STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL"),

- by -

RGLL, INC., JAMES METZ, and LAUREN SIMONS,

Respondents.

RULING OF THE COMMISSIONER

DEC Case No.: R4-2004-0330-41

With a cover letter dated June 13, 2006, respondent RGLL, Inc., filed a notice of "motion to relieve" from a decision and order dated January 21, 2005 (see Matter of RGLL, Inc., Commissioner's Decision and Order, Jan. 21, 2005). In that order, a total civil penalty of $57,000 was assessed against RGLL for violations of various provisions of parts 613 and 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), at several petroleum bulk storage ("PBS") facilities it owns and operates in Rensselaer and Columbia Counties. In addition, the January 21, 2005 decision and order required RGLL either to surrender the registration for the PBS facilities or, in the alternative, operate the PBS facilities in a manner consistent with the applicable requirements outlined in 6 NYCRR parts 613 and 614.

Upon receipt of RGLL's June 13, 2006 motion, staff of the Department of Environmental Conservation ("Department") was provided the opportunity to respond. With a cover letter dated July 10, 2006, Ann Lapinski, Esq., Assistant Regional Attorney, filed an affirmation on behalf of staff from the Department's Region 4 office in opposition to RGLL's motion. With Department staff's consent, RGLL's request for leave to file a reply to Ms. Lapinski's affirmation was granted. Although several extensions were granted, however, RGLL did not file a reply.

The motion was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter, subject to my comments below.

By its June 13, 2006 motion, RGLL seeks leave to re-open the record of an administrative enforcement action commenced

by Department staff with service of a motion for order without hearing dated May 13, 2004 in lieu of complaint (see 6 NYCRR 622.12). RGLL seeks to present exculpatory evidence, which Department staff allegedly failed to disclose to the ALJ.

RGLL argues that the grounds for vacating a civil judgment outlined at Civil Practice Law and Rules ("CPLR") 5015 should be relied upon as guidance to set aside the January 21, 2005 decision and order and to re-open the record of the administrative enforcement action. Referring to CPLR 5015(a)(2), RGLL argues that it has newly-discovered evidence which, if introduced in response to staff's May 13, 2004 motion, would have produced a different result. In addition, RGLL cites CPLR 5015(a)(3) and asserts that staff misrepresented its position to the ALJ on the May 13, 2004 motion for order without hearing by withholding exculpatory evidence that RGLL had provided to staff prior to service of the May 13, 2004 motion. According to RGLL, if documents it provided to Department staff had been disclosed during the pendency of staff's May 13, 2004 motion, the ALJ would have concluded that disputed issues of fact existed that required an adjudicatory hearing.

As discussed in detail in the attached summary report, at no time since Department staff commenced the administrative enforcement action has RGLL explained why it could not access and subsequently produce documentary evidence either at the time of the inspection or in response to the violations alleged in staff's May 13, 2004 motion (see CPLR 5015[a][2]).

During the pendency of the administrative enforcement hearing, RGLL had three opportunities to submit documentary and other evidence to refute the charges alleged in the May 13, 2004 motion. RGLL, however, neither presented such evidence nor explained why it could not present this evidence. The first opportunity was prior to the commencement of the administrative enforcement action during staff's November 6, 2003 inspection of the Chatham PBS facility. RGLL's second opportunity to present evidence was in response to staff's May 13, 2004 motion for order without hearing. RGLL's third opportunity to present evidence was in response to staff's July 13, 2004 supplemental filing. In its June 13, 2006 motion, RGLL failed to demonstrate that the evidence it would present at hearing could not have been discovered earlier with due diligence.

To vacate a civil judgment pursuant to CPLR 5015(a)(3), the movant has the burden of demonstrating fraud or misrepresentation. The information presented in RGLL's motion papers is insufficient to support its allegation of fraud or

misrepresentation by Department staff.

I note that the court has reviewed the January 21, 2005 decision and order in proceedings pursuant to CPLR article 78, and upheld it (see Matter of RGLL, Inc. v Crotty, Sup Ct, Albany County, October 5, 2005, Ceresia, J., Index No. 2401-05). Upon review of RGLL's June 13, 2006 motion papers and all duly authorized responses, I conclude that RGLL has failed to offer any newly-discovered evidence consistent with the conditions identified in CPLR 5015(a)(2). Moreover, no evidence exists of any fraud, misrepresentation, or other misconduct by Department staff (see CPLR 5015[a][3]). Accordingly, RGLL's motion to be relieved from the January 21, 2005 decision and order is denied.

For the New York State Department
of Environmental Conservation

/s/

By: Denise M. Sheehan
Commissioner

Dated: November 21, 2006
Albany, New York

STATE OF NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Article 17 of the New York State Environmental Conservation Law

- by -

RGLL, Inc.,

Respondent

DEC File No. R4-2004-0330-41

Summary Report

- by -

/s/

_____
Daniel P. O'Connell
Administrative Law Judge

Proceedings

With a cover letter dated June 13, 2006, RGLL, Inc.,[1] filed a notice of motion to "relieve from order," an affirmation by Matthew J. Sgambettera, Esq., and an affidavit by Lauren Simons in support of the motion to relieve from order. All of RGLL's motion papers are dated June 13, 2006. With a cover letter dated July 10, 2006, Ann Lapinski, Esq., Assistant Regional Attorney, filed an affirmation, on behalf of Staff from the Department's Region 4 office (Department staff) in opposition to RGLL's motion. With Department staff's consent, Chief Administrative Law Judge (ALJ) James T. McClymonds granted RGLL's request for leave to file a reply to Ms. Lapinski's affirmation. Although several extensions were granted, the Office of Hearings and Mediation Services never received a reply from RGLL.

I. Background

A. Motion for Order without Hearing (6 NYCRR 622.12)

In lieu of a notice of hearing and complaint, Staff commenced an enforcement action against RGLL, James T. Metz, and Lauren Simons (Respondents) by duly serving a motion for order without hearing dated May 13, 2004. According to Staff's May 13, 2004 motion, Respondents own seven petroleum bulk storage (PBS) facilities at the following locations:

1. East Greenbush Sunoco (Registration No. 4-429651)
   611 Columbia Turnpike
   East Greenbush (Rensselaer County), New York 12031

2. Fairview Sunoco (Registration No. 4-430862)
   Fairview Avenue
   Hudson (Columbia County), New York 12534

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[1] For this motion, Matthew J. Sgambettera, Esq., Todd M. Sardella, Esq., Gregory J. Sanda, Esq., from Sgambettera and Associates, P.C. (Clifton Park, NY), have appeared on behalf of RGLL, Inc. (RGLL).

3. Cobble Pond Farms (Registration No. 4-429643)
   52 Hudson Avenue
   Chatham (Columbia County), New York 12037

4. Cobble Pond Farms (Registration No. 4-430889)
   Route 9 North
   Valatie (Columbia County), New York 12184

5. Cobble Pond Farms (Registration No. 4-429694)
   Routes 22 and 23
   Hillsdale (Columbia County), New York 12529

6. Bricktavern Sunoco (Registration No. 4-462098)
   Routes 9H and 66
   Claverack (Columbia County), New York 12513

7. Germantown Sunoco (Registration No. 4-433322)
   Route 9G
   Germantown (Columbia County), New York 12526

With a cover letter dated June 27, 2004, Richard P. Feirstein, Esq., (Albany, New York), who was RGLL's former legal counsel, filed an affirmation, dated June 12, 2004, in opposition to Department staff's motion.

With leave from the undersigned ALJ, Department staff filed a reply dated July 13, 2004. Although provided the opportunity, Respondents did not file a sur-reply.

After considering the parties' papers, I issued a ruling and report dated September 9, 2004 with recommendations for the Commissioner's consideration. Subsequently, the Commissioner issued a Decision and Order on January 21, 2005. The Commissioner dismissed the charges of individual liability alleged in the May 13, 2004 motion for order without hearing against James T. Metz and Lauren Simons, two of RGLL's corporate officers.

Based on inspections conducted by Department staff on May 14, September 11, and November 6, 2003, the Commissioner determined further that RGLL violated the following provisions of 6 NYCRR parts 613 and 614. RGLL violated 6 NYCRR 613.3(d) at the Hudson, Chatham, Valatie, Hillsdale and Claverack facilities, identified above, by failing to keep the spill prevention equipment at these PBS facilities in good working order. RGLL violated 6 NYCRR 613.5(b)(2) at the Chatham facility by failing to monitor the cathodic protection system for the two tanks

located there. In addition, RGLL violated 6 NYCRR 613.8 on two occasions by failing to report a petroleum spill at the East Greenbush facility and one at the Germantown facility within two hours of discovery. Finally, RGLL violated 6 NYCRR 614.5 when it failed to monitor the interstitial space of the double-walled tanks at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities.

For these violations, the Commissioner assessed a total civil penalty of $57,000, and required RGLL either to surrender the PBS registration for the facilities identified above or, in the alternative, operate them in a manner consistent with the applicable requirements outlined in 6 NYCRR parts 612, 613 and 614. With respect to the alternative, the Commissioner's January 21, 2005 Decision and Order required RGLL to provide written and photographic documentation, within 90 days of the effective date of the order, to show that the seven PBS facilities comply with all applicable regulations.

B. RGLL's CPLR article 78 Petition

With a notice of petition dated April 20, 2005, RGLL sought judicial review of the Commissioner's January 21, 2005 Decision and Order pursuant to Civil Practice Law and Rules (CPLR) article 78. The Department opposed the petition, and asserted counterclaims that RGLL had violated the terms and conditions of the Commissioner's January 21, 2005 Decision and Order concerning payment of the assessed civil penalty.

Subsequently, the court issued a Decision/Order (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, October 5, 2005, Ceresia, J., Index No. 2401-05 identified as Exhibit B of Exhibit 1 to Ms. Lapinski's Affirmation dated July 10, 2006). The court held that the evidence submitted with Department staff's May 13, 2004 motion for order without hearing demonstrated that RGLL had violated various provisions of 6 NYCRR parts 613 and 614. The court found further that RGLL's response to Staff's May 13, 2004 motion consisted of conclusory denials which did not constitute admissible evidentiary proof sufficient to raise any material issues of fact that would require a hearing. As a result, the court dismissed RGLL's petition, and upheld the Commissioner's January 21, 2005 Decision and Order.

With respect to the counterclaims asserted by the Department, the court noted that RGLL had not replied to them, and that the Department had not moved for a default judgment.

The court concluded that it could not act on the Department's counterclaims absent a formal motion for default judgment.

C. Motion for Default Judgment pursuant to CPLR 3215

Mr. Sgambettera, who is RGLL's current counsel, filed a notice of appearance in the CPLR article 78 proceeding dated December 16, 2005 (*see* Exhibit C of Exhibit 1 to Ms. Lapinski's Affirmation dated July 10, 2006). Subsequently, RGLL filed a verified response, dated December 22, 2005, wherein RGLL generally denied the allegations in the Department's counterclaims (*see* Exhibit D of Exhibit 1 to Ms. Lapinski's Affirmation dated July 10, 2006).

In a letter dated January 5, 2006, Assistant Attorney General Karen R. Kaufmann, on behalf of the Department, rejected as untimely RGLL's December 22, 2005 verified response to the counterclaims (*see* Exhibit E of Exhibit 1 to Ms. Lapinski's Affirmation dated July 10, 2006).

With a notice of motion dated January 26, 2006, the Department moved for default judgment, pursuant to CPLR 3215, against RGLL for failing to respond to the Department's counterclaims. In addition, the Department further moved for a judgment declaring RGLL in violation of paragraph IV of the Commissioner's January 21, 2005 Decision and Order, and ordering RGLL to pay the assessed $57,000 civil penalty with interest.

RGLL's attorney, Mr. Sgambettera, filled an affirmation dated March 1, 2006, in opposition to the Department's motion for default judgment. With Mr. Sgambettera's affirmation, RGLL also included an affidavit by Lauren Simons sworn to February 27, 2006. In the March 1, 2006 affirmation, Mr. Sgambettera stated, among other things, that RGLL had provided Department staff with "exculpatory documents" prior to service of Staff's May 13, 2004 motion for order without hearing. With her February 27, 2006 affidavit, Ms. Simons attached a "representative sample" of the exculpatory documents. Mr. Sgambettera asserted further that despite having these documents, Department staff initiated the enforcement action, and did not disclose these documents with the May 13, 2004 motion for order without hearing. According to Mr. Sgambettera, the disclosure of these documents would have demonstrated material issues of fact that would have required an adjudicatory hearing. (*See* Exhibit 2 to Ms. Lapinski's Affirmation dated July 10, 2006.)

In his March 1, 2006 affirmation, Mr. Sgambettera stated further that Ms. Simons provided RGLL's prior counsel, Mr. Feirstein, with a set of the exculpatory documents. According to Mr. Sgambettera's affirmation, Mr. Feirstein did not attach these documents to his June 12, 2004 affirmation opposing Staff's May 13, 2004 motion for order without hearing. As a result of these circumstances, Mr. Sgambettera argued that RGLL had not been afforded a fair opportunity to dispute the allegations set forth in Staff's May 13, 2004 motion.

Subsequently, Justice Ceresia, Jr., issued a second Decision/Order (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, June 5, 2006, Ceresia, J., Index No. 2401-05 identified as Exhibit 3 to Ms. Lapinski's Affirmation dated July 10, 2006). The court denied RGLL's motion for leave to serve an answer. The court found that RGLL did not establish "good cause" for failing to serve a timely answer to the Department's counterclaims. Accordingly, the court granted the Department's motion for default judgment, and directed RGLL to pay the civil penalty assessed in the Commissioner's January 21, 2005 Decision and Order.

II. RGLL's Motion to Relieve from Order

A. RGLL's Position

As noted above, RGLL filed a notice of motion to relieve from order, an affirmation by Matthew J. Sgambettera, Esq., and an affidavit by Lauren Simons in support of the motion to relieve from order. All of RGLL's motion papers are dated June 13, 2006. By its June 13, 2006 motion, RGLL seeks leave from the Commissioner to re-open the record of the prior enforcement action so that it may present the exculpatory evidence, which Department staff allegedly failed to disclose to the ALJ and Commissioner, at a hearing where the Commissioner's January 21, 2005 Decision and Order would be reconsidered.

Generally, the statements made in Mr. Sgambettera's June 13, 2006 affirmation reiterate the arguments previously outlined in his March 1, 2006 affirmation filed with the court concerning the Department's default motion. Exhibit A to Mr. Sgambettera's June 13, 2006 affirmation is a copy of the set of documents that Ms. Simons had allegedly provided to Department staff prior to Staff's May 13, 2004 motion for order without hearing. In her June 13, 2006 affidavit, Ms. Simons stated that, prior to receiving Staff's May 13, 2004 motion, she met with representatives from Department staff concerning the allegations

outlined in the May 13, 2004 motion, and that during the meeting, Ms. Simons provided documents to Staff which demonstrated RGLL's compliance with requirements outlined in 6 NYCRR parts 613 and 614.

In her June 13, 2006 affidavit, Ms. Simons stated further that after service of the May 13, 2004 motion upon RGLL, Ms. Simons retained Mr. Feirstein as legal counsel, and provided him with a set of the documents she had previously provided to Department staff. According to Ms. Simons, neither Department staff nor Mr. Feirstein provided the ALJ with any documents that would have demonstrated RGLL's compliance with the requirements outlined in 6 NYCRR parts 613 and 614.

Mr. Sgambettera argued, based on Ms. Simons' June 13, 2006 affidavit, that Department staff had an obligation to disclose the documents allegedly provided by Ms. Simons to the ALJ as part of Staff's May 13, 2004 motion for order without hearing. To support this argument, RGLL cited the following case law: *Brady v Maryland*, 373 US 83 (1963); *People v Consolazio*, 40 NY2d 446, 453; *People v Andre W.*, 44 NY2d 179; *Griffin v United States*, 87 US App DC 172; *Ramos v City of New York*, 285 AD2d 284 (1st Dept. 2001).

According to RGLL, the Department is a governmental agency with full prosecutorial powers, and is therefore subject to the rules and requirements of professional conduct and civil practice, as well as the rules and requirements of criminal practice and procedure. Relying on the case law identified in the preceding paragraph, RGLL asserted that prosecutorial agencies, such as the Department, are required to disclose exculpatory evidence to the trier of fact.

Because 6 NYCRR part 622 is silent about motions to re-open enforcement proceedings, RGLL argued that CPLR 5015(a) should be relied upon. CPLR 5015(a)(3) provides for a motion to re-open based on the "misrepresentation ... of an adverse party." According to RGLL, Department staff misrepresented its position to the ALJ in the May 13, 2004 motion for order without hearing by withholding the exculpatory evidence that RGLL had provided to Staff prior to service of the May 13, 2004 motion.

In addition, RGLL referred to CPLR 5015(a)(2), which allows a record to be re-opened when there is "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result ...." RGLL contended that if the documents it provided to Department staff had been disclosed during the

pendency of the May 13, 2004 motion, the ALJ would have concluded there were issues of fact that required an adjudicatory hearing.

As noted above, RGLL had requested and obtained leave from the Chief ALJ to reply to Department staff's response, which is summarized in the next section. Without offering any explanation, however, RGLL did not file a reply.

B. Department Staff's Position

With a cover letter dated July 10, 2006, Ann Lapinski, Esq., Assistant Regional Attorney, filed an affirmation dated the same, on behalf of Department staff in opposition to RGLL's June 13, 2006 motion to relieve from order. Three exhibits were filed with Ms. Lapinski's affirmation. Exhibit 1 consists of a copy of Staff's Notice of Motion dated January 26, 2006 for a default judgment, pursuant to CPLR 3215, against RGLL for failing to respond to the Department's counterclaim. Exhibit 1 also includes an affirmation by Karen R. Kaufmann, Assistant Attorney General, dated January 26, 2006, as well as copies of the Department's papers previously filed with the court with respect to RGLL's CPLR article 78 petition concerning the Commissioner's January 21, 2005 Decision and Order.

Exhibit 2 to Ms. Lapinski's July 10, 2006 affirmation is a copy of RGLL's responding papers, which includes Mr. Sgambettera's affirmation dated March 1, 2006 and Ms. Simons' affidavit sworn to February 27, 2006. Also included with Exhibit 2 are copies of the documents that Ms. Simons had provided to Department staff (*i.e.*, the "exculpatory documents").

Exhibit 3 is a copy of Justice Ceresia's June 5, 2006 Decision/Order (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, June 5, 2006, Ceresia, J., Index No. 2401-05), which granted Staff's default motion concerning the counterclaim made during the CPLR article 78 proceeding.

Department staff opposes RGLL's June 13, 2006 motion to relieve from order, and offered three arguments. Citing *Matter of Niagara Recycling, Inc.*, (Interim Decision of the Commissioner, May 19, 1989), Staff argued, first, that the principle of res judicata applies to administrative decisions. With respect to the captioned matter, Staff noted that the relief RGLL seeks by this motion is the same relief that it sought by its CPLR article 78 petition. According to Department staff, Supreme Court has already decided RGLL's article 78 petition and the principle of res judicata now prevents the Commissioner from

reconsidering what Supreme Court has already reviewed and decided.

Second, Staff pointed out that Justice Ceresia gave RGLL specific instructions about the claims it made concerning the "exculpatory documents." The court held that RGLL's concerns that its prior counsel failed to submit certain evidence "are best addressed by either appealing this Court's original Decision and Order, ... or making a motion to renew and/or reargue" (*Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, June 5, 2006, Ceresia, J., Index No. 2401-05, footnote 3, at 4).

Finally, Staff argued that the Commissioner does not have any reason to re-open this matter. Referring to 6 NYCRR 622.18(d), Department staff contended that the Commissioner may only reopen the hearing record to consider new evidence prior to issuing the final decision. Staff noted that the principles of vacatur of a civil judgment pursuant to CPLR 5015 have been applied to DEC administrative hearings (*see e.g.*, *Matter of Mohawk Valley Organics, LLC*, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Record, September 8, 2003).

A ground among others, for vacatur is fraud, misrepresentation, or other misconduct of an adverse party (*see* CPLR 5015[a][3]). Staff stated that RGLL has alleged fraud and misconduct by Department staff with respect to the "exculpatory documents" that Ms. Simons provided first to Department staff and then to her former attorney, Mr. Feirstein. Staff observed that in her affidavits, Ms. Simons did not identify the exact date that she provided the documents to Department staff and to her former attorney. According to Staff, the "representative sample" implies that Ms. Simons does not know exactly what she provided. Although RGLL states that the representative sample of exculpatory documents were provided in the fall of 2003, Department staff noted that the documents primarily contain data from 2004 and 2005, and that some documents are either not dated or are only partially dated. The exception is the cathodic protection test data from the Chatham facility. Each document is addressed below (*also see* Appendix A).

Discussion and Ruling

I. Res judicata

After a matter has been duly decided, the doctrine of res judicata precludes further consideration of it, unless the matter is appealed to a higher level. If a litigant is dissatisfied

with the result of an adjudication, the proper course is to appeal the unsatisfactory result rather than ignore it and attempt to relitigate it in a separate action. The doctrine of res judicata applies not only to the matter litigated but also to what might have been litigated (*see Schuylkill Fuel Corp. v B&C Nieberg Realty Corp.*, 250 NY 304). From this principle, the concept of "claim preclusion" has developed. (*See* Siegel, New York Practice § 442, at 714 [3d ed]).

The doctrine of res judicata requires a final judgment on the merits and a determination that the second action involves the same "cause of action." Causes of action are considered the same if they arise out of the same transaction or series of connected transactions. Relevant factors include the time, place and origin of the causes of action (s*ee* Siegel, New York Practice § 447, at 721 [3d ed]).

Not only was the prior enforcement action fully litigated within the administrative forum, Supreme Court has reviewed the Commissioner's January 21, 2005 Decision and Order pursuant to CPLR article 78, and upheld it (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, October 5, 2005, Ceresia, J., Index No. 2401-05). As noted generally above and, in particular, by the court concerning the referenced CPLR article 78 proceeding, the proper course of action for RGLL is to appeal what it considers to be an unsatisfactory result rather than attempt to relitigate it (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, October 5, 2005, Ceresia, J., Index No. 2401-05 footnote 3, at 4).

II. Reconsideration

Only prior to the issuance of a final decision by the Commissioner does 6 NYCRR part 622 authorize the reopening of the hearing record. Specifically, 6 NYCRR 622.18(d) states, in pertinent part, that "[a]t any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence."

A Commissioner's order, issued pursuant to 6 NYCRR 622.18, represents a final action of the agency. After the Commissioner has issued an order, there is no express authority in either 6 NYCRR part 622 or the ECL for the Commissioner to suspend or reconsider the order, or to entertain other post-order motion practice as requested here by RGLL.

In a limited number of instances, however, the Commissioner has granted leave for reconsideration. In *Matter of Village of Elbridge (Water Supply Application No. 9039)*, (Commissioner's Ruling on Motion for Reconsideration, September 26, 1995, at 1), the Commissioner held that the Department has the power to modify an administrative decision to correct an error (*see Matter of Greene v Diamond*, 75 Misc 2d 724, 726 [Sup Ct, Albany County, 1973]). In *Elbridge* (*supra*, at 1), the Commissioner determined further that reconsideration is appropriate only when the decisionmaker has overlooked or misapprehended the facts or law, or for some other reason mistakenly arrived at a decision (*see Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 [3rd Dept 1993]).

More recently, the Commissioner has also relied on the grounds for vacating a civil judgment (*see* CPLR 5015), as guidance for determining whether to grant leave for motions to reconsider (*see, e.g.*, *Matter of Mary and Alan Risi*, Ruling of the Assistant Commissioner, April 5, 2005; *Matter of Stagecoach Field*, Commissioner's Ruling on Petition for Modification or Vacatur of the Commissioner's September 24, 1993 Order, March 12, 2004; *Matter of Mohawk Valley Organics, LLC*, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Record, September 8, 2003).

The standards outlined at CPLR 5015 include: excusable default; newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification or vacatur of a prior judgment or order upon which the judgment or order is based (*see* CPLR 5015[a][1]-[5]). As noted above, RGLL argued, first, that its "exculpatory documents," if introduced prior to the ALJ's consideration of Staff's May 13, 2004 motion for order without hearing, would have produced a different result and, second, that Department staff committed a fraud by failing to disclose RGLL's "exculpatory documents" to the ALJ prior to his consideration of Staff's motion.

Each party has filed copies of what RGLL has characterized as a representative sample of the exculpatory documents. Copies of the documents are attached as Exhibit A to Mr. Sgambettera's June 13, 2006 affidavit. Department staff attached an identical set of documents as part of Exhibit 2 to Ms. Lapinski's July 10, 2006 affirmation. The latter set has also been identified as Exhibit A to Ms. Simons' affidavit sworn to February 27, 2006.

Appendix A to this Hearing Report is a list and a brief description of each document filed as Exhibit A to Mr. Sgambettera's June 13, 2006 affidavit. To better identify the documents, the collection was Bates-stamped from 001 through 051. Some documents are not dated (*see* Document Nos. 001, 029, 042, and 049); others have incomplete dates, which lack a year (*see* Document Nos. 028, 030, 032, 035, 037, 039, and 041). Some documents pre-date Department staff's May 13, 2004 motion for order without hearing (*see* Document Nos. 002, 003, 004, 005, and 006-020). Another set of documents post-dates Staff's motion (*see* Document Nos. 021, 022, 023-024, 025, 026, 027, 031, 033, 034, 036, 038, 040, 043-044, 045, 046-047, 048, 050, and 051). Each group is discussed below.

A. Post-dated Documents

In Appendix A, the documents that post-date Staff's May 13, 2004 motion for order without hearing are identified as Document Nos. 021, 022, 023-024, 025, 026, 027, 031, 033, 034, 036, 038, 040, 043-044, 045, 046-047, 048, 050, and 051. Document No. 021 is a receipt for a FedEx priority overnight mailing. The receipt is dated June 27, 2005. This receipt demonstrates that Ms. Simons from RGLL sent something to Ms. Lapinski. Neither Ms. Simons' February 27, 2006 affidavit, nor Mr. Sgambattera's June 13, 2006 affirmation precisely identified what was sent to Ms. Lapinski. It can be reasonably be inferred, however, that Document Nos. 022, and 023-024 were sent via overnight delivery on June 27, 2005.

Document No. 022 is a copy of a cover letter dated June 27, 2005 from Ms. Simons to Ms. Lapinski. Ms. Simons' June 27, 2005 letter states that five categories of documents were enclosed with the cover letter. The first is an affidavit of compliance by Ms. Simons sworn to June 27, 2005 (*see* Document Nos. 023-024). The second category is a set of results for the corrosion protection test conducted on February 9, 2005 at the Chatham Facility (*see* Document Nos. 025 and 050). The third category of documents described in Ms. Simons June 27, 2005 cover letter is a set of annual leak monitoring forms (*see* Document Nos. 026, 031, 033, 034, 036, 038, 040, 043-044, 045, and 048).[2] The fourth category of documents described in Ms. Simons June 27, 2005 cover letter is a set of interstitial monitoring records (*see* Document

[2] Document No. 029 is described as an annual leak monitoring form, but it is not dated. Document No. 029 is discussed with the other non-dated documents.

Nos. 046-047).[3] The fifth category of documents described in Ms. Simons June 27, 2005 cover letter are copies of corrected registration certificates. None of the documents provide in Exhibit A to Mr. Sgambettera's June 13, 2006 affirmation relate to the fifth category of documents identified in Ms. Simons' June 26, 2005 letter, however.

All of the documents apparently submitted with Ms. Simons' June 27, 2006 cover letter post-date Staff's May 13, 2004 motion for order without hearing, and appear to respond to directives outlined in the Commissioner's January 21, 2005 Decision and Order. Paragraph VI of the Commissioner's January 21, 2005 Decision and Order directed RGLL to provide certain documentation to the Region 4 Department staff about the PBS facilities identified above within specific time periods. The purpose of the Commissioner's directive was to require RGLL to demonstrate that its PBS facilities comply with various requirements outlined in 6 NYCRR parts 613 and 614.

RGLL's contentions and arguments that the information provided in Document Nos. 021, 022, 023-024, 025, 026, 027, 031, 033, 034, 036, 038, 040, 043-044, 045, 046-047, 048, 050, and 051 is exculpatory in nature are without merit. Not only do these documents post-date Department staff's May 13, 2004 motion for order without hearing, they post-date the Commissioner's January 21, 2005 Decision and Order. Consequently, no information provided in this group of documents demonstrates that RGLL's facilities were in compliance with various requirements outlined in 6 NYCRR parts 613 and 614 at the time of Staff's inspections on May 14, September 11, and November 6, 2003, which served as the bases for the violations alleged in the May 13, 2004 motion.[4]

Moreover, RGLL could not have provided Department staff with any of these documents prior to service of Staff's May 13, 2004 motion for order without hearing because the dates on Document Nos. 021, 022, 023-024, 025, 026, 027, 031, 033, 034, 036, 038, 040, 043-044, 045, 046-047, 048, 050, and 051 post-date the

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[3] Document Nos. 028 and 035 are also described as interstitial monitoring reports. However, the dates on these documents do not include a year. Document Nos. 028, and 035 are discussed with the other partially dated documents.

[4] Whether RGLL has complied with the terms and conditions of the Commissioner's January 21, 2005 Decision and Order is beyond the scope of RGLL's motion.

motion. Contrary to RGLL's claim, Staff did not have these documents in hand prior to service of the May 13, 2004 motion and, therefore, Staff could not have provided them to the ALJ.

B. Non-dated Documents

The non-dated documents are identified in Appendix A as Nos. 001, 029, 042, and 049. At issue is whether RGLL provided Department staff with documents either in response to Staff's inspections of RGLL's PBS facilities conducted on May 14, September 11, and November 6, 2003, or prior to service of Staff's May 13, 2004 motion for order without hearing. In order to demonstrate that RGLL actually provided documents prior to service of Staff's May 13, 2004 motion, the proffered documents must be dated. Those documents which are not dated have no probative value to this inquiry. RGLL has not established when Document Nos. 029, 042, and 049 were created. Absent any date on these documents or some other proof about when these documents were created, they do not support any of RGLL's contentions or arguments with respect to its motion for reconsideration.

C. Incomplete Dated Documents

In Appendix A, Document Nos. 028, 030, 032, 035, 037, 039, and 041 are interstitial monitoring reports and leak monitoring logs. The dates on these documents are incomplete by missing the year or years. The year or years cannot be inferred from other data on the document.

At issue is whether RGLL provided Department staff with documents in response to inspections of RGLL's PBS facilities conducted on May 14, September 11, and November 6, 2003, or prior to service of Staff's May 13, 2004 motion for order without hearing. In order to demonstrate that RGLL actually provided documents prior to service of Staff's May 13, 2004 motion, the proffered documents must have a complete date on them. Those documents which do not have a complete date have no probative value to this inquiry. RGLL has not established the year or years in which Document Nos. 028, 030, 032, 035, 037, 039, and 041 were created. Absent a complete date on these documents, they do not support any of RGLL's contentions or arguments with respect to its motion for reconsideration.

D. Pre-dated Materials

Some documents pre-date Department staff's May 13, 2004 motion for order without hearing. In Appendix A, they are

identified as Document Nos. 002, 003, 004, 005, and 006-020. Document No. 002 is a facsimile transmission sheet dated October 1, 2003 from Ms. Simons to Mr. Schowe from the DEC Region 4 office. "Hillsdale, NY" is in the reference line. It can be reasonably inferred that Document No. 002 is the cover sheet for Document No. 003, which is a copy of a letter dated October 1, 2003 from Ms. Simons to Mr. Schowe. In the October 1, 2003 letter (Document No. 003), Ms. Simons states that within six days, she will forward copies of the inventory records and interstitial monitoring reports for the Hillsdale facility to Mr. Schowe by overnight mail.

Document No. 004 is a copy of Ms. Simons cover letter dated October 6, 2003, which follows up on her October 1, 2003 letter. According to the October 6, 2003 letter, Ms. Simons enclosed copies of the documents requested by Mr. Schowe concerning the Hillsdale facility. However, it is unknown exactly what Ms. Simons enclosed with her October 6, 2003 letter to Mr. Schowe.

The documents identified in Appendix A that refer to the Hillsdale facility are Document Nos. 036, 037, and 043-044. Document Nos. 036 and 043-044 could not have been enclosed with Ms. Simon's October 6, 2003 cover letter because they post-date the Commissioner's January 21, 2005 Decision and Order. As noted above, the date on Document No. 037 is incomplete and, therefore, has no probative value with respect to RGLL's June 13, 2006 motion. Consequently, none of the documents identified in Appendix A, with the possible exception of Document No. 037, are the enclosures described in Ms. Simons' October 6, 2003 letter (*see* Document No. 004).

RGLL's contentions and arguments that the information provided in Document Nos. 002, 003, and 004 is exculpatory in nature are without merit. Although these documents pre-date Department staff's May 13, 2004 motion for order without hearing, no information provided in them demonstrates that RGLL's PBS facilities were in compliance with various requirements outlined in 6 NYCRR parts 613 and 614 at the time of Staff's inspections on May 14, September 11, and November 6, 2003.

Document No. 005 is a copy of a corrosion protection testing form that presents the results of a test conducted on February 12, 2003 at the Chatham facility. This report (identified in Appendix A as Document No. 005) pre-dates Department staff's inspection of the Chatham facility on November 6, 2003 and Staff's May 13, 2004 motion for order without hearing.

In order to vacate a civil judgment pursuant to CPLR 5015(a)(2), the newly-discovered evidence must meet a two part test. With respect to the first part, the movant must establish that the new evidence, if introduced at trial, would have been relevant to a central factual issue of the case, and its consideration could have resulted in a different outcome. With respect to the second part, the movant must establish further that the evidence could not have been discovered earlier with due diligence (*see Federated Conservationists of Westchester County, Inc. v County of Westchester*, 4 AD3d 326, 327 [2d Dept 2004]).

Although meeting the first test, Document No. 005 is not a basis for vacating the Commissioner's January 21, 2005 Decision and Order because RGLL failed to demonstrate that the evidence could not have been discovered earlier with due diligence. GRJH, Inc., which is somehow related to RGLL,[5] created Document No. 005 for the PBS facility located in Chatham and operated by RGLL. Therefore, RGLL controlled the production and maintenance of Document No. 005.

Moreover, during the pendency of the administrative enforcement hearing, RGLL had three opportunities to present the February 12, 2003 report (Document No. 005) or similar evidence. RGLL, however, neither presented such evidence nor explained why it could not present this evidence. The first opportunity was during Mr. Showe's November 6, 2003 inspection of the Chatham facility. Based on Mr. Moore's notes on the inspection fact sheet for the Chatham facility (*see* Exhibit D, Sheet No. 3 to Staff's May 13, 2004 motion), RGLL did not monitor the cathodic protection system for Tanks 1 and 2 on an annual basis. According to Mr. Moore's supplemental affidavit sworn to July 13, 2004, Department staff requested monitoring records during the November 6, 2003 inspection and was informed by the operator at the Chatham facility that no records were kept on site. RGLL offered no proof to refute the evidence presented in Department staff's May 13, 2004 motion papers concerning the lack of corrosion protection testing.

RGLL's second opportunity to provide Document No. 005, or similar evidence, was in response to Staff's May 13, 2004 motion for order without hearing. In his June 12, 2004 affirmation (at ¶ 8), Mr. Feirstein asserted that the tanks at the Chatham facility are monitored for corrosion annually. However, Mr.

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[5] The two companies have the same telephone number. Compare Document Nos. 003 and 005.

Feirstein offered neither Document No. 005 nor any other evidence with his June 12, 2004 affirmation to support this assertion. On page 2 of Department staff's July 13, 2004 reply, Ms. Lapinski expressly asked Mr. Feirstein to provide the proof that supported his assertion. Finally, though given the opportunity, RGLL did not file a sur-reply, which was RGLL's third opportunity to present the February 12, 2003 report or similar evidence.

RGLL is not entitled to present the February 12, 2003 report (Document No. 005) now. For the foregoing reasons, RGLL has not shown that the evidence could not have been discovered earlier with due diligence. (*See Pezenik v Milano*, 137 AD2d 748 [2d Dept], *lv dimissed* 72 NY2d 909 [1988]; *Matter of Commercial Structures, Inc., v City of Syracuse*, 97 AD2d 965 [4th Dept 1983]). At no time since Department staff commenced the administrative enforcement action has RGLL explained why it could not access and subsequently produce this document, or similar evidence, either at the time of the inspection or in response to Staff's May 13, 2004 motion.

In her June 13, 2006 affidavit (at ¶ 5), Ms. Simons stated that prior to service of Staff's May 13, 2004 motion, she "met with DEC regarding these allegations and provided them with the documents they requested in connection with this matter." In addition, Ms. Simons stated (at ¶ 6) that "[t]hese documents, which I provided to the DEC as part of their inspections, contradicted the allegations contained in both Mr. Moore's affidavit and the DEC's Notice [of motion for order without hearing], and demonstrated that RGLL had not violated the provisions and regulations set forth in said Notice." Ms. Simons stated further (at ¶ 7) that "[a] representative sample of documents I previously submitted to the DEC in connection with this matter is included with Mr. Sgambettera's [June 13, 2006] Affirmation."

To vacate a civil judgment pursuant to CPLR 5015(a)(3), the movant must provide a prima facie showing of a fraud or misrepresentation (*see Stewart v Warren*, 134 AD2d 585; *Lins v Lins*, 98 AD2d 608). I find that the statements in Ms. Simons' affidavit are not sufficient to raise an allegation of fraud or misrepresentation by Department staff. In her June 6, 2006 affidavit, Ms. Simons is not specific about when she met with the "DEC" and with whom she met. For example, Ms. Simons does not expressly state that she met with any member of Department staff identified in the May 13, 2004 motion papers.

In addition, Ms. Simons' statements are inconsistent. First, Ms. Simons stated that she provided documents to DEC before service of the May 13, 2004 notice, and then stated that these documents "contradicted the allegations contained in both Mr. Moore's affidavit and the DEC's Notice." The sequence of these statements in Ms. Simons' June 13, 2006 affidavit suggests that Ms. Simons was familiar with the allegations in Staff's May 13, 2004 motion papers before Staff served them upon RGLL. Ms. Simons, however, does not explain how the "exculpatory documents" could have been responsive to Staff's motion before Staff actually served the May 13, 2004 motion.

Moreover, Ms. Simons does not specify what documents she provided to Department staff. As noted above, none of the documents identified in Appendix A, with the possible exception of Document No. 037, are the enclosures described in Ms. Simons' October 6, 2003 letter concerning the Hillsdale PBS facility (*see* Document No. 004). Therefore, I reject RGLL's unsubstantiated claim that Department staff had exculpatory documents prior to service of the May 13, 2004 motion for order without hearing.

With respect to the remaining documents that pre-date Department staff's May 13, 2004 motion for order without hearing, Document Nos. 006-020 are pages from a training manual, prepared by GRJH, Inc., for petroleum bulk storage operators. Pages 1 through 13 (Bates-numbered as Document Nos. 008-018 in Appendix A) of the manual have the date "January 2001" on the foot of these pages. RGLL does not explain in its June 13, 2006 motion papers how the training manual is relevant to the prior administrative enforcement action. The May 13, 2004 motion did not allege any violation of a requirement outlined in 6 NYCRR parts 613 and 614 related to the preparation, use, and maintenance of a training manual at PBS facilities.

* * *

As noted above, the Commissioner has reconsidered a very limited number of final determinations. In those limited instances, the Commissioner has relied on the standards outlined in CPLR 5015, which are the grounds for vacating a civil judgment, as guidance. Based on the foregoing discussion, RGLL makes no showing that any of these standards are applicable here. Consequently, there is no newly-discovered evidence consistent with the conditions identified in CPLR 5015(a)(2). Furthermore, no evidence exists of any fraud, misrepresentation, or other misconduct by Department staff (*see* CPLR 5015[a][3]).

Conclusions

1. The prior administrative enforcement matter, which commenced with service of a motion for order without hearing dated May 13, 2004 has been duly decided by the Commissioner. In addition, the court has reviewed the Commissioner's January 21, 2005 Decision and Order pursuant to CPLR article 78, and upheld it (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, October 5, 2005, Ceresia, J., Index No. 2401-05). The doctrine of res judicata precludes further consideration of it, unless the matter is appealed to a higher level. As further noted by Justice Ceresia, the proper course of action for RGLL is to appeal what it considers to be an unsatisfactory result rather than attempt to relitigate it (*see Matter of RGLL, Inc. v Crotty*, Sup Ct, Albany County, June 5, 2006, Ceresia, J., Index No. 2401-05, footnote 3, at 4).

2. In those limited instances when the Commissioner has reconsidered a final determination, the Commissioner has relied on the standards outlined in CPLR 5015, which are the grounds for vacating a civil judgment, as guidance. Based on the foregoing discussion, RGLL makes no showing that any of the standards outlined in CPLR 5015 should apply here.

Recommendation

The Commissioner should deny RGLL's June 13, 2006 motion to relieve from order.