Town's motion to dismiss were similar to the affirmative defenses articulated in the answer. In its Notice of Motion, the Town moved to dismiss the complaint in its entirety, with prejudice, because:

1. Department Staff's enforcement action is untimely and it violates both State Administrative Procedure Act Section 301 and the doctrine of laches.

2. Department Staff's enforcement action violates due process under the State and federal Constitutions.

3. Department Staff's complaint fails to name necessary parties.

4. Department Staff's complaint was not served in the manner required by the CPLR.

Department Staff opposed the motion to dismiss, and filed a cross-motion seeking dismissal of the Town's affirmative defenses.

Standard on Motion to Dismiss

In order for the Town to prevail on its motion to dismiss, the documentary evidence submitted must conclusively establish the Town's defenses to the allegations in the complaint as a matter of law. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). The trier of fact must accept as true the material facts alleged in the complaint as well as in any submissions in opposition to the motion. CPLR § 3211; 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001). Moreover, Department Staff must be accorded "the benefit of every possible favorable inference." Id., at 414 (citations omitted).

For the reasons set forth below, the Town's defenses were not established as a matter of law, and consequently, the Town's motion to dismiss the complaint must be denied. Department Staff's motion to strike the Town's affirmative defenses is granted.

Improper Service

The Town's sixth affirmative defense, at paragraph 10 of its answer, and the fourth basis for its motion to dismiss, raise a threshold jurisdictional issue. Specifically, the Town asserts that the notice of hearing and complaint were not properly served. Those allegations will be addressed first.

In its November 29, 2007 motion, the Town indicated that the notice of hearing and complaint were served only upon Patrick M. Snyder, Esq., the Town's attorney, and were not personally served

on the Town Supervisor or the Town Clerk. Snyder Affidavit, at ¶ 28. The Town pointed out that Section 622.3(a)(3) of 6 NYCRR states that "[s]ervice of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail." The Town noted further that pursuant to Section 311(a)(5) of the CPLR, either the Town Clerk or the Town Supervisor must accept process in order for service to be effective upon a town. See Matter of Eldor Contracting Corp., Inc. v. Town of Islip, 277 A.D.2d 233, 234 (2nd Dept. 2000). In that case, the Appellate Division upheld Supreme Court's determination that the proceeding was jurisdictionally defective because petitioner failed to effect personal service on either the town supervisor or the town clerk. The court observed that strict compliance with statutory procedures is required to institute claims against the State and its political subdivisions, "and where the Legislature has designated a particular public officer for the receipt of service of process, we are without authority to substitute another." Id. (citing Matter of Franz v. Board of Educ., 112 A.D.2d 934, 935 (2nd Dept. 1985), lv. denied, 67 N.Y.2d 603 (1986)). Accordingly, the Town sought dismissal of Department Staff's complaint.

By letter dated December 10, 2007, Department Staff advised the ALJ and the Town that Department Staff was withdrawing the September 21, 2007 notice of hearing and complaint, and would be re-serving those pleadings in order to correct the deficiencies in the prior service. Department Staff enclosed a notice of hearing and complaint dated December 10, 2007. In its letter, Department Staff stated that because "the Town of Virgil has previously attended a pre-hearing conference held on October 22, 2007, and has supplied its Answer, the Department will stipulate that such Answer may suffice for the Town in this newly commenced proceeding, if the Town so chooses."

According to the Sheen Affirmation, Department Staff served the notice of hearing and complaint on December 13, 2007. Attached as Exhibit 10 to Department Staff's reply were copies of certified mail return receipts addressed to Bonnie Hand, the Town Clerk, and to Supervisor Murphy. Both receipts indicated a date of delivery of December 14, 2007, and both were signed by Ms. Hand.

The Town did not object to service, and the December 10, 2007 complaint is essentially the same as the prior pleading. As a result, the Town has been served in conformance with 6 NYCRR Section 622.3, the sixth affirmative defense at paragraph 10 of the answer is stricken, and that portion of the Town's motion seeking dismissal based on improper service is denied.

Delay

The Town asserted that Department Staff's enforcement action was untimely as one of the bases for its motion to dismiss, and also as an affirmative defense at paragraph 6 of the answer. According to the Town, the extraordinary lapse of time between the expiration of the mining permit in 1981 and the commencement of this action contravenes the requirement of Section 301(1) of the State Administrative Procedure Act ("SAPA"). Section 301(1) provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within a reasonable time."

The Town also contended, as an affirmative defense at paragraph 7 of the answer, that Department Staff's complaint must be dismissed based upon the doctrine of laches. This doctrine was also one of the grounds for the Town's motion to dismiss. Although the Town acknowledged that this common law doctrine is generally unavailable as a defense to an agency's enforcement action where a private party is the respondent, the Town asserted that "[i]t is highly doubtful that the rule would have applied here, where the respondent is another governmental body – a duly incorporated town." Respondent's Memorandum of Law, at 4. According to Town, "[t]he genesis of the rule against laches where the government is the plaintiff was a desire to protect the public tax payers." Id.

The Town conceded that "[w]hile it is an interesting academic question whether laches could be invoked here, it need not be resolved," and went on to acknowledge that "[t]he doctrine of laches has been superceded by statute under the circumstances of this case." Id. Department Staff maintained that the applicable time period in which to commence an administrative action is not governed by the doctrine of laches, but rather, by SAPA 301(1), citing to Matter of Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d 169, 178 (1985), reargument denied, 66 N.Y.2d 1035 (1985), cert. denied, 476 U.S. 1115 (1986). The court in Cortlandt articulated four factors to be weighed in determining whether delay in bringing an administrative action is unreasonable as a matter of law. The Town countered that it is not clear whether the Cortlandt court intended that this inquiry would replace the doctrine of laches when a municipality is the respondent.

The Town did not cite any persuasive authority for this proposition, and its argument that the rule against laches as applied to a governmental body is intended to protect the taxpayers does not take into account the broader prohibition against the use of laches to thwart public policy. Matter of

Wille (Intra Bank, S.A.), 61 Misc.2d 992, 1015 (Sup. Ct., New York County 1968), aff'd no opn., 31 A.D.2d 721 (1st Dept. 1968), aff'd no opn., 25 N.Y.2d 619 (1969), cert. denied, 399 U.S. 910 (1970).

In Manitou Sand & Gravel, Inc. v. Town of Ogden, Supreme Court considered the Town of Ogden's defenses of res judicata and laches to a declaratory judgment action challenging agreements entered into in connection with a mining permit application. 9 Misc.3d 1112(A), 2005 WL 2312450, * 5-6 (Sup. Ct., Monroe County 2005) (unreported disposition). In that case, the court reasoned that laches, like the doctrine of res judicata, should not be applied because of the public importance of the issues involved, and ruled that "[p]recluding the meritorious claim that the 1988 and 1990 agreements violate the comprehensive regulatory scheme of the MLRL [Mined Land Reclamation Law], [on res judicata grounds], would leave the public policy of the state in regard to mining regulation wholly at variance with the circumstances erected by the parties in these agreements." Id., * 5.

The court went on to state that res judicata should not be applied to frustrate the purpose of State laws or thwart public policy. Id. The court concluded that "[f]or similar reasons, the Town's defense of laches, itself a judge made creature of public policy, cannot prevent the implementation of the comprehensive MLRL regulatory scheme." Id. at * 6 (citing Matter of Wille, supra). The same principle is applicable here. The defense of laches should not be used to frustrate the public policy requiring reclamation of mined lands to avoid adverse environmental consequences. In any event, as both parties acknowledge, the appropriate inquiry in this case must take into account the factors set forth by the court in Matter of Cortlandt, supra. Department Staff's motion to strike the Town's seventh affirmative defense grounded in laches is granted, and the Town's motion to dismiss on this basis is denied.

Cortlandt Factors

As noted above, the Town contended that Department Staff's complaint must be dismissed due to the extraordinary lapse of time between 1981, when a permit to mine that was issued to the Town in 1978 expired, and the commencement of this action. The Town asserted that it ceased mining at the site in or about 1981,

but maintained that other entities were mining there for several years thereafter.[1]

The Town acknowledged that "the extent of mining done by any party at the site is undocumented." Respondent's Memorandum of Law, at 3. Included as an exhibit to the Snyder Affidavit was a copy of an April 9, 1993 letter from the Cortland County Highway Department to Mr. Moskiewicz, enclosing a narrative indicating that the County had removed material from the Osbeck Pit "from approximately 1980 to 1986." Snyder Affidavit, ¶ 17, Exh. H. The letter went on to state that the site owner, Mr. Osbeck, had allowed contractors to mine on the property.

The letter stated that the County

> had mined the back (southeast) of the mine, and the Town and the owner (Osbeck through contractors) had mined the front (roadside) of the mine. The owner believed there was still usable material in the back, so the County had left it open and proposed to reclaim the front. As it is, no reclamation has been done and the County would like to propose reclaiming the area in which they are responsible within the next 5 years. The last issued permit on our record expired 6/30/81.

Snyder Affidavit, Exh. H. The Town pointed out that the documents it received in response to its Freedom of Information Law ("FOIL") requests "do not identify the specific areas mined by the Town, the areas mined by private parties, or the areas

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[1] The date that the permit was issued is not clear from the record. The Murphy Affidavit states that "[t]he documents I have seen, obtained previously from the DEC, indicate that the Town of Virgil had a mining permit from 1978-1981." Murphy Affidavit, ¶ 12. Attached as Exhibit C to the Snyder Affidavit is a copy of an undated letter from Joseph S. Moskiewicz, Jr., who at the time was a Mined Land Reclamation Specialist in the Department's Region 7 office. Accompanying the letter is a copy of an unsigned permit. Both the letter and the permit indicate that the expiration date of the permit was June 30, 1981. The complaint states that a permit was issued to the Town in 1979, and that the permit expired on June 30, 1981. Complaint, ¶ 4. The Sheen Affirmation indicates that an application was submitted in 1975, a mined-land use plan was submitted in 1978, and that the permit was "renewed" in 1978, and modified in 1979. Sheen Affirmation, ¶ 2. The Moskiewicz Affidavit states that a mining permit application for a 22-acre portion of the Osbeck Pit was submitted by the Towns of Virgil and Dryden on April 29, 1975, and that a permit was issued to the Town of Virgil in 1978. Moskiewicz Affidavit, ¶ 2. According to the Moskiewicz Affidavit, the permit was modified in 1979 to include an agreement among the Town, the Cortland County Highway Department, and the respective landowners of the Osbeck and adjoining McConnell Pit "to provide for reclamation in a coordinated, simultaneous, and concurrent fashion." Id.

which were mined prior to the Mined Land Reclamation Law (i.e., "grandfathered areas"). Id. ¶ 10.

"[T]here is no fixed period after which delay becomes unreasonable as a matter of law." Matter of Manor Maintenance Corp., ALJ's Hearing Report, at 7, 1996 WL 172655, *7 (Feb 12, 1986). Rather,

> an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation.

Matter of Cortlandt, supra, at 178. Moreover, the courts have construed the phrase "reasonable time" to be "directory only, noncompliance with which being insufficient to terminate the agency's jurisdiction absent a showing of substantial prejudice." Matter of Louis Harris and Assocs., Inc. v. deLeon, 84 N.Y.2d 698, 703 (1994) (citations omitted). The courts have also "rejected the claim that lapse of time in rendering an administrative determination can, standing alone, constitute prejudice as a matter of law." Id. at 702 (citations omitted).

Private Interest

With respect to the first Cortlandt factor (the nature of the private interest allegedly compromised by the delay), the Town maintained that the Town's interest "is purely the public's interest." Respondent's Memorandum of Law, at 5 (emphasis in original). In his affidavit, the Town Supervisor stated that the Osbeck Pit consists of approximately 25 acres of formerly mined land, and that "based on information received from the DEC and others, . . . the cost of reclamation could easily be $75,000 to $125,000." Murphy Affidavit, at ¶ 8. Mr. Murphy pointed out that the Town's population is only about 2,200 persons, that the Town does not have the funds to reclaim the Mine, and that "it would be a catastrophic financial hardship to the citizens of the Town to be forced to raise such funds." Id. at ¶ 9. The Town concluded that "[t]he taxpayers of Virgil have an interest in not spending tens of thousands of dollars to reclaim land on private property in another town, which land was disturbed by mining companies decades ago." Respondent's Memorandum of Law, at 5.

The Town Supervisor stated that the Town was never paid for gravel from the Mine, and that any payments would have gone to the landowner, Donald Osbeck.

Department Staff responded that the Town's interests had not been compromised in any way, and that "[o]n the contrary, the Town was able to receive a mining permit, with which it [sic] came full obligations of having to reclaim the mine, and Respondent operated the mine for numerous years without incurring any costs for reclamation or compliance." Department Staff's Memorandum of Law, at 6. Department Staff argued further that the Town had realized a savings by not reclaiming the mine, and that the interest on the money that was not spent on reclamation would be substantial. According to Department Staff, the violation in this matter is ongoing, and "the attempt to enforce the state's regulations cannot be found untimely, as the violation is still continuing today, and still must be addressed and remedied." Id. at 6.

In response, the Town observed that Department Staff's evidence on the cross-motion made it clear that parties in addition to the Town were responsible for mining at the site, and for the failure to reclaim. The Town pointed out that Mr. Moskiewicz's affidavit notes that "multiple operators" contributed to visual pollution that he observed during a site visit on September 2, 1981. Moskiewicz Affidavit, at ¶ 5. The Town took the position that the activities of other operators undercut Department Staff's contention that the alleged violation was continuing in nature.

Although the Town's argument that the taxpayers of the Town of Virgil would be unfairly burdened by the costs of reclamation is compelling, the statute requires a permittee to reclaim when a mining permit is issued. It is undisputed that the Town mined at the site for an approximately two-year period, some thirty years ago. Section 27-2713(2) of the ECL requires that

> [t]he reclamation of all affected land shall be completed in accordance with the schedule contained in the approved mined land-use plan pertaining thereto. . . . Reclamation of the affected land shall be completed within a two year period after mining is terminated, as determined by the department, unless the department deems it in the best interest of the people of the state to allow a longer period for reclamation.

Section 422.1, the regulatory provision requiring a reclamation plan as part of a mined land use plan, was in effect during the permit term and thereafter.[2] Thus, the permit issued to the Town carried with it the obligation to reclaim. That obligation outweighs the interest asserted by the Town, and this factor in the Cortlandt analysis favors Department Staff.

Although the record on these motions sufficiently identifies the private interest asserted by the Town for purposes of the Cortlandt analysis, factual questions remain that must considered at a hearing. It is unclear from the record what reclamation was contemplated when the original permit was issued. Paragraph 15 of the Podniesinski Affidavit refers to Exhibit 7, a two-page document entitled "Mining and Reclamation Plan for the Osbeck Pit." The document does not mention the Town of Virgil, and describes the mining operation and reclamation to be undertaken in general terms. According to Exhibit 7, the acreage of the affected land was approximately 25 acres or less, including haulageways. The Town asserted that

> the staff is trying to force the Town to reclaim 25 acres of land that are known to have been mined by several other parties. The only documentation provided in support of their 25 acre figure is their exhibit 7 – a document that is not specifically mentioned in Mr. Moskiewicz's affidavit. There is no evidence as to when the document was produced or who made it, and it does not even mention the Town of Virgil.

Respondent's Memorandum of Law in Response to Cross-Motion ("Respondent's Cross-Motion Response"), at 2. The Town went on to point out that

> Mr. Moskiewicz, the only staff member with personal knowledge of the events in question, does not refer in his affidavit to the mined land use plan provided by the staff. His affidavit does not describe this plan or identify it in any way. The only mined land use plan provided by the staff is its exhibit 7. . . . Mr. Podniesinski identifies this as "the approved reclamation plan" without

[2] Although Section 422.1 was amended in 1999, the provision in question was unchanged.

> further explanation. There is no explanation or evidence on the document as to who produced it, when it was produced, when it was submitted, or even who it applies to. There is no reference in the document to the Town of Virgil. One can only wonder how Mr. Podniesinski, who was hired in the year 2000, can now comment authoritatively on the history of this document that supposedly became legally binding on the Town of Virgil in 1978, no less than 22 years before he arrived on the scene.

Id. at 3-4. The Town went on to argue that

> [i]f exhibit 7 is in fact binding on the Town, there is no explanation as to why the staff would disregard these plans and seek to impose the far more costly and extensive plans that they included in the proposed consent order.

Snyder Reply Affidavit, ¶ 14.

Because the nature and scope of the reclamation to be undertaken by the Town pursuant to the permit is not clear from the record, a hearing should be held to develop that information so that the Commissioner may determine what, if any, reclamation should be required.[3] As a threshold matter, and as discussed more fully below, the mine is not located within the Town's boundaries, and the Town has asserted that it has no authority to enter the Mine property. The terms of the original reclamation plan, if any, are in dispute, as well as the extent of the acreage to be reclaimed. Moreover, as noted above, the statute requires reclamation "after mining is terminated, as determined by the department." ECL Section 27-2713(2). On this record, it is not clear when mining "terminated" such that the Town's obligation to reclaim would have been triggered. A decision on this issue would involve a legal conclusion, but that conclusion

[3] In this regard, Section 27-2713(1)(d) of the ECL provides that "[t]he department may, after notice and an opportunity for a hearing, impose a reclamation plan in the absence of an approved reclamation plan or upon a finding of noncompliance with or failure of any approved reclamation plan." In light of the uncertainties surrounding the reclamation plan contemplated at the time the permit was issued, and the Town's ability to implement such a plan at present, a hearing should be held. The record developed at the hearing would allow a recommendation to be made to the Commissioner as to any reclamation to be ordered or any penalty to be imposed, taking into account circumstances such as the lapse of time, the activities of other parties at the Mine, and the extent of the Town's operations there.

rests upon the facts of this case, and this and other factual questions should be the subject of a hearing.

Actual Prejudice

The second Cortlandt factor requires consideration of the actual prejudice to the Town. The Town maintained that it would be substantially prejudiced if this matter were to proceed to a hearing, pointing out that approximately 25 years have passed since the Town ceased mining at the site. Consequently, all former town employees and officers involved with the Mine are gone, as is the original land owner. According to the Town, no formal notice of violation was served upon the Town until the 2007 complaint. The Town noted that "[i]f this enforcement action had been brought in the early 1980's, as it easily could have been, the Town's ability to bring in the other mining companies and the land owner would not have been compromised. That potential has not just been compromised, it has been forever lost in these intervening 24 years." Respondent's Cross-Motion Response, at 3.

In addition to the unavailability of witnesses, the Town went on to argue that it would be prejudiced by the lack of documentary evidence. As noted above, the Town observed that Mr. Moskiewicz, the only Department Staff member with personal knowledge of the events in question, did not refer to the mined land use plan that Department Staff offered as Exhibit 7 to its cross-motion to dismiss the Town's affirmative defenses. The Town concluded that "[t]his is but 1 example of how the passage of time has gravely prejudiced the Town's ability to obtain facts necessary for a fair and reasonable resolution of this matter." Id.

Department Staff responded that "this action was commenced after years of negotiations with the Respondent regarding their legal liability and obligation to reclaim the mining site, including claims by the Respondent that they would reclaim." Department Staff's Opposition, at 5. Department Staff cited to ECL Section 23-2713(2), which authorizes the Department to allow a longer period for reclamation if the Department deems it in the best interests of the people of the State. According to Department Staff,

> for many years, the Department used this authority, in hopes that its willingness to work with the Respondent would, in fact, be in the best interest of the people of the state. It was not until the Department found

> that the Respondent was not willing at all to go through with its obligations that it decided that it was no longer in the best interest of the people of the state.

Id. According to Department Staff, the Town often asked to meet regarding the reclamation, and asked for additional time to reclaim the Mine. Consequently, Department Staff asserted that "there has been no significant delay that has not been caused by Respondent's own request regarding the reclamation of the site," and that the Town cannot now claim that this proceeding must be dismissed as untimely. Id., at 6.

Department Staff countered the Town's arguments concerning the unavailability of witnesses and documents by noting that the Department "has provided them all documents via their FOIL requests." Id., at 7. This argument overlooks the fact that the Town's own records, which may or may not duplicate records maintained by the Department, may no longer be in existence. Department Staff also maintained that "[i]t is clear that there are certain individuals that have been on the Town Board since the early 1980s, and are still employed by the Town, such as Mr. James J. Murphy himself."[4] Id. Department Staff argued that the Town had not presented any proof stating that any of the Town's records were destroyed, or that efforts to locate past employees that were involved in mining were undertaken. Nevertheless, in his Affidavit, Mr. Murphy, the Town Supervisor, stated that "[t]he Town of Virgil personnel involved with the mine, including the former Town Supervisor and Highway Superintendent, are long gone. Furthermore, we have no records that document the extent of the Town's involvement or the extent of other parties' involvement with the site." Murphy Affidavit, ¶ 11. Even if Department Staff is afforded the benefit of every possible inference on this motion to dismiss, Mr. Murphy's sworn testimony is sufficient evidence, given his tenure on the Town Board since 1983, and as Town Supervisor from 2004 to early 2008, that Town personnel and the Town's records are unavailable to assist in the Town's defense. The second Cortlandt factor favors the Town.

Although the Town has established that it would be prejudiced by the lack of witnesses and documentary evidence, it

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[4] Mr. Murphy's Affidavit states that he is the longest serving Town Board member, and that "[t]his will be my last year as supervisor of the Town of Virgil. I have decided to retire and I did not seek re-election this year." Murphy Affidavit, ¶¶ 3-4. Mr. Murphy states that he was originally elected to the Town Board in 1983, and served continuously until his election as Town Supervisor in 2004. Murphy Affidavit, ¶¶ 1-2. In its reply memorandum of law, the Town states that Mr. Murphy has now left office.

does not follow that the complaint must be dismissed on that basis. All of the factors set forth by the court in Cortlandt must be weighed in determining whether there has been unreasonable delay in an administrative proceeding.

The Parties' Conduct

The third Cortlandt factor requires consideration of the causal connection between the conduct of the parties and the delay. The Town took the position that the lengthy lapse of time was attributable to Department Staff's inaction. The Town noted that this matter was first referred for enforcement in 1993, citing to a March 24, 1993 memorandum from Mr. Moskiewicz to Thomas Fucillo, then-Regional Attorney, in which Mr. Moskiewicz requested a consent decree and schedule for reclamation. Snyder Reply Affidavit, ¶ 7, Exh. 1.

Mr. Murphy, the former Town Supervisor, stated that "[a]t no time during my years on the Town Board did it attempt to mislead the DEC concerning its intentions relative to the mine site." Murphy Affidavit, ¶ 6. The Town acknowledged that "Town representatives met from time to time with the Department to discuss potential solutions. However, there was never a meeting of the minds, and there was never any commitment made by the Town Board to undertake any specific action." Respondent's Memorandum of Law, at 6.

In response, Department Staff maintained that any delay was attributable to the Town. Mr. Moskiewicz stated that

> I was not able to negotiate a final settlement of the matter or advance the issue of site reclamation . . . until January 20, 1987, when the Cortland County Highway Department represented to me that the town would renew the permit for two additional years and then close and reclaim the mine. No permit application was ever received by the Department. During 1998 [sic], I determined that site to be in violation of the Environmental Conservation Law and documented by my observation and that of other Department personnel that the Town of Virgil was illegally operating the mine during 1988.

Moskiewicz Affidavit, ¶ 7. On March 27, 2000, Mr. Moskiewicz met with the Town's Highway Superintendent. Moskiewicz Affidavit, ¶

10. Mr. Podniesinski indicated that he met with the Town in 2001 and 2002. Podniesinski Affidavit, ¶¶7, 9, 11. Department Staff cited to a July 5, 2001 letter from Francis Casullo, Esq., the Town's attorney at that time, to Donald Osbeck, the property owner. Exh. 1A. In that letter, Mr. Casullo stated that the Town was working with the Department . . . in reclaiming the mine." Id. A subsequent letter contained a similar statement (see Exh. 4 (May 22, 2002 letter from F. Casullo to D. Osbeck).

The Department took the position that

> [w]hat Respondent is attempting now is to rely on a [sic] argument that because the Department wished to work with the Respondent, the Department believed the Respondent when it stated it wished to renew the permit and would begin reclamation of the Mine, and because the Department didn't simply ignore any of the above and instead just enforce for lack of reclamation within two years in which the Respondent supposedly ceased mining (despite the fact that the Department never received the required notice of termination of mining), that the Respondent no longer has a responsibility to reclaim the mine.

Sheen Affirmation, ¶ 4. Department Staff stated that after years of failed negotiations, it was obliged to bring this enforcement action when the plans for reclamation did not come to fruition.

The Town responded that "a close reading of [the Moskiewicz] affidavit proves that he has not documented one (1) single direct contact between the Department and the Town for the 19 years between 1981 and early 2000." Respondent's Reply Memorandum, at 1. The Town concluded that "[t]he staff can characterize the period of July 5, 2001 to October 17, 2003 as 'negotiations' if it likes, but it certainly cannot properly say that it was misled by the Town of Virgil." Snyder Reply Affidavit, ¶ 17. According to the Town, the correspondence and meetings that took place during those years did not bind the Town to anything. Rather, the Town asserted that it was

> investigating and evaluating the situation. It obviously wanted to be cooperative, but it ultimately would not agree to the costly and extensive reclamation that the staff wanted.

Snyder Reply Affidavit, ¶ 15.

It is clear from the record that the Town bears some responsibility for the delays in this case. Although it cannot be said, based upon the evidence submitted on the motion, that the Town intentionally misled Department Staff, the Town cannot be heard to argue that it was unaware of any obligation to reclaim, or had a reasonable belief that its obligation had been satisfied.

Nevertheless, in light of this chronology, the third Cortlandt factor favors the Town. Although it is appropriate for the Department to attempt to resolve enforcement matters, if possible, without a hearing, the time expended in this case is significant, even assuming that negotiations were ongoing during the entire period. As the Town noted, in the 24 year period between 1983 and 2007, the Department was under the impression between 1987 and 1990 that the Town would apply for another permit, and can claim that negotiations were taking place between 2001 and 2003. This does not account for the years between 1990 and 2000, and 2003 to 2007, when the complaint was served.

Underlying Public Policy

The fourth Cortlandt factor takes into account the underlying public policy advanced by governmental regulation. In this regard, the Town maintained that this enforcement proceeding "is highly questionable from an environmental standpoint." Respondent's Memorandum of Law, at 3. In his Affidavit, the Town Supervisor stated that "[e]ven if all the responsible parties were present and able to contribute toward the reclamation, it is highly questionable whether such reclamation would be in the best interests of the environment." Murphy Affidavit, ¶ 21. Mr. Murphy opined that "there is little or no reason for this mine site to be further reclaimed. The site has been mostly abandoned for about 20 years. Vegetation is growing in many areas. There are shrubs and trees in many areas that appear to be about 20 years old." Id., ¶ 22.

According to Mr. Murphy, the site is not causing any environmental damage to adjacent property, and he has never received any complaints from the citizens of the Town of Virgil about the Mine. Id., ¶¶ 23-24. Mr. Murphy stated that "[a]ll runoff is contained within the parcel of land. There is no off site sedimentation or pollution. I have been informed by DEC personnel that the issue is primarily 'aesthestics.'" Id., ¶ 23. Mr. Murphy maintained that the visual impacts from the Mine are minimal. Id., ¶ 25. Attached to the Murphy Affidavit were several photographs of the Mine depicting tree cover, but also

bare slopes. The Town concluded that if this action were allowed to proceed, "[i]t would extract significant funds from Virgil tax payers and it would be used to accomplish marginal, if any, environmental benefits." Respondent's Memorandum of Law, at 6.

In its opposition, Department Staff offered the Podniesinski Affidavit. That Affidavit states that Mr. Podniesinski inspected the Mine on July 11, 2000, and observed that vegetation was absent in many areas and that gullies were forming. Podniesinski Affidavit, ¶ 4. Mr. Podniesinski stated that he inspected the Mine again on June 13, 2003, and noted that "[e]rosion of the site had continued and become more pronounced." Id., ¶ 13. According to Mr. Podniesinski,

> [t]he approved reclamation plan [Exhibit 7] is to return the mine to pasture land. The current condition of the site is a series of pits and faces with stripped and previously mined land in between and has not been returned to a productive use. The site is eroding and in addition to the discharge of sediments from the mine site, is a source of visual pollution to thousands of motorists each day who use New York State Route 13 which is public highway that passes in front of the mine property.

Id., ¶ 15.

In the context of a motion to dismiss, the factual allegations supporting the complaint are taken as true, and Department Staff must be afforded the benefit of every favorable inference. As a result, Mr. Podniesinski's expertise with respect to reclamation of mining sites, and interpretation of the Department's regulations in this regard, establishes for the purposes of the Cortlandt analysis the compelling public interest that is compromised due to the lack of reclamation at the Mine. The public policy requiring reclamation of mining sites is an important component of the Department's regulation of mined land, and takes precedence over the concerns voiced by the Town.

Balancing of the Factors

Weighing all four of the Cortlandt factors leads to the conclusion that the Town's motion to dismiss cannot be granted. The public policy articulated in the MLRL, and the Town's contribution to the delay in this case, outweighs the Town's private interest and the prejudice it has asserted.

Moreover, there are a number of material factual disputes which must be resolved in order to determine liability and the penalty to be imposed, or remediation to be required. The scope and nature of any reclamation plan, any subsequent modifications to that plan, and the extent of the Town's and other parties' operations at the Mine are unclear. The Town's motion to dismiss based on unreasonable delay must be denied, and Department Staff's motion to dismiss the second affirmative defense, at paragraph 6 of the answer, is granted. Nevertheless, the Town's arguments with respect to each of the Cortlandt factors on this motion, and any further factual development of those factors at the hearing, may be considered by the Commissioner in determining the ultimate disposition of this action.

Due Process

In its motion to dismiss, and as an affirmative defense at paragraph 9 of its answer, the Town argued that the delay in bringing this enforcement action violated both the federal and State Constitutions' guarantees of due process of law. In response, Department Staff pointed out that the Town would be afforded a hearing on the allegations in the complaint. Department Staff argued further that the Town's due process affirmative defense failed to allege facts to excuse the violation or mitigate the relief sought in the complaint, and thus did not constitute a proper affirmative defense. According to Department Staff, the Town was "arguing its SAPA 301(1) argument in its 'due process' argument." Department Staff's Opposition, at 13.

The Town's due process argument fails for the reasons set forth above with respect to the denial of the Town's motion to dismiss based upon SAPA. The Town's motion does not set forth a persuasive argument that due process has been violated, and as a result, the motion to dismiss cannot be granted on that basis, and Department Staff's motion to strike the fifth affirmative defense, at paragraph 9 of the answer, is granted.

Failure to Name Necessary Parties

As a further basis for its motion to dismiss, and as an affirmative defense at paragraph 8 of its answer, the Town maintained that Department Staff failed to name necessary parties to this proceeding pursuant to Section 1001(a) of the CPLR. That provision requires that all those "who might be inequitably affected" by an action to be made parties to the litigation. Specifically, the Town asserted that the current owner of the

site, as well as the former owner, Donald Osbeck, must be joined as necessary parties to this proceeding.

According to the Town, the property is not located within the Town of Virgil's boundaries, and the current owner of the property has no contacts with the Town. Consequently, the Town argued that "[o]bviously the Town has no authority to enter onto this property with bulldozers and other equipment to re-grade approximately 25 acres of his property." Respondent's Memorandum of Law, at 8. The Town also contended that the former owner, Mr. Osbeck, "allegedly rented out his land to mining companies after the Town had left. There is also evidence in the record that Mr. Osbeck may have discouraged reclamation of the property to facilitate that additional mining." Id., at 9.

The Town went on to argue that it is highly inequitable for Department Staff to proceed against the Town, in light of the "extensive evidence of mining taking place on the property after the Town left. That includes, not only the County Highway Department, which is known to have mined on the site for several years, but also private construction companies." Id.

Department Staff characterized this affirmative defense as "irrelevant to the Town's liability." Department Staff's Opposition, at 14. According to Department Staff, the only necessary party to this enforcement action, the Town of Virgil, had been named. Department Staff emphasized that the Town, as the permittee, was the entity required to reclaim the Mine. In her Affirmation, counsel for Department Staff stated that

> [i]n 2002, the attorney for the prospective buyers of the Osbeck Mine property called the Department questioning whether the Respondent remained responsible for reclamation of the Mine. The Department indicated that as permittee, the Respondent was still liable. The Department was told that the new owners would provide access to the Mine for reclamation purposes.

Sheen Affirmation, ¶ 2. Mr. Podniesinski, in his Affidavit, indicates that

> On December 10, 2002, I received a phone call from Peter Mitchell, Esq., who reported that he was representing the prospective buyer of the Donald Osbeck property which includes the mine site. Per Mr. Mitchell's request, I

> verified to Mr. Mitchell that the Town would retain responsibility for reclaiming the mine in the event of a land sale. In response to my inquiry, Mr. Mitchell stated that the new owner would be willing to allow the Town access to the property for the purpose of reclamation.

Podniesinski Affidavit, ¶ 12.

It has been held that the Commissioner cannot order the Town to enter upon property that it does not own, or does not have permission to enter. See Matter of Barnes, ALJ's Hearing Report, at 10, 2000 WL 33341457, * 8 (Apr. 24, 2000) ("The Commissioner cannot order a trespass, or direct another party to undertake an action on property owned by someone else."); Matter of Ames, Order, at 2, 1994 WL 734482, * 1 (Dec. 29, 1994) ("Requiring a landowner to provide access to third parties to remediate a violation where the landowner has committed no wrongdoing is an extraordinary remedy"); Matter of Kimball, ALJ's Hearing Report, at 13, 1991 WL 161027, * 11 (Apr. 15, 1991) (Commissioner cannot, as a matter of law, order respondent to enter a vacant lot owned by non-parties, who were unaware of solid waste being deposited at the site). In Matter of Ames, supra, the Commissioner considered a freshwater wetlands violation where remediation was required, and declined to issue an order allowing the local municipality to enter upon property the Town did not own to conduct that remediation. The Commissioner observed that

> [r]ather than determine whether such authority exists under the Environmental Conservation Law, it is preferable for the Department to pursue whatever remedies it has against the violators themselves. If the violators cannot fulfill their remedial responsibilities because of a failure to obtain the landowners [sic] permission to access the site, the consent order may need to be revised and/or renegotiated. At this time, no relief is warranted in this forum.

Matter of Ames, Order, at 2, 1994 WL 734482, * 1.

The Town's ability to perform the reclamation component of the remedy sought in Department Staff's complaint is in doubt. The Town has asserted that it does not own the property where the Mine is located, nor does the Town have permission to enter that property to effect the remediation Department Staff seeks. Even

affording Department Staff the benefit of every favorable inference, the testimony offered by Department Staff concerning conversations that took place in 2002 suggesting that access would be permitted, without more, is insufficient to establish that the Town would have authority to enter the Mine. This question should be addressed at the hearing. The Town's assertion does not constitute an affirmative defense to liability. Rather, it is a mitigating factor that should be taken into account in determining the nature of the penalty to be imposed, if any.

Nevertheless, it does not follow that this matter cannot proceed in the absence of other parties such as the current or former landowner. The Department's enforcement regulations at Part 622 do not contain a specific provision requiring joinder of a potentially liable party. The earlier iteration of Part 622 contained language similar to the joinder provisions in the CPLR, stating that nonjoinder of a necessary party was a ground for dismissal, without prejudice, unless the ALJ determined that the hearing should go forward "in the interest of justice." See former Section 622.12(c)(2) and (3), effective Sept. 21, 1978.

Part 622 was amended effective January 9, 1994, and the current regulation does not contain this provision. Prior rulings have concluded that "[w]hether Department staff may be required to join a potentially liable party to an ongoing enforcement action is an open question." Matter of Gramercy Wrecking and Environmental Contractors, Inc., ALJ Ruling, at 7, 2008 WL ___, * ___ (Jan 14, 2008) (citing Matter of Huntington and Kildare, Inc., Ruling of the Chief Administrative Law Judge, at 4, 2006 WL 3380420, * 3 (Nov. 15, 2006).

The ALJ in Matter of Gramercy went on to note that "[w]here the Department's hearings regulations are silent on a particular issue presented, the CPLR may be consulted." Matter of Gramercy, supra, at 7-8, 2008 WL ____, * ___ (citing Matter of Makhan Singh, Decision and Order, at 2, 2004 WL 598989, * 1 (Mar. 19, 2004)). CPLR Section 1001(a) mandates joinder of necessary parties in order to provide complete relief between those who are already parties to the action, or to ensure that those who might be inequitably affected by a judgment are included in the action. Nevertheless, pursuant to Section 1003 of the CPLR, an action may proceed, in the court's discretion, even if necessary parties are not joined. That section provides further that a dismissal for non-joinder may be without prejudice.

These provisions of the CPLR, and the fact that the language in the prior version of the regulations was not included in the

current Part 622, supports the conclusion that joinder is not mandatory in a Department enforcement proceeding, and that an action may go forward, even without joinder of a necessary party, if certain requirements are met. CPLR Section 1001(b) provides that the court, "when justice requires," will consider the following factors when determining if joinder may be excused and the action may proceed:

1. whether the plaintiff has another effective remedy in the event of dismissal for nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

In this circumstance, the Town has not demonstrated that prejudice will result from the failure to join the current or former owner, or that an effective judgment may not be rendered in their absence. Department Staff's complaint asserts that the Town has not reclaimed the Mine as required pursuant to the permit that was issued, and failure to join the property owners does not affect a determination as to the nature and scope of any reclamation. To the extent Department Staff or the Town believes that those persons' testimony should be part of the record, they may be called as witnesses.

The Town also argued that "where a necessary party is not before the court the action must be dismissed, unless the statute of limitations has not run." Respondent's Memorandum of Law, at 9. This contention is not supported by recent case law. In Matter of Red Hook/Gowanus Chamber of Commerce and New York City Bd. of Standards & Appeals, the Court of Appeals declined to decide whether a necessary party, "by virtue of the lapsed statute of limitations, [was] subject to, or beyond, the jurisdiction of the court as the term is used in CPLR 1001." 5 N.Y.3d 452 (2005). The Appellate Division, Third Department, subsequently concluded that "[a] statute of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any remedy from a defendant."

Matter of Romeo v. New York State Dept. of Educ., 41 A.D.3d 1102, 1104 (3rd Dept. 2007). The court held that the trial court erred in dismissing the proceeding for failure to join a necessary party. Id. at 1105.

In this proceeding, dismissal for non-joinder is not mandated. Moreover, as discussed above, there is no statute of limitations applicable to this enforcement action, and the appropriate inquiry is whether the action was commenced within a reasonable time pursuant to Section 301(1) of SAPA. Because this ruling concludes that the action is not time-barred, other parties may be joined, as appropriate. Department Staff's motion to strike the fourth affirmative defense, at paragraph 8 of the answer, is granted, and the Town's motion to dismiss for non-joinder is denied. Nevertheless, at the hearing, the parties may present evidence with respect to the Town's assertion that it has no authority to enter the property where the Mine is located to effect reclamation.

Failure to State a Cause of Action

Finally, Department Staff sought to strike the Town's first affirmative defense at paragraph 5 of the answer, which alleged that the complaint failed to state a claim or cause of action against the Town. Department Staff maintained that the Town had not presented any facts to support this affirmative defense, and as a result, the defense was vague and ambiguous. The Town argued that this action should be dismissed for failure to state a claim "because it does not allege that the current statute and regulations are the same as what was in effect when the permit was issued – i.e. either 1979 (according to the complaint) or in 1975 (according to the Moskiewicz Affidavit)." Snyder Affidavit, ¶ 12. The Town did not make any showing that the statute and regulations are not substantially the same as those in effect during the permit term and thereafter.

This affirmative defense is stricken. Department Staff's complaint alleges facts that establish each element of the causes of action, and therefore is sufficient to state a claim against the Town. Department Staff has articulated the applicable statutory and regulatory provisions, and provided detail as to the time and nature of the violation alleged. Consequently, the Town is on notice as to the facts and legal authority surrounding the allegations. See Matter of Gramercy, supra, at 3, 2008 WL __ , * ____; Matter of Bradley Corp. Park, et al., ALJ's Ruling, at 6, 2001 WL 195350, * 4 (Jan. 18, 2001).

Moreover, as stated in Matter of Gramercy,

> [b]ecause Department Staff bears the burden of proof with regard to "all charges" set forth in the complaint (6 NYCRR 622.11[b][1]), staff cannot prevail where it has failed to state a claim upon which relief may be granted, absent amendment of staff's pleading. Accordingly, respondent has no burden to plead and prove that staff has failed to state a claim and respondent's first affirmative defense serves no purpose.

Id. (footnote and citation omitted). This does not preclude the Town from offering, at hearing, evidence concerning the regulatory and statutory provisions in effect during the permit term, or raising arguments based upon those provisions.

The Town's first affirmative defense is in essence an application to dismiss the complaint as a matter of law, and thus is more properly the subject of a motion to dismiss. See Platt v. Portnoy, 220 A.D.2d 652, 652 (2nd Dept. 1995) (affirming dismissal of affirmative defense that complaint failed to state a cause of action; affirmative defense should be stricken as such a defense must be raised by an appropriate motion); Homestead Development Corp. v. Ayres, 244 A.D.2d 928, 928 (4th Dept. 1997) (contention that complaint fails to state a cause of action not properly asserted as an affirmative defense; dismissal affirmed). The Town's first affirmative defense may be stricken on this basis.

The First, Third and Fourth Departments have concluded that the defense of failure to state a claim in the answer is surplusage, and that a motion to strike should be denied as unnecessary. See Riland v. Frederick S. Todman & Co., 56 A.D.2d 350, 353 (1st Dept. 1977); Salerno v. Leica, Inc., 258 A.D.2d 896, 896 (4th Dept. 1999); Pump v. Anchor Motor Freight, Inc., 138 A.D.2d 849, 851 (3rd Dept. 1988). However, following the rule in the Second Department (see Bentivegna v. Meenan Oil Co., 126 A.D.2d 506, 507-508 (2nd Dept. 1987)), because Department Staff has moved to strike, that motion should be granted. In any event, Department Staff's complaint is sufficient to state a cause of action. Accordingly, the Town's first affirmative defense, at paragraph 5 of the answer, is stricken.

CONCLUSION

The Town's motion to dismiss is denied. Department Staff's motion to strike affirmative defenses is granted. A conference call will be held to discuss scheduling and any pre-hearing matters during the week of June 30-July 3, 2008, and the parties are requested to advise the ALJ as to their availability for a call during that week.

/s/
Maria E. Villa
Administrative Law Judge

June 25, 2008
Albany, New York

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