STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law ("ECL") and Title 6, Part 608 et seq. of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTIONS

DEC File No. R4-2009-1120-176

- by -

December 12, 2014

ALAN GROUT,

Respondent.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Karen S. Lavery of counsel), for staff of the Department of Environmental Conservation

-- Tooher & Barone, LLP (Meave M. Tooher of counsel), for respondent Alan Grout

In this administrative enforcement proceeding, Department staff charges respondent Alan Grout with disturbing a protected stream without a permit on property owned by respondent in Valatie, Town of Kinderhook, Columbia County. The parties have filed various pre-hearing motions addressed to the pleadings including respondent's motion to dismiss the complaint, and Department staff's motion to strike affirmative defense. This ruling addresses the parties' various motions and requests.

I. PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated May 5, 2014 (see Affirmation of Karen Lavery in Support of Motion to Strike Affirmative Defenses [6-13-14], Attachment 2). Respondent Alan Grout, among other things, served an answer dated June 6, 2014 (see id., Attachment 3). In

the June 6, 2014 answer, respondent pleaded as his fifth affirmative defense that the complaint was not properly served on respondent (see id. at 8).

On June 13, 2014, Department staff filed a notice of motion and motion to strike affirmative defenses, with supporting documents. On June 23, 2014, respondent filed a notice of motion to dismiss the complaint and an attorney's affirmation in opposition to the Department's motion to strike and in support of respondent's motion to dismiss (see Affirmation of Meave M. Tooher [6-23-14]).

On the request of Department staff, the undersigned Administrative Law Judge (ALJ) convened a telephone conference call with the parties on June 24, 2014, to discuss procedural issues raised by staff. Thereafter, by letter dated June 25, 2014, Department staff notified respondent and the ALJ that it was withdrawing the complaint against respondent, and that the complaint would be re-served on respondent to correct any alleged lack of personal jurisdiction over respondent (see Letter from Karen Lavery to ALJ McClymonds [6-25-14]).

Department staff mailed a notice of hearing and complaint dated June 25, 2014, to respondent by certified mail. The complaint was received by respondent on June 28, 2014, thereby completing service (see 6 NYCRR 622.3[a][3]; see also Affirmation of Karen Lavery in Opposition to Motion to Dismiss [7-15-14], Attachment 1; Affirmation of Meave M. Tooher in Support of Respondent's Motion to Dismiss [7-7-14] [Tooher Affirmation (7-7-14)], ¶ 2). In the complaint, Department staff alleges that respondent violated 6 NYCRR 608.2(a) by burying a protected stream -- identified as "Stuyvesant Creek," a Class C(T) stream -- within a pipe running about 500 feet without a permit on property owned by respondent on Fordham Road, Valatie, Columbia County, New York. Staff seeks a civil penalty in the amount of $1,200, and the submission of a plan to restore the stream to its natural condition.

On July 7, 2014, respondent served a revised answer of the same date on Department staff (see Tooher Affirmation [7-7-14], Exhibit B). In his July 7, 2014 answer, respondent pleaded four affirmative defenses (see id.).

Also on July 7, 2014, respondent filed a notice of motion to dismiss the June 25, 2014, complaint, together with an attorney's affirmation and exhibits, and an affidavit of respondent Alan J. Grout in support of the motion to dismiss.

On July 15, 2014, Department staff filed papers in opposition to respondent's motion,[1] and a notice of motion and motion for permission to amend the complaint and to strike affirmative defenses. Staff also filed an attorney's affirmation in opposition to respondent's motion to dismiss, in support of its motion to strike affirmative defenses, and for permission to amend the complaint (see Affirmation of Karen Lavery [7-15-14]). Attached to the attorney's affirmation is a proposed amended complaint dated July 15, 2014 (see id., Attachment 3).

Respondent thereafter filed an attorney's affirmation dated July 22, 2014, in opposition to Department staff's motion to strike affirmative defenses and in response to the motion to amend the complaint (see Affirmation of Meave M. Tooher [7-22-14]).

On July 28, 2014, Department staff filed a further attorney's affirmation in opposition to respondent's opposition to the Department's motion to strike affirmative defenses and in response to the motion to amend the complaint (see Affirmation of Karen Lavery [7-28-14]). By letter dated July 29, 2014, respondent objects to staff's July 28, 2014 submission as a further responsive pleading not authorized by the ALJ pursuant to 6 NYCRR 622.6(c)(3). Accordingly, respondent requests that the July 28, 2014 affirmation be struck.

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[1] Department staff denominated its papers in opposition to respondent's motion to dismiss as a "Notice of Motion" and "Motion in Opposition to Respondent's Motion to Dismiss." Department staff is authorized by regulation to file papers in response to a motion by a respondent (see 6 NYCRR 622.6[c][3]). A motion is not necessary to file papers in response to a motion and, accordingly, I do not treat staff's "motion in opposition" to respondent's motion to dismiss as a separate affirmative motion.

II. DISCUSSION

A. Request To Strike Department Staff's July 28, 2014 Submission

Respondent is correct that Department staff's July 28, 2014 submission is in the nature of a reply on staff's motion to amend the complaint and to strike affirmative defenses. As such, filing of the reply requires leave of the ALJ (see 6 NYCRR 622.6[c][3]). Staff did not seek leave to file the July 28, 2014 affirmation prior to submission, nor has staff opposed respondent's request to strike the affirmation. Accordingly, respondent's request to strike the July 28, 2014 affirmation is granted and the affirmation will not be considered on these motions.

B. Department Staff's Motion to Amend the Complaint

In support of his motion to dismiss the June 25, 2014 complaint, respondent argues, among other things, that Department staff fails to properly identify the alleged protected stream in this matter. Respondent notes that the complaint alleges that the stream at issue is "Stuyvesant Creek" (see Complaint [6-25-14] ¶¶ 9-11). Respondent further notes that no Stuyvesant Creek is identified in 6 NYCRR 836.6, Table I. Respondent does recognize, however, that "[t]here is a stream on the property in question (the "Property") which is identified in the regulations as Stuyvesant Brook" (Tooher Affirmation [7-7-14] at 2, ¶ 7).

In its July 15, 2014 motion, Department staff requests leave to amend the complaint pursuant to 6 NYCRR 622.5(b) to correct two clerical errors: first, to correctly identify the stream at issue as "Stuyvesant Brook," not "Stuyvesant Creek;" and second, to correctly allege the stream's identification number as "H-209-1," not "H-204-1" (see Complaint [6-25-14] ¶ 9). Citing CPLR 3025(b), Department staff argues that leave to amend should be freely granted, provided respondent suffers no prejudice. Department staff asserts that respondent will suffer no prejudice if these two corrections are made. Attached to staff's papers is a proposed amended complaint in which the two corrections are made.

In response to staff's motion to amend, respondent asserts that the errors were identified by respondent in its first answer, and that staff failed to correct the errors when it withdrew and re-served the complaint. The prejudice respondent claims is the additional cost and expense in reviewing and responding to a third complaint.

Section 622.5(b) of 6 NYCRR provides that "[c]onsistent with the CPLR a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond." CPLR 3025(b) provides that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just."

Where typographical errors in pleadings are involved, the Office of Hearings and Mediation Services has applied CPLR 2001 standards (see Matter of 428 East 157th St. Hous. Dev. Fund Corp., Order of the Commissioner, Nov. 27, 2013, at 1-2; see also id., ALJ Hearing Report, at 5-6). Under CPLR 2001, a tribunal "may permit a mistake, omission, defect or irregularity . . . to be corrected, upon terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." Correction of a pleading does not necessarily require amendment of that pleading, but amendment pursuant to CPLR 3025 may be permitted if necessary (see Pinto v House, 79 AD2d 361, 365 [1st Dept 1981]).

Here, I conclude that Department staff should be permitted to correct the two clerical errors in the June 25, 2014 complaint. Examination of the regulations and maps incorporated in those regulations reveals that the only protected stream crossing Fordham Road in the vicinity of respondent's property is denominated "Stuyvesant Brook," a Class C(T) stream with stream identification number H-209-1 (see 6 NYCRR 863.6 Table I, Item No. 531; 6 NYCRR 863.9 Quadrangle Maps, Map L-25NW [Kinderhook]). Thus, staff's clerical errors are apparent from the regulations. Moreover, respondent recognized the errors and was fairly apprised concerning correct

designation of the stream at issue in this proceeding. Thus, respondent will not be prejudiced if the correction is allowed.

Accordingly, staff's motion should be granted in part, and the June 25, 2014 complaint is hereby corrected to identify the subject stream as "Stuyvesant Brook" with stream identification number H-209-1. Staff's motion to amend the complaint is otherwise denied as unnecessary. Service and filing of a third amended complaint and answer is not necessary at this time.

C. Respondent's Motion to Dismiss the Complaint

1. Sufficiency of Complaint

Respondent moves to dismiss the complaint on multiple grounds. First, respondent argues that Department staff failed to plead facts with sufficient particularity to establish the violation alleged in the complaint and place respondent on notice. Specifically, respondent argues that Department staff failed to adequately identify the property at issue, the nature of the alleged violation, and the activity requiring the alleged permit. Respondent also asserts that staff failed to adequately specify the alleged stream, its mean high water mark, and the location of its bed or banks.

In response, Department staff asserts that its complaint sets forth the necessary elements of proof to show a violation of 6 NYCRR 608.2(a).

In a Part 622 proceeding, motions to dismiss a complaint are analyzed applying the grounds for and standards governing CPLR 3211 motions (see e.g. Matter of Estate of Ryan, Ruling of the Chief ALJ on Motion to Dismiss, Oct. 15, 2010, at 11). Where a motion to dismiss is addressed to the sufficiency of the pleading, the standards governing motions to dismiss for failure to state a claim under CPLR 3211(a)(7) are applied (see id.). To determine whether a complaint states a claim, the pleading is liberally construed, the facts alleged in the complaint are accepted as true, the proponent of the complaint is given the benefit of every possible favorable inference, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (see AG Capital

Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

With respect to the notice provided by the complaint, the Department is required by statute and regulation to provide "reasonable" notice of the charges involved in the proceeding, including, among other things, a statement of the legal authority and jurisdiction under which the proceeding is to be held, a reference to the particular sections of the statutes, rules, and regulations involved, and a concise statement of the matters asserted (see State Administrative Procedure Act § 301[2]; 6 NYCRR 622.3[a]). In the administrative context, a complaint is sufficient if it is reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against that party and to allow for the preparation of an adequate defense (see Matter of Board of Educ. v Commissioner of Educ., 91 NY2d 133, 139-140 [1997]; Matter of Block v Ambach, 73 NY2d 323, 332 [1989]; see also 6 NYCRR 622.3[a][1]).

Here, a fair reading of the June 25, 2014 complaint reveals that it contains all of the elements required by SAPA and section 622.3(a), and is sufficiently specific to apprise respondent of the charges against him. The complaint states the relevant regulatory provisions alleged to have been violated and describes the alleged violation with sufficient particularity to allow respondent to prepare a defense. Specifically, the complaint alleges that a protected stream, the Stuyvesant Brook, is located on property owned by respondent on Fordham Road, Valatie, Columbia County, and that respondent disturbed the stream by burying it in a pipe for approximately 500 feet on the site without a permit. Moreover, review of respondent's submissions on the motion reveal that respondent is aware of the property and stream at issue, and understands the nature of charges against him sufficiently to allow him to prepare a defense. Thus, the complaint fairly states a claim for a violation of 6 NYCRR 608.2(a).

2. Failure to Name Necessary Party

Second, respondent moves to dismiss the complaint on the ground that Department staff failed to name Golden Harvest Farms, Inc., as a necessary party. In his answer, respondent

asserts that Golden Harvest is the operator of the subject property, which is currently used as part of an orchard, and is responsible for any and all activities on all orchard property (see Answer ¶ 2). Respondent further asserts that the actions of respondent Grout at or in relation to the property were in his capacity as president and corporate officer of Golden Harvest (see id. ¶¶ 2, 71). Thus, on his motion and as the fourth affirmative defense pleaded in the answer, respondent argues the complaint must be dismissed for failure to name Golden Harvest as a necessary party.

In response, and in support of its motion to strike the fourth affirmative defense, Department staff notes that respondent has admitted that he is the owner of the property at issue, and that staff has exercised the prosecutorial discretion to charge respondent as the property owner.

In response to staff's motion to strike, respondent again asserts that Golden Harvest is the operator of the farm on the property, but does not further elaborate as to why Golden Harvest is a necessary party.

A complaint may be dismissed without prejudice upon the ground that the tribunal should not proceed in the absence of a person who should be a party (see CPLR 3211[a][10]; see also CPLR 1003). Pursuant to CPLR 1001(a), a non-party is considered to be a necessary party if (1) complete relief cannot be accorded between the parties to the action without the nonparty, or (2) the nonparty might be inequitably affected by a judgment (see also Matter of Karta Corp., ALJ Ruling on Motion to Join Third-Party Respondent, Dec. 8, 2008, at 4). Even assuming a nonparty is a necessary party under CPLR 1001(a), a tribunal may allow an action to proceed without that party under the provisions of CPLR 1001(b) (see CPLR 1003; see also Matter of Karta Corp., ALJ Ruling at 4-5). Among the factors considered when determining whether an action may proceed in the absence of a necessary party are (1) the prejudice that may accrue from the nonjoinder to the defendant or the non-party, and (2) whether an effective judgment may be rendered in the absence of the person who is not joined (see CPLR 1001[b]).

Here, respondent has not established that Golden Harvest is a necessary party. Respondent has not demonstrated that complete relief as between respondent and the Department

cannot be accorded without joining Golden Harvest. To the extent respondent seeks to establish that Golden Harvest is responsible, in whole or in part, for the violation alleged in the complaint, he may do so without joining Golden Harvest as a party. Moreover, although respondent indicates that the pond constructed on the property is necessary for Golden Harvest's orchard operation and that there might be "difficulties" in modifying the pond's structure without losing its agricultural value (Grout Affidavit at 5, ¶ 5), respondent does not demonstrate conclusively that loss of the pond's use would be a necessary result of granting the relief staff seeks, namely, restoration of the protected stream. Thus, respondent has not established at this point in the proceeding that Golden Harvest will be inequitably affected by an order in this matter. Accordingly, respondent has not demonstrated that the complaint must be dismissed on this ground.[2]

3. Remaining Defenses

In the remainder of respondent's motion, respondent argues that the complaint should be dismissed based upon its remaining defenses: (1) the lack of a permit requirement for construction of an agricultural pond; (2) laches or administrative delay; and (3) equitable estoppel. In support of these defenses, respondent submits the affidavit of Alan Grout and various other documents.

Consistent with CPLR 3211(a)(1), one or more causes of action may be dismissed based a upon a defense founded upon documentary evidence (see Matter of Town of Virgil, ALJ Ruling on Motion to Dismiss and Cross-Motion to Dismiss Affirmative Defenses, June 25, 2008, at 4 [citing Leon v Martinez, 84 NY2d 83, 88 (1994)]). Where dismissal of a complaint is sought based on documentary evidence, the evidence must conclusively establish defenses to the allegations in the complaint as a matter of law (see id.; Goshen v Mutual Life Ins. Co., 98 NY2d 314, 326 [2002]). Evidence deemed "documentary" includes deeds, leases, and other records of out-of-court transactions that are "unambiguous and of undisputed authenticity" and "essentially

[2] Department staff's motion to strike the fourth affirmative defense is addressed below.

undeniable" (see Fontanetta v John Doe 1, 73 AD3d 78, 84-86 [2d Dept 2010]). On the other hand, letters and affidavits generally do not constitute documentary evidence (see id. at 85-86).

In this case, the motion to dismiss is supported by respondent's affidavit, an environmental review and analysis provided by respondent's consultant (see Motion to Dismiss, Exh C), and various correspondence. None of these submissions constitute the type of documentary evidence sufficient to support a motion to dismiss pursuant to CPLR 3211(a)(1). Respondent's affidavit and his consultant's report raise credibility issues that would require a hearing to resolve and, thus, are not undeniable (see Fontanetta, 73 AD2d at 86). To the extent the letters are "essentially undeniable," the evidence they provide is either irrelevant to the charge involved here, or fails to establish respondent's remaining defenses as a matter of law. Accordingly, respondent's motion to dismiss based upon the submitted materials is denied.[3]

D. Department Staff's Motion To Strike Affirmative Defenses

Department staff moves to strike the four defenses pleaded in respondent's July 7, 2014, answer. Motions to strike defenses in proceedings under Part 622 are governed by the standards governing motions to dismiss defenses under CPLR 3211(b) (see Matter of Truisi, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010, at 10-11). Motions to dismiss may either challenge the pleading facially -- i.e., on the ground that it fails to state a claim or defense -- or may seek to establish, with supporting evidentiary material, that a claim or defense lacks merit as a matter of law (see id. at 10). Here, staff does not support its motion with evidentiary material. Accordingly, respondent's pleadings are examined to determine whether defenses are stated.

[3] It is not apparent from the papers that the parties have charted a summary judgment course on respondent's motion. Nor has notice been provided that this motion is being converted to summary judgment (see CPLR 3211[c]). Accordingly, I do not treat respondent's motion as one for summary judgment.

1. First Affirmative Defense -- Permit Requirement

Section 622.4(c) of 6 NYCRR provides that "[w]henever the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense." Here, respondent pleads that because the pond constructed at the property by Golden Harvest is a permissible agricultural activity under ECL 24-0701(4), respondent was not required to obtain a freshwater wetlands permit.

Department staff argues that it did not charge respondent for a violation of the freshwater wetland permit requirement of ECL 24-0701. Instead, Department staff charged respondent with violating the requirements of 6 NYCRR 608.2(a), which requires a Part 608 stream protection permit for disturbances of protected streams. Accordingly, staff moves to dismiss the first defense pleaded in the answer.

The first defense should be dismissed. Pursuant to ECL 15-0501(1) and its implementing regulations, "no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit issued pursuant to subdivision 3 of this section" (see also 6 NYCRR 608.2[a]). Subdivision 2 of section 15-0501 defines protected streams as including streams classified as C(T) (see also 6 NYCRR 608.1[aa]).

The exemption for agricultural activities included in ECL 24-0701(4) from the requirements for freshwater wetlands permits does not apply to protection of streams permits under ECL 15-0501 and 6 NYCRR 608.2(a). Moreover, although ECL 15-0501 contains an exemption from its permit requirements for certain agricultural activities, those activities do not include the activities alleged in this proceeding -- the disturbance of the bed and banks of a protected stream, and the burying of that stream in about 500 feet of pipe (see ECL 15-0501[7]; 6 NYCRR 608.2[b][2]). Thus, respondent fails to state a defense to the permit requirement of ECL 15-0501 and 6 NYCRR 608.2.

2. Second Affirmative Defense -- Laches and Administrative Delay

In his second defense, respondent asserts that the Department is guilty of laches or failure to bring the proceeding within a reasonable period of time in accordance with SAPA, 6 NYCRR part 622, and the holding of Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 178 [1985], cert denied 476 US 1115 [1986]) by failing to commence this proceeding within a reasonable time after the alleged violation occurred. Respondent allege that in the interim, witnesses and evidence have been lost causing significant and irreparable harm to his ability to defend.

Department staff asserts that respondent has not established that other witnesses are not available to aid in respondent's defense, and that the environmental evidence respondent claims is lost is relevant only to his claim of stream misclassification, which is an issue beyond this proceeding.

Staff has not submitted documentary evidence in support of its motion to dismiss. Accordingly, as noted above, respondent's defense is reviewed only to determine whether a defense is stated. To the extent respondent pleads a laches defense, that defense is unavailable against a State agency acting in a governmental capacity to enforce a public right (see Matter of Cortlandt, 66 NY2d at 177 n 2). Thus, the second defense should be dismissed in part.

To the extent respondent pleads a defense of administrative delay based upon Cortlandt, respondent sufficiently states a defense. To plead a defense based upon Cortlandt, a respondent must allege not only a relevant delay, but also injury to the respondent's private interests, and a significant and irreparable prejudice to the respondent's defense of the proceeding resulting from the delay (see id. at 177-178, 180-181; see also 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]; Matter of Stasack, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010, at 9).

Here, respondent alleged a relevant delay -- the almost five-year period between the alleged disturbance of the stream on or prior to October 2009, and the service of the June 25, 2014 complaint. Respondent also alleges the loss of witnesses and evidence necessary to his defense. Some of the alleged lost evidence is relevant only to respondent's claim that Stuyvesant Brook is misclassified and, thus, is irrelevant to issues in this proceeding (see Matter of Costa, ALJ Ruling on Motions, Dec. 11, 2007, at 7 [administrative enforcement proceeding not the proper forum to challenge a stream classification; stream reclassification to be raised through appropriate administrative process]; see also ECL 17-0301). However, respondent also alleges that the passage of time has resulted in the loss of witnesses to the various inspections by and discussions with Department staff during the construction of the agricultural pond, and the approvals that were allegedly provided by the Department. Thus, respondent pleads the loss of witnesses and evidence relevant to the charges in this matter.

Finally, respondent pleads injury to his private interest, namely the costs associated with removing the completed construction in order to return the stream to its prior condition. Therefore, respondent pleads a Cortlandt defense sufficient to place staff on notice of the factual assertions underlying the defense (see Stasack, at 9). Accordingly, Department staff's motion to dismiss respondent's second defense should otherwise be denied.

3. Third Affirmative Defense -- Equitable Estoppel

As a third affirmative defense, respondent claims that the Department should be equitably estopped from bringing an enforcement proceeding against respondent because staff negligently or wrongfully misrepresented to respondent that no permits were required to construct an agricultural pond on the Fordham Road property, and that he relied on those misrepresentations when he purchased the property, constructed the agricultural pond, and developed the orchard.

Department staff moves to dismiss the third defense on the ground that any representations concerning permits required to dig a pond in a wetland are irrelevant to the charge in this matter -- the disturbance of a protected stream without a permit

pursuant to 6 NYCRR 608.2. Moreover, staff argues that respondent's ignorance of the permit requirement for protected stream disturbance is no defense.

Although 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 a State 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).

On a motion to dismiss affirmative defenses, the answer is liberally construed, the facts alleged are accepted as true, and the pleader is afforded every possible inference (see Leon v Martinez, 84 NY2d at 87; Butler v Catinella, 58 AD3d 145, 148 [2d Dept 2008]; see also Truisi, at 10; 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; 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]).

Here, liberally construing the answer and examining respondent Grout's affirmation gives rise to a cognizable defense. Respondent alleges that he repeatedly contacted the Department -- prior to purchasing the property at issue, prior to constructing the pond, and during pond construction -- to inquire whether permits were required for the project.

Respondent also alleged that Department staff made repeated site visits. Respondent asserts that Department staff repeatedly assured him that no permits were required for the project, and that staff did not identify any stream as C(T) when observing the property. Respondent alleges that staff did not notify respondent that there might be a trout stream on the property until July 2008, during construction of the pond, and that staff did not inform respondent that a permit might be required until after the construction was completed.

These allegations, taken together, sufficiently allege prejudice to respondent arising from his justifiable reliance upon staff's statements that no permits were required for respondent's project. Thus, respondent has stated a defense, if not to liability, then at least in mitigation of any penalty or remedial relief that might be imposed in this matter. Accordingly, Department staff's motion to dismiss the third affirmative defense should be denied.

4. Fourth Affirmative Defense -- Necessary Party

As noted above, in his fourth affirmative defense, respondent alleges that the complaint fails to name Golden Farm as a necessary party to this proceeding. Although respondent has not demonstrated that he is entitled to dismissal of the complaint based on this defense, he has nonetheless stated the defense sufficiently to place Department staff on notice of the defense. Thus, Department staff's motion to dismiss the fourth affirmative defense should be denied.

III. RULING

Based upon the foregoing discussion, it is hereby ordered that:

1. Respondent's request to strike Department staff's July 28, 2014 attorney's affirmation is granted on the ground that the submission is an unauthorized reply on staff's motion to amend the complaint and to strike affirmative defenses (see 6 NYCRR 622.6[c][3]).

2. Respondent's motion to dismiss the June 25, 2014 complaint is denied.

3. Department staff's motion, insofar as it seeks leave to amend the June 25, 2014 complaint, is granted in part, and the June 25, 2014 complaint corrected to identify the subject stream as "Stuyvesant Brook" with stream identification number H-209-1. Staff's motion to amend the complaint is otherwise denied as unnecessary.

4. Department staff's motion, insofar as it seeks to strike affirmative defenses, is granted in part and the first affirmative defense and that portion of the second affirmative defense that pleads a laches defense, is dismissed. Staff's motion to strike affirmative defenses is otherwise denied.

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

Dated: December 12, 2014
Albany, New York