

STATE OF NEW YORK  
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  
and Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the State of  
New York (6 NYCRR) parts 612, 613, and 614

- by -

**RGLL, INC., and GRJH, INC.**

Respondents.

DEC File No. D3-601405-02-06  
(Old Millerton Sunoco)

DECISION AND ORDER OF THE COMMISSIONER

December 29, 2009

## DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns the charged violations of various petroleum bulk storage (PBS) provisions of the New York Environmental Conservation Law (ECL) and its implementing regulations at a gas station in Millerton, Dutchess County, New York.

### I. PROCEDURAL BACKGROUND

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated February 22, 2006. The proceeding was originally initiated solely against respondent RGLL, Inc. As discussed more fully in the attached hearing report, Department staff twice sought leave to amend its complaint.

In its initial complaint, Department staff charged that RGLL owned and operated a PBS facility located in the Millerton Square Shopping Plaza on Route 44 East, Millerton (Dutchess County), New York. This facility is referred to as the "Old Millerton Sunoco PBS facility." Staff's complaint charged that RGLL had violated various provisions of ECL article 17, title 10 (Control of Bulk Storage of Petroleum), as well as parts 612, 613, and 614 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New of New York (6 NYCRR) (Registration of Petroleum Storage Facilities; Handling and Storage of Petroleum; and Standards for New and Substantially Modified Petroleum Storage Facilities, respectively). RGLL answered the complaint in the form of a letter dated May 10, 2006, and stated that it operated the facility.

On September 14, 2006, Department staff requested leave to amend the complaint to add 13 violations based on inspections conducted by Department staff on January 19, 2006, and August 28, 2006. Administrative Law Judge (ALJ) Daniel P. O'Connell granted the request. RGLL filed an answer to staff's amended complaint on January 3, 2007, but this time RGLL denied that it was an operator of the facility.

On January 8, 2007, Department staff requested leave to amend its complaint a second time to name GRJH, Inc., also an operator of the facility, as an additional respondent in this matter. RGLL did not object to the addition of GRJH as a party to the action. ALJ O'Connell granted staff's request to file and serve a second amended complaint.

The second amended complaint dated January 8, 2007, asserts that RGLL is an operator and/or owner and GRJH is an operator of the Old Millerton Sunoco PBS facility. This complaint further charges that respondents RGLL and GRJH committed a total of 15 violations of various provisions of ECL article 17, title 10, as well as 6 NYCRR parts 612, 613, and 614 at the Old Millerton Sunoco PBS facility. See Appendix A, attached to this decision and order, for a list of the 15 charged violations.

The violations charged in the second amended complaint were based in part on inspections of the Old Millerton Sunoco PBS facility that Department staff conducted on two dates: January 19, 2006, and August 28, 2006.<sup>1</sup> These inspections then resulted in the issuance of two Notices of Violation (NOVs), dated January 20, 2006, and September 12, 2006. Department staff conducted a follow-up inspection on March 1, 2007, after service of the second amended complaint and a few days prior to the adjudicatory hearing.

RGLL and GRJH, who were represented by the same counsel, filed separate answers to staff's second amended complaint. In their respective answers, RGLL and GRJH each asserted, among other things, that they are neither the operators nor the owners of the Old Millerton Sunoco PBS facility. They claim that the landowners, Robert Trotta and Joseph A. Trotta III, who have owned the real property upon which the facility is located for over 30 years (see Exhs 29, 30), have been the owners and operators of the facility since at least when the tank was installed in 1999 and certainly after March 2003. The Trottas were not named as parties to this proceeding.

ALJ O'Connell presided over an adjudicatory hearing on March 6-7 and April 4, 2007, and prepared the attached hearing report. As discussed in more detail below, I accept only in part the ALJ's Hearing Report as my decision in this matter.

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<sup>1</sup> Although Department staff issued a Notice of Violation (NOV) on July 10, 2001, which was based on a May 18, 2001, inspection, staff counsel conceded at the hearing that the second amended complaint was not based on the violations identified in the 2001 NOV (Tr, at 69). Instead, counsel represented that staff is relying on those violations (i.e., no color coding, no inventory records, and no leak detection) only as evidence that respondents had knowledge of them, which factors into the calculation of a penalty under the Department's Civil Penalty Policy (Id.).

## II. FACTUAL BACKGROUND

In October 1999, respondent GRJH entered into a lease agreement with the Trotts for a five-year period effective from January 1, 2000, to December 31, 2004, to operate a gasoline service station upon the property where the Old Millerton Sunoco PBS facility is located (see Exh 32). To further that venture, during the summer of 1999, respondent RGLL installed at the site a 12,000 or 15,000 gallon<sup>2</sup> underground PBS tank, which was a double-walled split tank of fiberglass-coated steel. The Department granted RGLL's application to register the tank; the certificate of registration expired on March 1, 2005 (see Exh 38). Neither RGLL nor anyone else filed a tank registration renewal application for this facility.

After signing the lease with the Trotts in October 1999, respondent GRJH sub-leased the site to a third party - Singh Mart/Millerton Minimart (Singh Mart) - which operated the gasoline service station and a convenience store on the property from the time the tank was installed and operational to August 2001. Singh Mart is not a party in this enforcement proceeding. GRJH remained the primary lessee while Singh Mart operated the facility.

After Singh Mart stopped operating the facility in August 2001, RGLL operated it as an active facility until approximately March 2003. During this period, RGLL claims that the employees at the site were affected by petroleum fumes associated with two unremediated petroleum spills at the site dating from 1993, well before when RGLL installed the underground tank in the summer of 1999 and when GRJH entered into the lease with the Trotts in October 1999 (see Exhs 1, 2).

In March 2003, respondent GRJH advised the Trotts that it was terminating the lease and was stopping operations at the facility because of the petroleum fumes at the site (see Exh 33).<sup>3</sup> Respondents assert in this proceeding that they

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<sup>2</sup> Some confusion exists in the record as to the size of the tank that RGLL installed at the Old Millerton Sunoco PBS facility - 12,000 gallons or 15,000 gallons. In correspondence to the Department, RGLL referred to it as a 12,000 gallon tank (see Exh 4), but the Department's records list the tank as a 15,000 gallon tank (see Exhs 16, 38).

<sup>3</sup> The prior contamination at the site is not at issue in this matter, which only addresses the regulatory compliance related to the tank that RGLL installed at the Old Millerton Sunoco facility

"abandoned" the site around late March or early April 2003.

When the Old Millerton gas station stopped operating as an active gas station, RGLL continued to exercise control over the facility. First, it informed Department staff that it would maintain the tank until it was removed from the site (see Exh 4). Second, it filed with DEC Region 3 an application for temporary closure of the tank (see Exh 39). Third, it arranged for the removal of the petroleum products in the split tank, leaving one inch of product in the tank. Fourth, from April 2003 until January 2006, it continued to take inventory of the tank's contents and conduct interstitial monitoring (see Exh 41). Finally, it informed Department counsel on October 5, 2006, that it was going to remove the tank on October 10, 2006, after which it would then file "the appropriate Tank Closure Report" (see Exh 14). The tank removal, however, did not occur (see Exh 15).

### III. MOTIONS TO DISMISS

#### A. Background

At the beginning of the adjudicatory hearing, respondents' counsel made two trial motions to dismiss the proceeding against respondents. The first motion sought dismissal of the second amended complaint for lack of specificity of the charged violations. The ALJ denied this motion without prejudice and advised respondents' counsel that he could renew the motion at the end of the proceeding. At the end of staff's case, respondents' counsel renewed the motion. The ALJ decided not to rule on it, instead deferring the final decision to me. Having presided over the hearing, and having reviewed the entire record, the ALJ provided recommendations to me on both motions.

The second trial motion also sought dismissal of the complaint, but on the grounds that respondents do not own or operate the facility and thus were not liable under the PBS statutes or regulations. The ALJ also deferred the decision on this motion to me, but as mentioned above, provided recommendations to me on the final outcome.

At the end of staff's case, respondents' counsel further moved to dismiss the proceeding against GRJH. As with the other motions, the ALJ deferred the decision of that motion

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in 1999, but it does explain the motivation for GRJH to terminate its lease with the Trotts, and for both respondents to stop the facility's active operation.

to me, and offered his recommendation as to the outcome. I am incorporating this additional motion as part of the second trial motion.

B. Ruling of the Commissioner on the Motions to Dismiss

Upon review of the record and the attached hearing report, I deny the first motion to dismiss in its entirety. I grant the second motion to dismiss as to GRJH, but deny it as to RGLL.

1. First Motion to Dismiss - Sufficiency of the Second Amended Complaint

The Department's regulations set forth the standards for the sufficiency of a complaint. Specifically, 6 NYCRR 622.3(a)(1)(i)-(iii) requires that a complaint contain

"(i) a statement of legal authority and jurisdiction under which the proceeding is to be held;

(ii) a reference to the particular sections of the statutes, rules and regulations involved; and

(iii) a concise statement of the matters asserted."

Applying these requirements here, I concur with the ALJ and conclude that the second amended complaint very clearly sets forth the first two requirements of appropriate legal authority and jurisdiction, with references to statutory and regulatory provisions. As to the third requirement of "a concise statement of the matters asserted," I accept the ALJ's assessment that the second amended complaint meets this basic requirement.<sup>4</sup> The various complaints in this matter were based on the Notices of Violation in the record, which, as the ALJ noted, provided a fair appraisal of the charged violations.

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<sup>4</sup> Numbering the alleged violations or causes of action would have been helpful, and I direct staff counsel to do this for all future matters.

## 2. Second Motion to Dismiss - Liability as Owner and Operator

I also accept the ALJ's recommendation on the second motion to dismiss, and deny that motion in part. As discussed more fully below, I conclude that staff made a prima facie showing that RGLL is liable as (1) an owner from the time it installed the tank in 1999 until January 8, 2007 (the date of the second amended complaint) and (2) an operator from the time it operated the facility in August 2001 until January 8, 2007.

While I conclude that GRJH was an operator from when it signed the lease with the Trotts in October 1999 until it terminated that lease and stopped the active operations of the Old Millerton Sunoco PBS facility around March 2003, I am nonetheless granting the motion to dismiss as to GRJH. Department counsel stated on the record (Tr, at 69, 71) that the second amended complaint is not based on the violations from the July 10, 2001, NOV (Exh 26), which itself was based on a May 18, 2001, inspection (Id.). The other two inspections that formed the basis of the second amended complaint occurred in 2006 (Exhs 9, 27, 25), and a follow-up inspection was conducted on March 1, 2007, a few days before the hearing (Exh 18). The record does not demonstrate, however, that GRJH was an operator of this facility after March 2003. Thus, staff failed to make a prima facie showing that GRJH is responsible for violations that the Department identified after that time.

### a. Status as an Owner and Operator after a Lease Is Terminated and Commercial Operations Stop

A central issue to respondents' second motion to dismiss is whether an entity retains its status as an owner or operator, or both, of a PBS facility even after a lease for operating a gas station is terminated and the site stops its commercial operations as a gas station. Stated specifically here, the issue is whether respondents RGLL and GRJH continue to be deemed an owner or operator, or both, of the Old Millerton Sunoco PBS facility under the PBS statute and regulations *after* GRJH terminated the lease in March 2003 and the facility stopped selling gas.

State regulation of PBS facilities first came into existence in 1983 with the enactment of ECL article 17, title 10 (ECL 17-1001, et seq.), "Control of the Bulk Storage of Petroleum." This ECL article was enacted because, of the 100,000 storage tanks then in New York, "data indicates that 15 to 20% of these tanks are leaking and posing a serious threat to groundwater, especially to private and public drinking water

wells." Senate Memorandum in Support of S.2913, at 2. As a further rationale for the bill, the Senate acknowledged the difficulties of cleaning up a contaminated water supply, and that it was "preferable to institute a program to prevent leaks and detect them early through periodic testing." Id. To prevent leaks, or at the very least, to ensure their earliest detection, the PBS program includes a number of important regulatory measures, such as registration of tanks, maintenance of daily inventory records, testing of tanks, and temporary and permanent closure of tanks.

The Department followed up the 1983 statutory enactment two years later with adoption of a comprehensive set of regulations for the bulk storage of petroleum. Notice of Adoption of Amendments to 6 NYCRR Parts 610, 612, 613, and 614 (New York State Register, December 18, 2005, at 11-13). The Department estimated that 20% of underground storage tanks (USTs) (16,000 of 83,000) were leaking. Id., at 12. The Department determined that "[c]ompliance with the testing and inspection requirements of these regulations will result in the elimination of almost all of the leaking underground . . . storage tanks that exist in the State at this time." Id.

Thus, the chief purposes of both the PBS statute and its implementing regulations are to prevent leaks from happening in the first place, or, barring full prevention, to promote their early detection.

The PBS regulations impose obligations on owners and operators of PBS facilities, which include USTs, from before the tank is in the ground to its permanent closure. Before installation, the regulations impose requirements on the type of tanks that can be put into the ground. 6 NYCRR 614.2. The regulations also require not only initial registration of each tank (6 NYCRR 612.2[a][1], [c]), but also registration renewal every five years (6 NYCRR 612.2[a][2]). The regulations even require registration for existing facilities that may be out of service, but not permanently closed. 6 NYCRR 612.2(a)(1). In this way, the Department can be apprised of the location of each tank - whether it is commercially active or not.

When a tank is no longer actively used, the regulations require at least its temporary closure. 6 NYCRR 613.9(a). This entails removing and disposing of the product from the tank and securing the fill lines to prevent unauthorized use or tampering. 6 NYCRR 613.9(a)(1). A tank that is temporarily closed still requires an updated registration and compliance with all of the regulatory requirements for active facilities. 6 NYCRR



613.9(a)(2).

The regulations also provide for a tank's permanent closure. 6 NYCRR 613.9(b). This entails removing and disposing of liquid and sludge; rendering the tank vapor-free; disconnecting and removing connecting lines, or capping and plugging them; and either filling the tank with an inert material (sand or concrete slurry) or removing the tank altogether. 6 NYCRR 613.9(b)(1)(i)-(v).

This regulatory scheme thus imposes obligations on owners and operators of USTs along a continuous timeline - prior to and beyond the active commercial operation of a facility.

The PBS statute and regulations use identical language to define "owner" and "operator," respectively, as follows:

- "Owner means any person who has legal or equitable title to a facility." ECL 17-1003(4); 6 NYCRR 612.1(c)(18).
- "Operator means any person who leases, operates, controls or supervises a facility." ECL 17-1003(3); 6 NYCRR 612.1(c)(16).

The PBS statute and regulations define "facility" differently, as follows:

Facility - statutory definition

- "'Facility' means one or more stationary tanks, including any associated pipes, lines, fixtures and other equipment, which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum at the same site, but shall not include facilities licensed under article twelve of the navigation law or regulated under the federal natural gas act, or a heating oil tank used for on premises consumption at the same site which is not interconnected to any other heating oil tank and is used to store or contain less than one thousand one hundred gallons of petroleum." ECL 17-

Facility - regulatory definition

- “‘Facility’ or ‘storage facility’ means one or more stationary tanks, including any associated intra-facility pipelines, fixtures or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site. A facility may include aboveground tanks, underground tanks or a combination of both. Pipelines which enter or leave the site and nonstationary tanks are not part of the facility.”  
6 NYCRR 612.1(c)(10).

As indicated in Appendix A (attached to this decision and order), respondents were charged with various violations of the PBS regulations, some of which impose obligations on only an owner, on only an operator, or on both an owner and an operator.

Here, RGLL is liable both as an owner and an operator of the Old Millerton Sunoco PBS facility. The facility itself is comprised of a stationary UST (with a capacity of greater than 1,100 gallons of petroleum) and associated equipment. RGLL installed the tank in 1999; actively operated the facility from August 2001 until March 2003; and exercised control over the facility well after March 2003, when the facility was no longer commercially active. This continuing control included (1) informing Department staff that it would maintain the tank until it was removed (see Exh 4); (2) filing with DEC Region 3 an application for temporary closure of the tank (see Exh 39); (3) arranging for the removal of the petroleum products in the tank, leaving one inch of product in the tank (Tr, at 648-649); (4) continuing to take inventory of the remaining contents in the tank from April 2003 until January 2006 (see Exh 41);<sup>6</sup> (5) conducting interstitial monitoring from April 2003 until January 2006 (see Exh 41); and (6) informing Department counsel on October 5, 2006, that it was going to remove the tank on October

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<sup>5</sup> This is the statutory language in effect as of the date of the second amended complaint; the statute was amended in 2008. See L.2008, c. 334.

<sup>6</sup> After the adjudicatory hearing concluded, respondents' counsel submitted inventory and interstitial monitoring records for April 16, 2003 - January 3, 2006 (Exh 41).

10, 2006,<sup>7</sup> after which it would then file "the appropriate Tank Closure Report" (see Exh 14).

These are hardly the actions of an entity claiming it has ceased its operation and ownership of a facility. Rather, they demonstrate that RGLL did not in fact make a "complete break" from the site in March 2003, but instead continued to exercise control and responsibility over the facility.

RGLL's interpretation of the PBS regulatory scheme is self-serving and wrong. For example, it asserted that it checked the inventory of the temporarily closed tank on a weekly basis only to protect itself from a later claim that its product was leaking (Tr, at 544). RGLL's motives here, however, are irrelevant under the regulatory scheme. Temporarily closed tanks are subject to all of the requirements of Parts 612 and 613, which includes taking daily (not weekly) inventory. 6 NYCRR 613.9(a)(2), 613.4(a).

Thus, RGLL is liable as an owner from October 1999 until the date of the second amended complaint, January 7, 2007, and as an operator from August 2001 until January 7, 2007.

GRJH would also be liable as an operator because it was a lessee of the site. A lease is expressly contemplated by the statutory and regulatory definitions of the term "operator" in ECL 17-1003(3) and 6 NYCRR 612.1(c)(16). As stated above, however, the Department has not established any violations during GRJH's tenure as an operator, which was from October 1999 until March 2003.

b. Status of the UST - Non-trade Fixture or Trade Fixture

Respondents ignore the definitions of owner and operator in the PBS statute and regulations and instead rely on landlord-tenant law to support their argument that only the property owners, the Trottas, own the UST at the Old Millerton Sunoco PBS facility. Specifically, respondents claim that (1) the lease agreement between GRJH and the Trottas provided that all equipment on the site became the property of the landowners as soon as it was attached to the property, and (2) even if that equipment did not include trade fixtures, the UST is not a trade

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<sup>7</sup> When staff arrived at the site to observe the tank removal on October 10, 2006, the date that RGLL informed staff that it was going to remove the tank, the tank had not been removed. Exh 15.

fixture. Respondents' Closing Brief, at ¶¶ 33-42 (July 10, 2007). Respondents' arguments here are belied both by the lease and the relevant case law.

First, respondents are wrong that the lease provides that all improvements belong to the landlord. While the lease does provide that improvements to the premises made by the tenant shall become the landlord's property, that provision expressly excludes trade fixtures (see Exh 32, ¶ 11). Thus, by the express terms of this lease, only improvements that are not trade fixtures become the property of the landlord.

Second, I agree with the ALJ's analysis of the case law on whether USTs are trade fixtures (Hearing Report, at 24-28) and likewise conclude that respondents' interpretation of some of that case law is incorrect. In sum, most modern cases hold that USTs are trade fixtures. See, e.g., Drouin v. Ridge Lumber, 209 AD2d 957, 958 (4th Dept 1994); Shell Oil Co. v. Capperelli, 648 F Supp 1052, 1055 (SDNY 1986).

The case law holding that underground tanks are not trade fixtures is distinguishable. One other recent case, which held that the tank was not a trade fixture, was based on the specific language of the lease, which is not present here. 310 South Broadway Corp. v. McCall, 275 AD2d 549, 550-551 (3d Dept 2000). That language distinguished between movable trade fixtures, which did not belong to the landlord, and stationary trade fixtures, which did. Id. The court determined that the UST in that case was not a movable trade fixture because it was imbedded in the land and thus belonged to the landlord. Id. at 551. The court relied on a much older case which also held that an underground tank was not a trade fixture because it was imbedded in the land. Sunnybrook Realty Co. v. State of New York, 15 Misc 2d 739, 741-742 (Court of Claims 1959). This 1959 case from a lower New York court pre-dated the PBS regulatory scheme and is contrary to the more recent cases mentioned above.

Perhaps recognizing that both the plain language of the lease and the case law on trade fixtures do not support their position, respondents offered testimony at the hearing that the parties later agreed orally that the UST belongs to the Trotts (Testimony of James T. Metz, Tr, at 540). I conclude that this testimony is self-serving, not credible, and standing alone, is insufficient to establish that the lease was modified orally later.

Respondents' claim that the lease was modified orally - i.e., that the parties agreed that the UST belonged to the

Trottas - also fails as a matter of basic contract law. A lease is a contract. 219 Broadway Corp. v. Alexander's, Inc., 46 NY2d 506 (1979). When a contract is unambiguous, its terms must be given effect. WWW Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 (1990) ("[w]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"). See also Greenfield v. Philles Records, Inc., 98 NY2d 562, 569 (2002) ("[a] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"). Extrinsic evidence (also known in the law as "parol evidence") is generally inadmissible to change the terms of an unambiguous contract. WWW Associates, Inc., 77 NY2d at 162; Greenfield, 98 NY2d at 569 ("extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide"). An ambiguity is not created by the silence of a document. Nissho Iwai Europe PLC v. Korea First Bank, 99 NY2d 115, 121 (2002). Based on these basic precepts of contract law, if the parties intended the UST to belong to the landowner, they should have indicated that in the lease.

Additionally, RGLL's further assertion that it abandoned the facility, leaving the USTs to the landowners, is belied by its own actions. While the site may have stopped operating as a commercially active service station sometime around March 2003, both Mr. Metz and Ms. Simons testified that RGLL continued to engage in numerous activities at the site for nearly three additional years. As illustrated above, these activities included draining the tank, filing a temporary closure application, measuring the inventory in the tank, conducting interstitial monitoring, and informing the Department that it would remove the tank. Thus, no abandonment in fact occurred.

In any event, respondents' reliance on the lease here has no application to respondent RGLL, which was not a party to the lease agreement. While GRJH may have terminated the lease that it had with the Trottas, that action did not relieve RGLL from its continuing obligations under the PBS regulatory scheme. RGLL was not a signatory to the lease and, as noted above, continued to exert control over the facility even after GRJH terminated the lease with the Trottas. Simply stated, a tenant's obligations and the status of fixtures under landlord tenant law is not congruent with the status of an owner or operator under the PBS scheme.

As a matter of public policy, a company that installs and maintains a tank and continues to exert control over a site

even when it stops being operated as a commercially active service station is not excused from its obligations under the PBS statutory and regulatory program. The PBS program regulates not only the active operation of a gas station, but also the safe and appropriate closure of any tanks that were installed to benefit that venture. While the terms "owner" or "operator" may also apply to a current landowner (here, the Trottas), it does not mean that those terms do not also apply to respondents here.

In sum, I reject respondents' assertion that the lease was orally modified and that RGLL had abandoned the site.

#### IV. RULING OF THE COMMISSIONER ON VIOLATIONS CHARGED IN THE SECOND AMENDED COMPLAINT

In this administrative enforcement proceeding conducted pursuant to 6 NYCRR part 622, Department staff carries the burden of proof on all charges and matters affirmatively asserted in the second amended complaint (see 6 NYCRR 622.11[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

On the record developed at the hearing, Department staff has carried its burden against respondent RGLL on 9 of the 15 violations charged in the second amended complaint.

##### A. Registration Violations

The second amended complaint charges three registration violations: failure to register the facility (§§ 5-6); failure to display a registration certificate at the facility (§§ 11-12); and failure to have a current and valid registration certificate at the facility (§§ 13-14). As discussed below, I conclude that RGLL failed to (1) register (more accurately, re-register) the facility, and (2) failed to display a registration certificate.

A key provision of the PBS regulatory scheme is the requirement that tanks be registered. See 6 NYCRR 612.2(c). Tanks are initially registered for five years, and then re-registered for subsequent five-year periods. 6 NYCRR 612.2(a)(2). The burden is on the tank owner to both register and re-register a tank. 6 NYCRR 612.2(a). Registration renewal is not required of the owner on the initial registration when the Department receives written notice that a tank has been permanently closed or when ownership of the facility has been transferred. 6 NYCRR 612.2(a)(2). This regulation (6 NYCRR 612.2[a][2]) does not specify who provides the written notice of

a transfer of ownership, which means that either the prior owner or the new owner can provide it.<sup>8</sup> Prudence dictates that a prior owner would provide this notice and not leave it solely to a new owner to do so.

I agree with the ALJ that staff has met its burden on the violation of failure to register the facility (second amended complaint ¶¶ 5-6). Respondent RGLL violated 6 NYCRR 612.2(a)(1) when, as an owner of the facility, it allowed the initial registration to lapse on March 1, 2005, without re-registering the tank. Moreover, the record demonstrates that the tank was not permanently closed (Tr, at 216; Exh 20), and that the Department never received written notice of a transfer of ownership (Tr, at 401).

I also agree with the ALJ that because RGLL did not re-register the facility as it was required to do, it also violated the requirement to *display* a current and valid registration certificate at the facility in violation of 6 NYCRR 612.2(e) (second amended complaint ¶¶ 11-12).

I further conclude, however, that staff failed to establish RGLL's failure to *have* a current and valid registration certificate (second amended complaint ¶¶ 13-14). Department staff claimed that the original registration was not accurate in a number of ways, and was therefore not "valid."<sup>9</sup> One alleged discrepancy was that a 15,000 gallon tank was included in the Department's facility information report (Exh 16), but that in correspondence to the Department, RGLL represented the tank's capacity was 12,000 gallons (Exh 4). A second alleged discrepancy was that the facility information report (a document created and maintained by staff) did not indicate that the tank was a split tank (Exh 16; Tr, at 116).

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<sup>8</sup> Another regulation, 6 NYCRR 612.2(b), provides that once ownership has transferred, the new owner must register the tank within 30 days. This regulation was adopted to prevent new owners from claiming the balance of a registration period bestowed to a prior owner. It does not resolve the issue of who provides the written notice of a transfer of the facility, which is required by 6 NYCRR 612.2(a)(2). In any event, the Department did not receive notice from a new owner at this facility, which supports the legal conclusion that RGLL was still the owner.

<sup>9</sup> Staff focused more on the term "valid" for this violation. As to a violation for not having a "current" registration, that part of the regulation has been addressed in my ruling that RGLL did not re-register the tank.

Staff did not prove these alleged inaccuracies because staff could not produce the supporting documentation to the facility information report, i.e., the original PBS application, any renewal application, and all related documents for the facility that is kept in a file in the ordinary course of business.

#### B. Daily Inventory Records Violation

The Department charges in ¶¶ 7-8 of the second amended complaint that respondent RGLL failed to keep daily inventory records. I agree with the ALJ that staff has established this violation. RGLL's own witness admitted that she continued to record and retain weekly (not daily, as the regulation requires) inventory records at the Old Millerton facility, and she stopped doing so in January 2006 (Tr, at 645.) Therefore, the record demonstrates that RGLL violated this regulatory provision from April 16, 2003, to January 7, 2007, nearly four years.

Nor did the post-hearing submission of inventory and monitoring records (Exh 41) cure this violation. Again, the inventory records were kept on a weekly, not daily, basis. Additionally, Department staff reviewed these records, extensively analyzed them, and determined that the calculations in them were "dubious" (see Dep't Staff's Closing Br, at 22-23). RGLL did not respond to staff's analysis of these records, though it had the opportunity to do so.<sup>10</sup> After reviewing staff's extensive analysis, I accept staff's assessment of these records as dubious, which warrants the increased penalty that staff requests.

#### C. Leak Detection and Monitoring Violations

Other key provisions of the PBS regulations center around leak detection and monitoring requirements. As stated above, when tanks leak, they present environmental and health hazards. The PBS statutory and regulatory scheme was enacted to prevent leaks. Functioning leak detection systems and proper and timely monitoring provide vital information about the integrity of USTs.

Here, staff charge seven leak detection and monitoring violations at the facility in the second amended complaint:

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<sup>10</sup> The ALJ authorized the parties to file reply briefs. Staff filed one; respondents did not.



- failure to install a leak monitoring system (§§ 25-26);
- failure to maintain leak detection equipment (§§ 15-16);
- failure to monitor leak detection equipment (§§ 17-18);
- failure to monitor the interstitial space of the tank (§§ 29-30);
- failure to maintain spill prevention equipment (§§ 31-32);
- failure to "tightness test" the tank (§§ 21-22); and
- failure to have secondary containment (§§ 23-24).

As to the failure to install a leak monitoring system, staff has not met its burden. The ALJ correctly states that 6 NYCRR 614.5(a) requires that the interstitial space of a double-walled tank (the space between the two walls) must be monitored. The regulation further allows the monitoring to occur through a number of ways, including through an electronic system or a manual system. As discussed below, staff did not prove that all possible leak detection methods were absent for the double-walled tank at this facility.

Here, the record demonstrates that sometime after staff's inspection on May 18, 2001, an electronic leak monitoring system, referred to as a Veeder Root system, was installed at the facility (Tr, at 449-451). When the electricity was turned off at the facility sometime after the facility stopped selling gasoline around March 2003, RGLL's witness testified that the electronic system gave way to a manual (sticking) system (Tr, at 644). In a manual sticking system, a long stick is placed in the interstitial space to determine if any leaks have occurred (Tr, at 456). Before the Veeder Root system was installed and after it was either removed or not operating because of a lack of electricity, staff did not prove that another leak detection system was not being used. Thus, staff did not prove this

violation.<sup>11</sup>

My ruling on this violation reaches the same result as the ALJ's recommendation, but the analysis differs slightly. The ALJ ended his analysis with the determination that the Veeder Root system had once been installed. My analysis goes beyond the Veeder Root system to whether another system was used.

As to a failure to maintain and monitor leak detection equipment, denominated in the second amended complaint as two separate violations (see second amended complaint, ¶¶ 15-16, 17-18), the record does demonstrate that the Veeder Root system may have been later removed, but even if it was not removed, it was not able to operate once the electricity on the site was cut off, which may have been shortly after March 2003 when the site was no longer being operated as an active gas station (Tr, at 644-645). However, an electronic leak detection system is not the only acceptable leak detection and monitoring system. A facility can comply with this regulatory requirement by using the low-tech manual "sticking" method.

Here, the evidence showed that RGLL switched from an electronic system to a manual system (Tr, at 644-645). Though staff's witness, R. Daniel Bendell, testified that sensors in place from a Veeder Root system would have to be removed in order to use a manual method, he did not conduct the inspections in 2006,<sup>12</sup> and his testimony based on a review of photos in evidence as to whether sensors were in place or removed was equivocal. Additionally, I cannot credit the testimony of Josh Cummings, who conducted an inspection on March 1, 2007. That inspection was

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<sup>11</sup> Additionally, staff did not brief this charged violation, and the ALJ and I were thus without the benefit of staff's marshaling of the evidence. Indeed, briefing by the parties can be very helpful to a decisionmaker. Here, staff counsel has not briefed 4 of the 15 violations charged in the second amended complaint. These charged violations are set forth in the second amended complaint as paragraphs 9-10, 23-24, 25-26, and 31-32 (see table of alleged violations in the second amended complaint, set out in Appendix A, attached to this decision and order). Unless the ALJ instructs the parties to limit their briefing (which the ALJ did not do here), if staff counsel does not brief an issue because counsel deems the charge to not have been proven or to be weak, I would expect in the future that staff counsel would withdraw that charge.

<sup>12</sup> The staff member who conducted the inspections in 2006, Robert Amato, was not available to testify at the hearing. Tr, at 182.

conducted after the date of the second amended complaint and cannot serve to prove a violation. Thus, on this record, staff has not established that RGLL failed to monitor or maintain the manual system. Therefore, staff has not established the two violations in ¶¶ 15-16 and 17-18 of the second amended complaint (failure to maintain and monitor leak detection equipment).

My ruling differs from the ALJ's recommendation. The ALJ concluded that RGLL failed to maintain and monitor the Veeder Root system. Removal or cessation of the Veeder Root system does not mean, however, that another system was not being maintained or monitored. Thus, I conclude that staff did not establish these violations.

As to the failure to monitor the tank's interstitial space (second amended complaint ¶¶ 29-30), RGLL's witness testified that she manually monitored the tank's interstitial space - but that this monitoring ended in January 2006 (Tr, at 644-645). Thus, through this witness's admission that monitoring of the interstitial space ended in January 2006, I agree with the ALJ and conclude that this violation was established.<sup>13</sup>

As to the failure to maintain spill prevention equipment (second amended complaint ¶¶ 31-32), the September 12, 2006, NOV stated that spill prevention equipment was not maintained because liquids were allowed to accumulate in sumps and fill port basins (Exh 27). The inspection on August 28, 2006, which formed the basis of the September 12, 2006, NOV, was conducted by Mr. Amato. Although Mr. Amato was not available to testify at the hearing, Mr. Bendell testified that a photograph (Exh 12-A) that Mr. Amato took as part of his inspection on August 28, 2006, demonstrated that liquids were allowed to collect in a dispenser sump when the sump should have been dry. I disagree with the ALJ that this violation is subsumed within the alleged violation of a failure to install, maintain, and monitor leak detection equipment (Hearing Report at 47). I instead conclude that staff has established this as a separate violation. However, staff did not brief this violation and consequently did not request a penalty. Because of this omission here, I decline to assess a penalty.

As to the failure to "tightness test" the tank, I agree

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<sup>13</sup> While staff briefed this charged violation (Dep't Staff Closing Brief, at 28), it incorrectly ascribed the violation to paragraph 18 of the second amended complaint (failure to monitor leak detection equipment), rather than to paragraphs 29-30 (failure to monitor interstitial space).

with the ALJ that staff has met its burden. As staff demonstrated in its closing brief (Dep't Staff Closing Brief, at 30), the Department can require tightness testing at facilities that fail to conduct appropriate monitoring. 6 NYCRR 613.4(c)(2) and 613.7. As discussed above, RGLL failed to conduct appropriate monitoring. Additionally, the Department informed RGLL in the January 20, 2006, NOV that it failed to perform a tightness test (Exh 9). Although RGLL's witness stated that the tank was "tested" in January 2006 (Testimony of L. Simons, Tr, at 641, 645), the test results were never submitted to the Department.

As to the failure to have secondary containment, I agree with the ALJ that staff did not produce any proof establishing this violation. Indeed, the record demonstrates that the tank at issue here was a double-walled tank, which satisfies the requirement for secondary containment. 6 NYCRR 614.4(b)(1).

D. Failure to Close a Permanently Out of Service Tank

Another key provision of the PBS regulatory scheme is the proper temporary and permanent closure of out of service tanks. 6 NYCRR 613.9. Out of service tanks can pose problems to the environment because leaks can still occur from them. As discussed above, even temporarily closed tanks are subject to the regulatory requirements.

Permanently out of service tanks must be closed, and the regulations provide for two ways to do that: (1) remove the tank or (2) close it in place. The latter method is accomplished by, among other things, completely draining the tank and filling it to capacity with sand or concrete slurry or some other inert material. 6 NYCRR 613.9 (b)(1)(v).

Here, staff demonstrated that respondent RGLL did not permanently close this out of service tank. By RGLL's own admission, the tank was merely drained sometime around the end of March 2003, leaving one inch of product in the tank. Mr. Metz, who testified at the hearing in his capacity as RGLL's consultant and GRJH's Vice President, at one time indicated a hope or intent to reopen the facility (see Exh 33). The fact is, however, that the facility has not reopened for service. Instead, RGLL has decided on its own to have the tank's status remain in a state of limbo, i.e., temporarily closed for a very long period of time, going on approximately 4.5 years from March 2003 until the record

in this matter closed on August 8, 2007 (see Exh 39).<sup>14</sup>

Thus, I agree with the ALJ that staff established this violation. The record demonstrates that this tank is permanently out of service and that RGLL has violated 6 NYCRR 613.9(b) by failing to close it.

#### E. Other Charged Violations

The second amended complaint (¶¶ 27-28) charges that RGLL violated 6 NYCRR 613.3 by failing to label the fill ports. Fill ports are required to be labeled and color-coded so that product remains in its designated tank, or as here, in its section of a split tank. Here, I agree with the ALJ that the Department staff established that the fill ports were not properly color-coded (see Exhs 10-C, 12-B). Thus, RGLL violated this regulatory provision.

I also agree with the ALJ (Hearing Report at 44-45) that staff did not demonstrate an additional labeling violation relating to the failure of having a stencil or a plate on the tank that contains information required by 6 NYCRR 614.3(a). The claimed violation appeared for the first time in staff's closing brief. Indeed, the evidence at the hearing focused on the color-coding violation, not the additional labeling violation.

As to the charge that respondent violated 6 NYCRR 612.2 by failing to notify the Department of a substantial modification at the facility (second amended complaint ¶¶ 9-10), I agree with the ALJ that staff did not produce any proof to support this charge.

As to the charge that respondent violated 6 NYCRR 614.7 by failing to have "as built" plans for the tank (second amended complaint ¶¶ 19-20), I agree with the ALJ that staff established this violation. RGLL was notified of this violation in the January 20, 2006, NOV and was directed to submit the "as built" plans within 30 days. RGLL, however, did not submit the "as built" plans.

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<sup>14</sup> I note that the State Fire Code requires that tanks that are out of service for one year shall be removed or closed in place. Fire Code of New York State §§ 3404.2.13.1.3; 3404.2.13.1.4 (2007).

## V. CIVIL PENALTY AND INJUNCTIVE RELIEF

Department staff requests a civil penalty and an order directing respondents to permanently close (i.e., remove) the underground PBS tank at the Old Millerton Sunoco PBS facility, consistent with the requirements of 6 NYCRR 613.9.

### A. Staff's Civil Penalty Request

In its second amended complaint, Department staff requests an overall civil penalty of \$55,000. In its Closing Brief, staff increased the requested penalty by \$6,100, bringing the total requested penalty to \$61,100.<sup>15</sup> Staff based the increase on its review of the inventory and monitoring records that RGLL submitted after the hearing. Staff analyzed those records, submitted a comprehensive analysis of them (see Department Staff Closing Brief at 22-23), which was not rebutted by respondents, and concluded that those records were "dubious" (Id., at 1, 22-23).

For violations of ECL article 17, titles 1 through 11, inclusive, and title 19, as well as implementing regulations, which include 6 NYCRR Parts 612, 613, and 614, ECL 71-1929 provides for a maximum civil penalty of \$37,500 per day for each violation.

As set forth above, I have determined that respondent RGLL violated 9 of the 15 charged violations. These violations, along with staff's requested civil penalties are set forth in the following table:

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<sup>15</sup> When the requested penalties set forth in Department Staff's Closing Brief for the individual violations are added up, the figure is not \$55,000 or \$61,100. Rather, the figure is \$70,100, and I am working from that figure.

<b>Violation</b>	<b>Staff's Requested Civil Penalty</b>
Failure to renew the facility registration	\$10,100
Failure to keep daily inventory records	\$15,000 plus \$6,100
Failure to display a registration certificate at the facility	\$ 200
Failure to label (color code) the fill ports of the PBS tank at the facility	\$ 400
Failure to monitor the interstitial space of the PBS tank at the facility	\$ 5,000
Failure to maintain spill prevention equipment at the facility	\$ 0 (staff did not brief or request a penalty)
Failure to "tightness test" the split tank	\$20,000
Failure to permanently close the out of service tank at the facility	\$10,000
Failure to have "as built" plans for the facility.	\$ 2,000
<b>Total</b>	<b>\$68,800</b>

These requested penalties are well within the amounts authorized by statute and guidance. Indeed, even higher penalties would have been supportable in this case in light of seriousness of the violations and their continuing nature, particularly the failure to renew the tank registration, the failure to conduct daily monitoring, the failure to conduct interstitial monitoring, and the failure to permanently close this facility. All four of these requirements are central to the PBS regulatory scheme. Moreover, I agree that RGLL's submission of inventory records that staff has determined to be dubious warrants the increased penalty of \$6,100, as staff has requested.

B. Injunctive Relief - Removal of the Tank

The regulations plainly require the tank to be closed, and, as the ALJ recommends, I am ordering RGLL, as the owner of the tank, to close it.

As discussed above, tank closure can be done either by (1) removing the tank, or by (2) removing all product from the tank and filling the tank with an inert material. Staff is requesting removal of the tank here, as well as remediation of any associated contamination. That requested relief is appropriate, and I am ordering it here.

**NOW, THEREFORE,** having considered this matter and being duly advised, it is hereby **ORDERED** that

I. The first motion made by respondents RGLL, Inc. and GRJH, Inc. seeking dismissal of the second amended complaint on the grounds that it lacked specificity for the charged violations is denied in its entirety.

II. The second motion made by respondents RGLL, Inc. and GRJH, Inc. seeking dismissal of the second amended complaint on the grounds that respondents do not own or operate the facility is granted as to GRJH, Inc. Department staff failed to establish that respondent GRJH, Inc., as an operator of a petroleum bulk storage (PBS) facility, committed any of the violations charged in the second amended complaint. Therefore, the second amended complaint is dismissed as against respondent GRJH, Inc.

III. The second motion made by respondents RGLL, Inc. and GRJH, Inc. seeking dismissal of the second amended complaint on the grounds that respondents do not own or operate the facility is denied as to RGLL, Inc. Department staff established that respondent RGLL, Inc., as owner and operator of a PBS facility, committed 9 of the 15 violations charged in the second amended complaint:

- A. 6 NYCRR 612.2 by failing to renew the registration of the facility after the initial registration expired on March 5, 2005;
- B. 6 NYCRR 613.4 by failing to keep daily inventory records;
- C. 6 NYCRR 612.2(e) by failing to display a registration certificate at the facility;
- D. 6 NYCRR 613.3(b) by failing to label (color code) the fill ports of the 12,000 gallon PBS tank at the facility;



- E. 6 NYCRR 614.5(b) by failing to monitor the interstitial space of the 12,000 or 15,000 gallon PBS tank at the facility;
- F. 6 NYCRR 613.3 by failing to maintain spill prevention equipment at the facility;
- G. 6 NYCRR 613.5 by failing to "tightness test" the tank at the facility;
- H. 6 NYCRR 613.9 by failing to close the permanently out of service tank at the facility; and
- I. 6 NYCRR 614.7 by failing to have "as-built" plans for the tank at the facility.

IV. Department staff failed to establish that respondent RGLL, Inc. committed 6 of the 15 violations charged in the second amended complaint:

- A. 6 NYCRR 612.2 by failing to have a current and valid registration certificate;
- B. 6 NYCRR 612.2 by failing to notify the Department of substantial modifications at the facility;
- C. 6 NYCRR 613.3 by failing to maintain leak detection equipment at the facility;
- D. 6 NYCRR 613.5(b) (3) by failing to monitor leak detection equipment at the facility;
- E. 6 NYCRR 614.4 by failing to have secondary containment at the facility; and
- F. 6 NYCRR 614.5 by failing to install a leak monitoring system at the facility.

V. Respondent RGLL, Inc., being liable for the violations of the above-referenced provisions of 6 NYCRR Parts 612, 613, and 614, shall pay a civil penalty in the amount of sixty-eight thousand eight hundred dollars (\$68,800.00). The entire civil penalty shall be paid within 30 days of service of this order upon respondent RGLL, Inc.

VI. The civil penalty shall be paid in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental

Conservation" and shall be mailed or delivered to

Scott W. Caruso, Esq.  
(f/k/a Scott W. Owens)  
Senior Attorney  
New York State Department of Environmental Conservation  
Division of Legal Affairs  
Bureau of Enforcement and Compliance Assurance  
14<sup>th</sup> Floor  
625 Broadway  
Albany, New York 12233-5500

VII. Respondent RGLL, Inc., shall permanently close the tank at the Old Millerton Sunoco PBS facility by removing the tank and remediating any associated contamination.

VIII. All communications with Department staff concerning this order shall be made to Scott W. Caruso, Esq., at the above address.

IX. The provisions, terms, and conditions of this order shall bind respondent RGLL, Inc., and its officers, directors, agents, employees, successors, and assigns, in all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_ /s/  
Alexander B. Grannis  
Commissioner

Dated: December 29, 2009  
Albany, New York

**APPENDIX A**

**RGLL, Inc. & GRJH, Inc. (Old Millerton Sunoco)**

**Case No. D3-601405-02-06**

**Table of Violations Set Forth in the Second Amended Complaint**

<b>Charged Violation</b>	<b>Second Amended Complaint ¶¶</b>	<b>Regulation Cited 6 NYCRR §</b>	<b>Commissioner's Ruling Violation: Yes/No Penalty Assessed</b>
1. Failure to register facility (underground storage tank)	5,6	612.2	<b>Yes</b> \$10,100
2. Failure to keep daily inventory records and maintain those records for 5 years	7,8	613.4	<b>Yes</b> \$15,000 +\$6,100
3. Failure to notify Department of substantial modifications at the facility	9,10	612.2	No
4. Failure to display registration certificate at the facility	11,12	612.2	<b>Yes</b> \$200
5. Failure to have current & valid registration certificate at the facility	13,14	612.2	No
6. Failure to maintain leak detection equipment at the facility	15,16	613.3	No
7. Failure to monitor leak detection equipment at the facility	17,18	613.5 (b) (3)	No
8. Failure to have "as-built" plans for the tank at the facility	19,20	614.7	<b>Yes</b> \$2,000
9. Failure to "tightness test" the tank at the facility	21,22	613.5	<b>Yes</b> \$20,000
10. Failure to have secondary containment	23,24	614.4	No
11. Failure to install leak monitoring system	25,26	614.5	No
12. Failure to label (color code) fill ports appropriately	27,28	613.3	<b>Yes</b> \$400
13. Failure to monitor interstitial space of the tank at the facility	29,30	614.5	<b>Yes</b> \$5,000
14. Failure to maintain spill prevention equipment at the facility	31,32	613.3	<b>Yes</b> \$0 (staff did not request penalty)
15. Failure to close out-of-service tank at the facility	33,34	613.9	<b>Yes</b> \$10,000
<b>TOTAL</b>			<b>\$68,800</b>

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1550

In the Matter

of

Alleged Violations of Article 17 of the Environmental  
Conservation Law of the State of New York (ECL), and Title 6 of  
the Official Compilation of the Codes, Rules and Regulations of  
the State of New York (6 NYCRR) parts 612, 613 and 614

by

RGLL, INC. and GRJH, INC.,  
Respondents.

Case Number: D3-601405-02-06  
(Old Millerton Sunoco)

Hearing Report

by

/s/

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Daniel O'Connell  
Administrative Law Judge

## Proceedings

Staff of the New York State Department of Environmental Conservation (Department staff) commenced this administrative enforcement action with service, by certified mail, return receipt requested, of a notice of hearing and a complaint, both dated February 22, 2006, upon Respondent RGLL, Inc., P.O. Box 728, Sharon, Connecticut 06069 (RGLL). In the February 22, 2006 complaint, Department staff asserted that RGLL owns and operates a petroleum bulk storage (PBS) facility, as defined in the regulations at title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) 612.1(c)(10), on Route 44 East, in the Millerton Square Shopping Plaza, Millerton (Town of Northeast, Dutchess County), New York. In this hearing report, the PBS facility will be referred to as the "Old" Millerton Sunoco facility.

In the February 22, 2006 complaint, Staff alleged that RGLL violated various provisions of Environmental Conservation Law (ECL) article 17, title 10 (Control of the Bulk Storage of Petroleum), as well as provisions outlined in 6 NYCRR parts 612 (Registration of Petroleum Bulk Storage Facilities), 613 (Handling and Storage of Petroleum), and 614 (Standards for New and Substantially Modified Petroleum Storage Facilities). The violations alleged in the February 22, 2006 complaint are based on Department staff's January 19, 2006 inspection of the Old Millerton Sunoco facility. RGLL answered the February 22, 2006 complaint with a letter dated May 10, 2006.

With a cover letter dated June 28, 2006, Department staff filed a statement of readiness of the same date pursuant to 6 NYCRR 622.9. In the statement of readiness, Staff requested that an adjudicatory hearing be scheduled.

Subsequently, with a cover letter dated September 14, 2006, Department staff requested leave to amend the February 22, 2006 complaint. With this request, Staff provided, among other things, copies of a Notice of Violation (NOV) dated January 20, 2006 concerning Staff's January 19, 2006 inspection of the Old Millerton Sunoco facility, and a NOV dated September 12, 2006 concerning Staff's August 28, 2006 inspection.

RGLL did not oppose Staff's request. As a result, I granted it, and set November 15, 2006 as the return date for RGLL to answer Staff's amended September 14, 2006 complaint. With a letter dated January 3, 2007, RGLL's counsel filed an answer, dated January 2007, to the amended complaint. In the January 2007 answer, RGLL denied the violations alleged in the September

14, 2006 amended complaint, and asserted four affirmative defenses.

In a letter dated January 8, 2007, Department staff requested leave to amend the September 14, 2006 complaint. In the second request to amend the complaint, Staff sought permission to name GRJH, Inc. (GRJH) as an additional respondent in this matter. Staff alleged that GRJH operates the Old Millerton Sunoco facility. With its January 8, 2007 request, Staff included a copy of the proposed second amended complaint, which was also dated January 8, 2007.

In a letter dated January 22, 2007, RGLL responded to Staff's January 8, 2007 request for leave. Referring to its January 2007 answer, RGLL explained that the basis for its denial of the charges alleged in the September 14, 2006 amended complaint is that it owns the Old Millerton Sunoco facility, but does not operate it. RGLL did not object to adding GRJH as a party to this action, and agreed that it would be efficient to do so. In addition, RGLL requested that the adjudicatory hearing be adjourned from February 6 and 7, 2007 to the first week in May 2007 to provide additional time to prepare for the adjudicatory hearing.

In a ruling dated January 30, 2007, I granted Staff's request for leave to amend the complaint. To provide RGLL and GRJH with the opportunity to answer the January 8, 2007 second amended complaint and to avoid any prejudice, I adjourned the adjudicatory hearing that had been scheduled for February 6 and 7, 2007, to March 6, 2007, and set February 20, 2007 as the date by which RGLL and GRJH could file their respective answers to the January 8, 2007 second amended complaint (the complaint).

On February 22, 2007, counsel for RGLL and GRJH requested leave to file answers after the established return date of February 20, 2007, and enclosed for each Respondent, separate answers to the complaint. Over Department staff's objection, I accepted Respondents' late filed answers in a ruling dated March 5, 2007.

As scheduled, the hearing commenced at the Department's Central Office at 625 Broadway, Albany, New York on March 6, 2007 and continued at the same location on March 7, 2007. After adjournments were duly taken, the hearing reconvened at the Department's Central Office on April 4, 2007, and was completed on that date.

During these proceedings, Department staff was represented by Scott W. Owens, Esq., Senior Attorney, and Benjamin Conlon, Esq., Associate Attorney. R. Daniel Bendell, P.E., and Josh Cummings testified on behalf of Department staff. Mr. Bendell supervises the Bulk Storage Unit (Division of Environmental Remediation, Bureau of Spill Prevention) at the Department's Region 3 Office in New Paltz, New York. Mr. Cummings works in the Department's Region 3 Bulk Storage Unit and inspects PBS facilities.

Respondents RGLL and GRJH were represented by Matthew J. Sgambettera, Esq., from Sgambettera & Associates, PC (Clifton Park, New York). In addition, James T. Metz appeared on behalf of GRJH as a representative (Tr, at 143).<sup>1</sup> Mr. Metz and Lauren Simons offered testimony on behalf of both RGLL and GRJH.

The Department's Office of Hearings and Mediation Services received the final transcript from the April 4, 2007 session on June 4, 2007. Department staff timely filed its closing brief on July 10, 2007. RGLL and GRJH timely filed a joint brief on July 10, 2007. Department staff timely filed its reply brief on July 25, 2007. Though provided the opportunity, Respondents did not file a reply brief.

With a cover letter dated July 30, 2007, Department staff filed a motion to close the record of the hearing when RGLL and GRJH failed to file a reply brief. Counsel for RGLL and GRJH requested additional time to respond to Staff's July 30, 2007 motion. RGLL and GRJH, however, did not file anything further. In a letter dated August 23, 2007, I advised the parties that the record of the hearing closed on August 8, 2007, and that I would prepare a hearing report with recommendations for the Commissioner's consideration.

### **Findings of Fact**

1. The Old Millerton Sunoco service station is a PBS facility, as that term is defined in the Department's regulations, located at the Millerton Square Shopping Plaza, Route 44 East, Millerton (Town of Northeast, Dutchess County), New York 12546.

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<sup>1</sup> During his testimony, Mr. Metz stated that he was a consultant for RGLL and a corporate officer (*i.e.*, vice president) for GRJH (Tr, at 144 and 558).

## Background

2. Prior to August 7, 1974, Joseph A. Trotta, Jr. and Gertrude W. Trotta owned the real property where the Old Millerton Sunoco service station is presently located (the site). On August 7, 1974, Joseph A. Trotta, Jr. and Gertrude W. Trotta transferred the real property to Robert D. Trotta and Joseph A. Trotta III (the Trottas). A title search of the real property shows there are no deeds outstanding since August 7, 1974. The Trottas are the record owners of the real property.
3. Before 1993, a gasoline service station was located at the Millerton Square Shopping Plaza on Route 44 East in Millerton, New York. The operator was known as "Great American/ATI." Four 4,000 gallon, underground PBS tanks were located on the site in 1993.
4. On March 11, 1993 and November 28, 1993, petroleum spills at the site were reported to the Department. The Department assigned spill numbers (9213766 and 9310395, respectively) to each event, and issued spill reports, which are identified in the hearing record as Exhs 1 and 2.
5. On December 29 and 30, 1998, M.C. Environmental Services, Inc. excavated the four 4,000 gallon, underground PBS tanks at the Great American/ATI site in Millerton, New York. When the tanks were removed, approximately 250 cubic yards of petroleum contaminated soil were also excavated from around the tanks, and stockpiled on the site. Subsequently, Alpha Geoscience performed a site assessment and subsurface investigation.
6. Hearing Exhs 6, 7 and 8 are a series of letters from Jean M. Neubeck, a Hydrogeologist from Alpha Geoscience to Vincent McCabe, Environmental Engineering Technician III, of the Department's Region 3 Office, Division of Environmental Remediation. This set of letters and an associated report (Exh 34) outline a remediation plan to decontaminate the site. As of the April 4, 2007 hearing session, the site had not been fully remediated.

## The Old Millerton Sunoco Service Station

7. RGLL is a Delaware corporation with business offices located at 25 Mitchelltown Road (P.O. Box 728), Sharon, Connecticut 06069. GRJH is a Delaware corporation with business offices



also located at 25 Mitchelltown Road (P.O. Box 728), Sharon, Connecticut 06069.

8. James T. Metz is a consultant for RGLL and a corporate officer of GRJH (Tr, at 558).
9. Lauren Simons was an employee of RGLL from 1999 until the commencement of this administrative proceeding.
10. RGLL installed one, double-walled, fiberglass-coated, steel tank at the site during the summer of 1999 (Exh 4). The total capacity of the underground PBS tank is between 12,000 - 15,000 gallons. The underground PBS tank is split, which allows two different products to be stored in each section of the tank.

#### Operator

11. In October 1999, GRJH entered into a lease agreement with the Trottas effective from January 1, 2000 to December 31, 2004 (Exh 32). According to the terms of the lease, the existing building on the real property was known as "The Gas Station at Millerton Square Plaza," and GRJH agreed to use the building as a gas station and convenience store.
12. RGLL was not a signatory to the lease agreement.
13. After signing the lease with the Trottas in October 1999, GRJH initially sub-leased the property to Singh Mart/Millerton Minimart, who operated a service station and convenience store. During that time, Ms. Simons assisted the operator of Singh Mart/Millerton Minimart until it went out of business in August 2001. Subsequently, GRJH took over operations, and operated the Old Millerton Sunoco facility from August 2001 until April 2003.
14. Beginning in August 2001, RGLL jointly operated the Old Millerton Sunoco facility with GRJH. After April 2003, RGLL continued to operate the Old Millerton Sunoco facility until January 2003.
15. The Trottas subsequently informed Mr. Metz that the 1993 petroleum spills at the site had not been fully remediated prior to RGLL's installation of the underground PBS tank in the summer of 1999. After the Old Millerton Sunoco facility began operations, workers at the site were often overcome by

the petroleum fumes associated with the unremediated 1993 gasoline spills.

16. GRJH stopped operating the Old Millerton Sunoco facility in April 2003 due to the excessive amount of petroleum fumes.

#### Owner

17. The PBS number assigned to the Old Millerton Sunoco service station is 3-601405. The facility information report (Exh 16) identifies RGLL as the facility owner and GRJH as the facility operator. The contact person is Lauren Simons. The facility information report shows that the PBS registration certificate for the Old Millerton Sunoco facility expired on March 1, 2005.
18. RGLL is the current owner of the Old Millerton Sunoco facility.

#### Inspections by Department Staff

19. Daniel Bendell holds a Bachelor of Science in Chemical Engineering from Clarkson University, and is a New York State licensed professional engineer. Mr. Bendell has been employed at the Department of Environmental Conservation for over 16 years. Currently, Mr. Bendell manages the Petroleum Bulk Storage Unit in the Department's Region 3 Office.
20. Josh Cummings holds a Bachelor of Civil Engineering from Pennsylvania State University, and a Master of Environmental Engineering from the University of Tennessee. In November 2003, Mr. Cummings began working at the Department's Region 3 Office. Currently, Mr. Cummings works in the Region 3 Petroleum Bulk Storage Unit.
21. Department staff inspected the Old Millerton Sunoco facility on May 18, 2001, January 19, 2006, August 28, 2006, and March 1, 2007.
22. On May 18, 2001, Mr. Bendell inspected the Old Millerton Sunoco facility. Based on that inspection, Staff sent a notice of violation (NOV) dated July 10, 2001 (Exh 26) to RGLL by certified mail return receipt requested, which RGLL received on July 13, 2001.
23. Robert Amato works in the Department's Region 3 Petroleum Bulk Storage Unit under Mr. Bendell's supervision. He

inspected the Old Millerton Sunoco facility on January 19, 2006. Staff issued a NOV dated January 20, 2006 (Exh 9) to RGLL. During his January 19, 2006 inspection, Mr. Amato took a set of photographs (Exh 10).

24. Mr. Amato inspected the Old Millerton Sunoco facility for a second time on August 28, 2006. He prepared a comprehensive PBS inspection report (Exh 25). Mr. Bendell subsequently sent a NOV dated September 12, 2006 (Exh 27) to RGLL.
25. Mr. Amato returned to the site of the Old Millerton Sunoco facility on October 10, 2006 to observe the removal of the underground PBS tank. The underground PBS tank, however, was not removed on that date. While at the site, Mr. Amato took a set of photographs (Exh 12).
26. Josh Cummings inspected the Old Millerton Sunoco facility on March 1, 2007, and prepared a comprehensive PBS inspection report (Exh 18). During his inspection, Mr. Cummings took a set of photographs (Exh 17).

#### Facility Registration

27. After installing the underground PBS tank at the Old Millerton Sunoco service station, RGLL registered the Old Millerton Sunoco facility, and obtained a registration certificate from the Department effective until March 1, 2005.

#### Inventory Records

28. When Department staff inspected the Old Millerton Sunoco facility on January 19, 2006 and August 28, 2006, RGLL did not provide Staff with daily inventory records.
29. Exhibit 41 is a set of inventory and interstitial monitoring records for the Old Millerton Sunoco facility from April 2003 to January 2006. Exhibit 41 shows that RGLL monitored the inventory in the underground PBS tank on a weekly, rather than on a daily, basis.

#### Registration Certificate (Display)

30. When Department staff inspected the Old Millerton Sunoco facility on January 19, 2006 and August 28, 2006, a current and valid registration certificate was not being displayed. The January 20, 2006 and September 21, 2006 NOVs directed

RGLL to submit a photo to Department staff, to show that a current and valid registration certificate was being displayed. To date, RGLL has not complied with this request.

#### Leak Detection Equipment

31. Subsequent to Department staff's May 18, 2001 inspection but prior to Staff's January 19, 2006 inspection, RGLL installed a Veeder-Root system at the Old Millerton Sunoco service station to monitor the interstitial space of the underground PBS tank.
32. The components for the Veeder-Root system remained in place when Department staff inspected the Old Millerton Sunoco facility on March 1, 2007. The system, however, was not functioning, because the electricity to the kiosk had been disconnected by the local utility.
33. RGLL monitored the interstitial space of the underground PBS tank at the Old Millerton Sunoco service station with the Veeder-Root system until April 2003. Subsequently, RGLL manually monitored the interstitial space each week until January 3, 2006.
34. When Staff inspected the Old Millerton Sunoco facility on January 19, 2006, RGLL was not using any of the systems outlined in 6 NYCRR 614.5(a) to monitor the interstitial space of the underground PBS tank.
35. The January 20, 2006 NOV, concerning the January 19, 2006 inspection, directed RGLL to submit documentation to Department staff to show that the system has been repaired. Staff also directed RGLL to submit "the last four monitoring reports." RGLL did not provide Staff with the requested information.

#### As-Built Plans

36. The January 20, 2006 NOV states that RGLL did not have as-built plans available for review at the Old Millerton Sunoco facility when Staff was at the service station on January 19, 2006. The January 20, 2006 NOV directed RGLL to submit a copy of the as-built plans and the required statement from the installer within 30 days from the date of the NOV. RGLL has yet to comply with this requirement, and the violation continues.

### Testing Tank Tightness

37. As noted above, RGLL did not keep daily inventory records (Findings Nos. 29 and 30). The January 20, 2006 NOV states that the Old Millerton Sunoco facility has not undergone a system test as required by 6 NYCRR 613.5(a)(1)(i). The NOV directed RGLL to test the system for tightness, and to report the results to Department staff within 30 days. No results were offered at the hearing.

### Color Coded Fill Ports

38. When Department staff inspected the Old Millerton Sunoco facility on May 18, 2001, Staff observed that the fill ports were not properly color coded. Given the products offered for sale at the Old Millerton Sunoco facility, one fill port should have been white with a black cross and the other should have been red with a white cross. Staff's July 10, 2001 NOV (Exh 26) advised RGLL that the fill ports for the underground PBS tank were not properly color coded.
39. When Staff inspected the Old Millerton Sunoco facility on January 18, 2006, the fill ports were not properly color coded.
40. When Staff went to the Old Millerton Sunoco service station on October 10, 2006, to observe the removal of the underground PBS tank, Staff observed that the fill ports were not properly color coded.

### Spill Prevention Equipment

41. Staff's inspection report for the August 28, 2006 visit to the Old Millerton Sunoco service station notes a violation of 6 NYCRR 613.3(d) because the sump and fill port catch basin for the underground PBS tank is not maintained. The September 12, 2006 NOV (Exh 27) states that liquids have accumulated in the sump, and notes that the owner and operator are required to keep all gauges, valves and other equipment for spill prevention in good working order.
42. The September 12, 2006 NOV directed RGLL to clean out the sumps and to submit a photograph to Department staff to demonstrate compliance with the requirement. RGLL did not provide this documentation.

### Closure

43. Until permanently closed, underground PBS tanks remain subject to all applicable regulatory requirements (see 6 NYCRR 613.9[a][2]). When Staff inspected the Old Millerton Sunoco service station on August 28, 2006, the underground PBS tank had not been permanently closed. The September 12, 2006 NOV directed RGLL to permanently close the Old Millerton Sunoco facility, and to submit the appropriate documentation. To date, RGLL has not complied with this directive.

### The New Millerton Sunoco Service Station

44. After leaving the Old Millerton Sunoco service station in April 2003, Respondents began operating the "new" Millerton Sunoco facility, which is located on Route 44 East near the site of the Old Millerton Sunoco facility. The new Millerton Sunoco facility is a PBS facility, as that term is defined in the regulations.
45. The new Millerton Sunoco facility consists of three storage tanks. Regular gasoline is stored in the first tank, and its capacity is 15,000 gallons. Ultra gasoline is stored in the second tank, and its capacity is 5,000 gallons. Diesel gasoline is stored in the third tank, and its capacity is 5,000 gallons.
46. Exhibit 11 is a notice of violation dated September 12, 2006 concerning Staff's August 28, 2006 inspection of the new Millerton Sunoco facility. During the August 28, 2006 inspection, the operator of the new Millerton Sunoco facility did not provide Department staff with any inventory records. Though Respondents subsequently produced some inventory records for the new Millerton Sunoco facility, Respondents did not offer any inventory records for the period from August 21 to 31, 2006.

## **Discussion**

### I. Second Amended Complaint dated January 8, 2007

The complaint alleges that RGLL and GRJH violated 15 various provisions of ECL article 17, title 10 (Control of the Bulk Storage of Petroleum), and requirements outlined in 6 NYCRR part

612 (Registration of Petroleum Storage Facilities), part 613 (Handling and Storage of Petroleum), and part 614 (Standards for New and Substantially Modified Petroleum Storage Facilities). Each alleged violation is discussed below. A copy of the complaint is attached to this hearing report as Appendix A.

In the complaint, Department staff seeks a total civil penalty of \$55,000, and an order from the Commissioner that directs RGLL and GRJH to remove all underground PBS tanks from the Old Millerton Sunoco facility consistent with the requirements outlined in 6 NYCRR 613.9. In its closing brief, however, Staff requested an additional civil penalty of \$6,100, for a revised total civil penalty of \$61,100 (\$55,000 + \$6,100).

## II. Respondent's Answers

Although, as noted in the proceedings, RGLL and GRJH filed separate answers on February 22, 2007, the answers to Department staff's complaint are substantially the same. Each Respondent generally denies the violations alleged in the complaint, and requests that the Commissioner dismiss the alleged charges and award attorney's fees.

In their respective answers, each Respondent asserts the same four affirmative defenses. As the first affirmative defense, each Respondent asserts that the second amended complaint fails to state any claim upon which relief can be granted. Each Respondent asserts further, as the second affirmative defense, that the Department's claims in the complaint are barred by the doctrines of waiver, estoppel, laches and unclean hands. For the third affirmative defense, each Respondent asserts that if any violations occurred, which are expressly denied, Respondents' actions were based on their respective reliance on the affirmative representations of the Department.

As the fourth affirmative defense, each Respondent asserts that any and all damages and violations that may have occurred, which are expressly denied, were the result of the wrongdoing, fault, poor business judgment, negligence and failure of due care of the Department, their agents, servants and employees, or Joseph A. Trotta, III and Robert Trotta (the Trottas) and their insured. Each Respondent asserts further than any recovery should be reduced in direct proportion to the culpable conduct of the Department, as well as to that of Joseph Trotta and Robert Trotta.

### III. Respondents' Motions to Dismiss

When the hearing convened on March 6, 2007, Respondents' counsel filed two motions *in limine* to dismiss the charges alleged in the complaint. These motions are addressed individually below.

#### A. Vague and Ambiguous Complaint

In the first motion, Respondents asserted they could not meaningfully defend themselves because the charges alleged in the complaint were vague. To support this assertion, Respondents explained in their motion papers how the charges asserted in the complaint did not state where, when, how, or in what manner Respondents allegedly violated the ECL and implementing regulations. Respondents' counsel provided additional argument during the March 6, 2007 hearing (Hearing Transcript [Tr.] pp. 11-17, 19-22).

Department staff responded orally to Respondents' motion (Tr, at 17-19). According to Staff, Respondents could have moved for a more definite statement of the charges alleged in the complaint as provided by 6 NYCRR 622.4(e) within 10 days of service, and did not. Although Respondents' motion asserted that Staff had numerous opportunities to refine the charges, Department staff argued that Respondents similarly had several opportunities to request a more definite statement and never did. Staff also argued that the charges alleged in the complaint relate to the underground PBS tank located at the Old Millerton Sunoco service station. In addition, Staff argued that the dates of Staff's inspections are identified in the notices of violation.

At the hearing, I denied Respondents' first motion *in limine* without prejudice to renew (Tr, at 22). I explained that I was not the final decision maker, and that the Commissioner, or his designee, would be the final decision maker. I further stated that my role was to develop a record for the Commissioner's consideration.

Pursuant to 6 NYCRR 622.3(a)(1), a complaint must contain "(i) a statement of the legal authority and jurisdiction under which the proceeding is to be held; (ii) a reference to the particular sections of the statutes, rules and regulations involved; and (iii) a concise statement of the matters asserted."



Upon review of the record, I make the following conclusions for the Commissioner's consideration. I conclude that the complaint complies with the first and second criteria outlined at 6 NYCRR 622.3(a)(1). Respondents' objection to the January 8, 2007 complaint centers on the third regulatory criterion. For the following reasons, I conclude that Respondents' objection is without merit, and recommend that the Commissioner find the same.

By the time the administrative hearing convened on March 6, 2007, Department staff had served three complaints upon RGLL concerning the Old Millerton Sunoco facility. As noted above, the February 22, 2006 complaint included a reference to Department staff's January 19, 2006 inspection of the Old Millerton Sunoco facility.

Department staff's first amended complaint, dated September 14, 2006, did not assert the dates on which the alleged violations occurred at the Old Millerton Sunoco facility. However, Staff included a copy of the January 20, 2006 NOV, which outlined Staff's observations during the January 19, 2006 inspection. These observations served as the basis for the violations alleged in the September 14, 2006 first amended complaint.

Similarly, when Staff moved to amend the complaint a second time to include GRJH as an operator of the Old Millerton Sunoco facility, Staff included a copy of the January 20, 2006 NOV, as well as a copy of the September 12, 2006 NOV. The latter NOV concerns an inspection conducted on August 28, 2006. Staff's observations during these two inspections serve as the basis for the violations alleged in the complaint.

Though not expressly stated in the complaint, the January 20, 2006 and September 12, 2006 NOVs, which Staff included with its request to amend the September 14, 2006 complaint, provided Respondents with the dates of Staff's inspections of the Old Millerton Sunoco facility. Therefore, I conclude that the January 8, 2007 second amended complaint complies with the criteria outlined at 6 NYCRR 622.3(a)(1)(i-iii). I recommend that the Commissioner conclude the same, and deny Respondents' first motion to dismiss.

B. Respondents' Second Motion to Dismiss

With the second motion *in limine*, Respondents moved for a directed verdict to dismiss the charges alleged in the complaint. According to Respondents' motion papers, they entered into a

lease agreement with the property owners on January 1, 2000. Respondents argued that the Trottas owned the underground PBS tank at the Old Millerton Sunoco service station and were, therefore, responsible for all registration and maintenance requirements for the underground PBS tank.

Respondents argued further that on March 1, 2003, they terminated the lease agreement pursuant to its terms. Respondents maintained that they never owned the underground PBS tank at the Old Millerton Sunoco service station, and were not responsible for any violations that may have occurred there after the lease agreement with the landlords terminated.

In their second motion *in limine*, Respondents argued that the circumstances in *310 South Broadway Corp. v. McCall* (275 AD 2d 549 [3<sup>rd</sup> Dept. 2000]) are similar to those at the Old Millerton Sunoco facility. Respondents argued that the court in *310 South Broadway* found that the landlord owned the underground PBS tank at the facility, and affirmed the lower court's decision to find the landlord liable for the violations related to the storage tank. Because RGLL and/or GRJH were lessees and not owners of the Old Millerton Sunoco facility, Respondents argued that they could not be held liable for any of the violations alleged in the complaint.

During argument on the motion at the hearing, Respondents reiterated their position concerning the lease agreement with the Trottas (Tr, at 22-28; 31). According to Respondents' counsel, RGLL and GRJH notified their landlord on March 1, 2003 that they were terminating the lease agreement. Respondents argued that the Trottas have owned the underground PBS facility, as well as all related fixtures since RGLL and GRJH terminated the lease agreement on March 1, 2003. Respondents conclude that the Trottas are responsible for any violations that may have occurred at the Old Millerton Sunoco facility since that time.

According to Department staff, the first time Staff learned that RGLL did not operate the Old Millerton Sunoco facility was when Staff received RGLL's and GRJH's respective February 22, 2007 answers to the complaint. Staff also noted that, though they claim otherwise, RGLL and GRJH act like the owners and operators when they state, for example, that they will remove non-compliant tanks and submit documentation related to tank removal. Staff argued that when ownership changes, the new owner must notify the Department pursuant to requirements outlined in 6 NYCRR part 612, and noted that RGLL and GRJH have not provided the required notice to the Department (Tr, at 28-30).

At the hearing, I denied Respondents' second motion *in limine* without prejudice to renew (Tr, at 33). I explained that I was not the final decision maker, and that the Commissioner, or his designee, would be the final decision maker. I further stated that my role was to develop a record for the Commissioner's consideration.

Respondents' renewed their motion for a directed verdict after Department staff made its opening statement. Respondents argued that Staff made no offer of proof in the opening statement that either RGLL or GRJH owned the facility. I denied the motion for the reason previously stated (Tr, at 41).

Subsequently, counsel for RGLL and GRJH renewed their motions *in limine* after Department staff completed its direct case. The parties were provided with an opportunity to present additional argument about the motion. For the reasons outlined above, I denied the motions (Tr, at 498-513).

As discussed in detail below, Department staff presented a prima facie case with respect to some of the violations alleged against RGLL. Therefore, I recommend that the Commissioner deny in part, and grant in part, the second motion to dismiss the charges alleged in the complaint against RGLL. In addition, this hearing report concludes that Department staff failed to meet its burden of proof with respect to all the charges alleged against GRJH. The established violations occurred after the period that GRJH operated the Old Millerton Sunoco facility. Accordingly, I recommend that the Commissioner dismiss all charges alleged against GRJH in the complaint.

#### IV. Additional Exhibits

During the adjudicatory hearing, Department staff identified the documents that RGLL and GRJH could submit that would demonstrate compliance with provisions of the regulations. RGLL and GRJH agreed to provide the documents by April 20, 2007. Upon review of these documents, Department staff counsel stated that he would advise whether Staff would consider withdrawing any violations alleged in the complaint (Tr, at 622-629).

With a cover letter dated April 20, 2007, Respondents' counsel enclosed copies of the following documents:

1. Original PBS Application for Millerton Sunoco, RGLL, Inc. - applicant (Exh 37);

2. PBS Registration Certificate dated May 31, 2000 for the Millerton Sunoco, RGLL, Inc. - owner (Exh 38);
3. Temporary Closure, PBS application dated March 4, 2003 for the Millerton Sunoco, RGLL, Inc. - applicant (Exh 39); and
4. An instruction letter dated February 28, 2003 by Jean Neubeck (Exh 40), and Interstitial Monitoring Records for the Millerton Sunoco from April 2003 to January 2006 (Exh 41).

With this group of documents, RGLL and GRJH provided copies of two different PBS applications. The first is neither signed nor dated (Exh 37). The second PBS application relates to PBS No. 3-601405 (*i.e.*, the Old Millerton Sunoco facility), and is dated March 4, 2003 (Exh 39). Based on Mr. Sgambettera's April 20, 2007 cover letter (Exh 36), Exh 39 is an application to temporarily close the Old Millerton Sunoco facility.

Department staff counsel responded in a letter dated April 27, 2007. Based upon a review of the documents provided by Respondents' counsel, Department staff did not withdraw any charges alleged in the complaint.

Department staff requested, however, that the documents submitted by RGLL and GRJH be marked as exhibits and received into the evidentiary record of the proceeding. In the joint closing brief, Respondents did not oppose Staff's requests to identify the documents provided with Respondents' April 20, 2007 cover letter as hearing exhibits and to receive those exhibits into the evidentiary record of the proceeding.

I grant Department staff's requests. The last document offered at the hearing on April 4, 2007 is identified as Exh 35, which consists of copies of New York State Daily Inspection Logs from August 2006 to September 2006, and 10-day inventory reconciliation worksheets from August 5, 2006 to August 30, 2006. During the hearing, Exh 35 was received into evidence (Tr, at 657). Exhibit 35, however, relates to the New Millerton Sunoco facility.

For clarity, the documents provided with Respondents' April 20, 2007 cover letter will be identified in the hearing record as Exhs 36 through 41, inclusive. Accordingly, Exh 36 will be Mr. Sgambettera's cover letter dated April 20, 2007. The undated PBS application will be Exh 37. Exhibit 38 will be the PBS

registration certificate dated May 31, 2000. The second PBS application dated March 4, 2003 and signed by Lauren Simons concerning the temporary closure of the Old Millerton Sunoco facility will be Exh 39. Exhibit 40 will be the February 28, 2003 instruction letter by Jean Neubeck. Finally, Exh 41 will be the inventory and interstitial monitoring records from April 2003 to January 2006. Exhibits 36 through 41, inclusive, are received into evidence.

What is referred to as Exh 38 attached to Department staff's July 10, 2007 closing brief will be identified as Exh 42 in the hearing record, and it is received into evidence. Attached to this hearing report as Appendix B is an Exhibit List.

V. Period of the Alleged Violations

In the first motion *in limine*, Respondents argued, among other things, that the charges in the complaint were vague because Staff does not assert when the violations allegedly occurred or how long they may have occurred. However, prior versions of complaints related to this matter included either dates, or supporting documents that identified when the alleged violations occurred.

Mr. Bendell testified that he and other members of Department staff inspect PBS facilities. During an inspection, Mr. Bendell stated that Department staff complete inspection reports while at the facility. If violations of the applicable regulations are observed during the inspection, Staff prepares a NOV upon returning to the office. Staff then mails the NOV to the facility owner or operator to advise of any non-compliance. For each PBS facility, Department staff retains copies of the inspection reports and the NOVs. (Tr, at 66.) This practice was applied to the Old Millerton Sunoco facility.

Department staff inspected the Old Millerton Sunoco facility on May 18, 2001, January 20, 2006, August 28, 2006, and March 1, 2007. During the hearing, Department staff offered either the inspection reports, the NOVs related to these inspections, or both. (See Appendix B.)

After Mr. Bendell's May 18, 2001 inspection, Staff sent a NOV dated July 10, 2001 to RGLL by certified mail, return receipt requested (Exh 26). According to the signed domestic return receipt, RGLL received the July 10, 2001 NOV on July 13, 2001.

Subsequently, Robert Amato inspected the Old Millerton Sunoco facility on January 19, 2006, and Staff issued a NOV dated January 20, 2006 to RGLL. In the hearing record, the January 20, 2006 NOV is identified as Exh 9. Exhibit 10 is a set of photographs taken by Mr. Amato during his January 19, 2006 inspection.

Exhibit 25 is a copy of Mr. Amato's comprehensive PBS inspection report for a visit to the Old Millerton Sunoco facility on August 28, 2006. Mr. Bendell subsequently sent a NOV dated September 12, 2006 to RGLL, which is identified as Exh 27 in the hearing record.

Josh Cummings inspected the Old Millerton Sunoco facility on March 1, 2007, and prepared a comprehensive PBS inspection report (Exh 18). During his inspection, Mr. Cummings took a series of photographs, which are identified as Exh 17 in the hearing record.

In its closing brief dated July 10, 2007 (at 8 of 35), Department staff specifically references the NOVs identified as Exhs 9, 11, and 18 as the basis for the violations alleged in the complaint. Exhibit 9 is the January 20, 2006 NOV concerning Mr. Amato's January 19, 2006 inspection. As noted above, Staff expressly relied on the January 20, 2006 inspection as the basis for the violations asserted in the February 22, 2006 complaint, and the September 14, 2006 first amended complaint.

Contrary to the arguments presented in the closing brief, Staff's reliance on Exh 11 as evidence of the violations alleged in the complaint is misplaced. Exhibit 11 is a NOV dated September 12, 2006 concerning an inspection by Mr. Amato on August 28, 2006 of the "New" Millerton Sunoco facility. Although located near the Old Millerton Sunoco facility, the New Millerton Sunoco service station is not the subject of the captioned administrative enforcement proceeding. At the hearing, Staff explained that the purpose of Exh 11 is to establish aggravating factors related to the civil penalty calculation related to the captioned matter (Tr, at 104-107).

Exhibit 18 documents Mr. Cummings' March 1, 2007 inspection of the Old Millerton Sunoco facility. Staff's March 1, 2007 inspection, however, post-dates service of the complaint. Therefore, Exh 18 cannot be relied upon as evidence of any violations alleged in the complaint.

During the hearing, Department staff counsel stated that Staff's observations during the May 18, 2001 inspection of the Old Millerton Sunoco facility, and the violations noted in the July 10, 2001 NOV (Exh 26) do not serve as the basis for any of the allegations asserted in the complaint. Rather, Staff stated during the hearing that the purpose of Exh 26, like Exh 11, is to justify the requested civil penalty by demonstrating that Respondents had knowledge of the violations that Staff subsequently observed at the Old Millerton Sunoco facility. (Tr, at 69, 71.)

Staff's closing brief is silent about its reliance on Exh 27, which is a copy of the September 12, 2006 NOV resulting from the August 28, 2006 inspection of the Old Millerton Sunoco facility. Department staff included a copy of Exh 27 with its request to amend the complaint a second time.

Based on the foregoing discussion, the relevant period that will be considered in determining whether the violations alleged in the complaint occurred is from the January 19, 2006 inspection until service of the complaint. The related exhibits are the January 20, 2006 NOV (Exh 9) and the September 12, 2006 NOV (Exh 27). In addition, to these NOVs (Exhs 9 and 27), Mr. Amato went to the Old Millerton Sunoco service station on October 10, 2006, and took a series of photographs identified in the hearing record as Exh 12. Mr. Bendell offered testimony about these photographs (Exh 12), and they serve as the basis for the some of the violations discussed below. The next section of this report address the questions of whether Respondents owned and operated the Old Millerton Sunoco facility and, if so when.

## VI. Owner-Operator

RGLL is a Delaware corporation with business offices located at 25 Mitchelltown Road (P.O. Box 728), Sharon, Connecticut 06069. GRJH is a Delaware corporation with business offices also located at 25 Mitchelltown Road (P.O. Box 728), Sharon, Connecticut 06069. James T. Metz testified that he is a consultant for RGLL and a corporate officer of GRJH (Tr, at 558). Ms. Simon is an employee of RGLL. Lauren Simon's signature appears on correspondence sent on behalf of RGLL to the Department (see e.g. Exhs 4, 28, and 39), and Ms. Simon is identified as the contact person for RGLL (see e.g. Exhs 16, 25, and 40).

In Paragraph 1 of the complaint, Department staff asserts that RGLL "is the operator and/or the owner" of the Old Millerton

Sunoco facility. In Paragraph 2 of the complaint, Department staff asserts that GRJH "is the operator" of the facility. RGLL and GRJH contend, however, that they are neither the operators nor the owners of the facility, and assert that Robert Trotta and Joseph A. Trotta III are the operators and the owners of the Old Millerton Sunoco facility.

The statutes and regulations identified in the complaint apply to either the owner or the operator, and in some cases, to both the owner and operator of a PBS facility. Therefore, the following statutory definitions are pertinent here. A "facility" means one or more stationary tanks, including any associated pipes, lines, fixtures and other equipment, which are used alone or in combination for the storage of more than 1,000 gallons of petroleum (see ECL 17-1003[1]).

Pursuant to ECL 17-1003(3), the "operator" of a PBS facility is any person who leases, operates, controls or supervises the facility. Pursuant to ECL 17-1003(4), the "owner" of a PBS facility is any person who has legal or equitable title to the facility. Regulatory definitions of the terms "facility or storage facility," "operator," and "owner" are provided at 6 NYCRR 612.1(c)(10), (16), and (18), respectively. The language of the regulatory definitions closely mirrors the statutory definitions. Parts 613 and 614 incorporate, by reference, the regulatory definitions provided at 6 NYCRR 612.1(c) (see 6 NYCRR 613.1[c] and 614.1[c]).

Staff's allegations that RGLL is the operator and/or owner of the Old Millerton Sunoco facility, and that GRJH is the operator are based on the information provided in Exhs 4 and 16. Exhibit 4 is a letter dated February 26, 2003 from Ms. Simons on RGLL letterhead to Vincent McCabe, Environmental Engineering Technician III of the Department's Region 3 Office, Division of Environmental Remediation. In her February 26, 2003 letter, Ms. Simons responds to Mr. McCabe's notification dated February 20, 2003 regarding petroleum contaminated soil. Mr. McCabe's February 20, 2003 notification is identified in the hearing record as Exh 3.

In her February 26, 2003 letter (Exh 4), Ms. Simons states that RGLL did not own any underground PBS tanks at the Old Millerton Sunoco service station in December 1998. Ms. Simons states further, however, that RGLL installed one fiberglass-coated, steel tank with a capacity of 12,000 gallons during the summer of 1999. Also in Exh 4, Ms. Simons states that RGLL will be closing the underground PBS tank at the Old Millerton Sunoco



service station on March 10, 2003, and that RGLL plans to remove it by the end of the year. Ms. Simons explains that, in the meantime, RGLL will maintain the automated interstitial monitoring system at the Old Millerton Sunoco facility until the tank is removed.

With respect to determining who owns and operates the Old Millerton Sunoco facility, Staff also relied upon the information presented in Exh 16. Exhibit 16 is a copy of the Department's PBS facility information report for the Old Millerton Sunoco facility, printed on March 4, 2007. The PBS number assigned to the Old Millerton Sunoco facility is 3-601405. According to the facility information report, the facility is located in the Town of Milan, Dutchess County. The PBS facility information report identifies RGLL as the facility owner, and GRJH as the facility operator. Ms. Simons is identified in the PBS facility information report as the emergency contact person. The facility information report also states that the PBS registration certificate for the Old Millerton Sunoco facility expired on March 1, 2005.<sup>2</sup> Based on his review of Exh 16, Mr. Bendell concluded that RGLL is the PBS facility owner (Tr, at 86; 292), and that GRJH is the PBS facility operator (Tr, at 392). In find the same.

During his testimony, Mr. Bendell also referred to Exhs 6, 7 and 8. These exhibits are a series of letters from Jean M. Neubeck, a Hydrogeologist from Alpha Geoscience to Mr. McCabe. In general, these letters discuss the petroleum spills that occurred at the Old Millerton Sunoco facility in 1993, and outline a remediation plan. Exhibit 6 is a letter dated October 16, 2000. Exhibit 7 is a letter dated April 17, 2003, and Exh 8 is a letter dated May 1, 2003. Exhibit 6 refers to a report dated July 2000, which is identified as Exh 34 in the hearing record.

After reviewing Exhs 6, 7 and 8, Mr. Bendell explained the distinction between the owner and operator of the Old Millerton

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<sup>2</sup> Exhibit 38 is a copy of the PBS registration certificate for the Old Millerton Sunoco facility, which expired on March 1, 2005. The Department issued this certificate on May 31, 2000 to RGLL. On the certificate, G. Singh is identified as the operator. According to the May 31, 2000 certificate, correspondence concerning the facility should be mailed to J.T. Metz, RGLL, Inc., P.O. Box 728, Sharon, Connecticut 06069.

Sunoco facility, and the owner of the real property where the Old Millerton Sunoco facility is located. With respect to the referenced matter, Mr. Bendell testified that Exhs 6, 7 and 8 show that Robert Trotta owns the real property, and that RGLL owns the Old Millerton Sunoco facility (Tr, at 119-121).

I assign substantial weight to Exhs 4 and 16. Based on these exhibits, I find that RGLL owns the underground storage tank that, pursuant to ECL 17-1003(1), is the petroleum bulk storage facility known as the Old Millerton Sunoco facility. In addition, Exhs 4 and 16 also establish that GRJH was an operator of the Old Millerton Sunoco facility.

Exhibit 29 is a copy of the deed for the real property where the Old Millerton Sunoco facility is located. Exhibit 30 is a cover letter dated March 9, 2007 with a copy of the title search. According to the deed (Exh 29), ownership of the real property where the Old Millerton Sunoco facility is located was transferred on August 7, 1974 from Joseph A. Trotta, Jr. and Gertrude W. Trotta to Robert D. Trotta and Joseph A. Trotta III. The title search (Exh 30) shows that since August 7, 1974, there are no deeds outstanding for the real property.

Respondents fail to acknowledge that the statutory and regulatory definitions identified above distinguish the owner and operator of a PBS facility from the owner of real property where a PBS facility may be located. Although a landowner may also own and operate a PBS facility on his or her property, it is possible that the owner and operator of a PBS facility does not own the land where the PBS facility is located. The latter circumstance applies to the captioned matter. Consequently, Respondents' reliance on Exhs 29 and 30 to prove that they are not the owners of the Old Millerton Sunoco facility is misplaced.

Exhibits 29 and 30, therefore, substantiate the information presented in Exhs 6, 7 and 8, which distinguish the owner and operator of the Old Millerton Sunoco facility from the owner of the real property where the Old Millerton Sunoco facility is located. I find that Exhs 29 and 30 prove that Robert D. Trotta and Joseph A. Trotta III own the real property where the Old Millerton Sunoco service station is located.

Robert and Joseph Trotta, however, are not parties to the captioned matter. Therefore, issues related to whether the Trottas, as real property owners, complied with any applicable requirements outlined in ECL article 17, title 10 (Control of the Bulk Storage of Petroleum) and implementing regulations at 6

NYCRR parts 612, 613 and 614 are beyond the scope of this proceeding.

VII. The Lease Agreement (Exhibit 32)

To further support the contention that they do not own the Old Millerton Sunoco facility, Respondents also offered Exh 32, which is a lease agreement between the Trottas and GRJH. The Trottas are the landlords, and GRJH is the tenant/lessee. According to the terms of the lease, the existing building on the real property is known as "The Gas Station at Millerton Square Plaza," and is used by GRJH as a gas station/convenience store. The Trottas and GRJH executed the lease agreement in October 1999, and the lease was effective from January 1, 2000 to December 31, 2004. Mr. Metz testified that he was not aware of any amendments to the lease during its effective period (Tr, at 526-528).

The lease agreement provides additional proof about who operated the Old Millerton Sunoco facility. Based on the lease (Exh 32), GRJH was authorized by the landlord to operate the Old Millerton Sunoco facility from January 1, 2000 to December 31, 2004. A lease is expressly contemplated by the statutory definition of the term "operator" (see ECL 17-1003[3]). Also, according to Ms. Simons' testimony, RGLL began, in August 2001, to jointly operate the Old Millerton Sunoco facility with GRJH (Tr, at 633-634).

A. Trade Fixtures

Pursuant to the terms of the lease agreement (Exh 32), and an alleged oral agreement that Mr. Metz made with the Trottas (Tr, at 540-542), Respondents contend that ownership of the underground storage tank, installed by RGLL during the summer of 1999, transferred to the Trottas in April 2003. In their jointly filed closing brief, Respondents referenced case law to support this contention. As discussed in detail below, Respondents did not demonstrate that ownership of the Old Millerton Sunoco facility transferred to the Trottas. Rather, I conclude that the underground PBS tank at the Old Millerton Sunoco service station is a trade fixture, and not an improvement that became the property of the landlord.

Paragraph three of the lease agreement (Exh 32) states, among other things, that the tenant will not disfigure or deface any part of the building except as may be necessary to affix trade fixtures without the landlord's consent.

Paragraph eleven of the lease agreement (Exh 32) states in full that:

"[a]ll improvements made by the Tenant to or upon the demised premises, except said trade fixtures, shall when made, at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements excepted."

The parties dispute whether the underground PBS tank at the Old Millerton Sunoco service station is a "trade fixture," as that term is used in the lease agreement. According to Respondents, the underground PBS tank is an improvement that the Trottas own, and not a trade fixture. Department staff, however, contends that the underground PBS tank is a trade fixture that Respondents continue to own and operate.

It should be noted that aspects of the parties' arguments concerning the issues discussed in this portion of the hearing report are not clear. For example, in their joint closing brief, Respondents tend to refer to themselves interchangeably as the tenant or lessee. Also, Department staff makes no distinction between the two Respondents in its closing and reply briefs. As a result, a glaring omission from the arguments presented by the parties is the applicability of the lease agreement to RGLL.

Pursuant to the express terms of the lease agreement, GRJH had authority to operate a gasoline dispensing station and convenience store, and could have made the necessary improvements to the Trottas' real property to do so. Because RGLL was not a signatory to the lease agreement, RGLL was not bound by the terms and conditions of the lease agreement. The parties offered no evidence about an agreement between RGLL and the real property owners that allowed RGLL to install the underground PBS tank.<sup>3</sup> Under these circumstances, it is not clear how relevant the lease agreement is to resolving the issue of whether the Old Millerton Sunoco facility is an improvement owned by the landlord or a

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<sup>3</sup> As noted above, Paragraph 3 of the lease agreement (Exh 32) allows the tenant to affix trade fixtures without the landlord's consent. Therefore, if RGLL had been the tenant, it could have installed the underground PBS tank, as a trade fixture, at the Old Millerton Sunoco service station without the Trottas' permission.

trade fixture. Nevertheless, the status of underground PBS tanks as trade fixtures is a significant public policy issue associated with this regulatory program. Therefore, the following analysis of the parties' arguments is provided for the Commissioner's consideration.

To support the position that they do not own the underground PBS tank because it is an exempt fixture, Respondents cite *Golovach v Bellmont LM, Inc.*, 4 AD3d 730, appeal denied 2 NY3d 793; *Drouin v Ridge Lbr.*, 209 AD2d 957; *310 South Broadway Corp. v. McCall*, 275 AD2d 549; and *Sunnybrook Realty Co. v State of New York*, 15 Misc 2d 739, 741, mod on other grounds 11 AD2d 888, affd 9NY2d 960. Based on this case law, Respondents argue that the courts have uniformly held that underground PBS tanks, which tenants may have installed, are considered fixtures (rather than trade fixtures), and that the ownership of these fixtures (*i.e.*, the tanks) passes to the landlord upon the termination of the tenancy.

According to Department staff, the PBS tank that RGLL installed at the site of the Old Millerton Sunoco service station during the summer of 1999 (see Exh 4) is a trade fixture based on the court's determination in *Drouin* (209 AD2d at 958). Staff cites *Shell Oil Co. v Capperelli* (648 F Supp 1052, 1055 [SDNY 1986]) to further support its position that underground PBS tanks are trade fixtures.

In its reply brief, Department staff argues that Respondents' reliance on *310 South Broadway* (275 AD2d 549) and *Drouin* (209 AD2d 957) is misplaced because these cases do not support Respondents' arguments. According to Staff, the holding in both cases is that underground PBS tanks are trade fixtures, rather than fixtures, and that under the lease agreement between the Trotts and GRJH, GRJH, as the tenant, retains control over trade fixtures, such as the underground PBS tank. Staff's argument, with respect to this point, is undermined by the fact that RGLL, not GRJH, installed the tank, and that RGLL was not a signatory to the lease agreement.

One issue considered in *Shell* (648 F Supp 1052 [SDNY 1986]) was whether Shell Oil Co. was entitled to recover underground storage tanks that it had installed at a gasoline service station. To resolve this issue, the court reviewed the lease agreement between Shell and the property owner, and considered whether the underground storage tanks were trade fixtures.

According to the terms of the lease, the *Shell* court held that any equipment installed on the premises by Shell remained Shell's property, and that Shell had the right to remove that equipment when the lease ended (see *Shell*, 648 F Supp at 1054 - 1055). The court rejected the property owner's argument that any improvements became the property of the landlord, and that the tanks were permanently affixed to the property. The court agreed with Shell's characterization that the tanks were trade fixtures, and cited several cases decided by New York State courts, which supported the court's finding that underground petroleum storage tanks are trade fixtures (see *Shell*, 648 F Supp at 1055).

In *Shell*, the court considered the following case law to support the proposition that a trade fixture is property installed by a tenant at its own expense, during the term of a lease, to carry on the business for which the real property was leased (see *East Side Car Wash v KRK Capitol, Inc.*, 102 AD2d 157 and *Foureal Co. v National Molding Corp.*, 74 Misc 2d 316). Citing *East Side Car Wash*, 102 AD2d at 162, and *Crater's Wharf v Valvoline Oil Co.*, 204 AD 840 (1922), the District Court determined further that when the property at issue is a trade fixture, the tenant has the right to remove it, even if the property is affixed to the related real property. Finally, the court also cited *Interstate Lien Corp. v Schmidt*, 180 Misc 910, 912 (1943), and concluded that a tenant may remove whatever it builds on site for the purpose of carrying on trade, whether it consists of machinery or buildings, even if built on the ground or otherwise attached to the real property. (See *Shell*, 648 F Supp at 1055; see also *Orange County-Poughkeepsie MSA Ltd. Partnership v Bonte*, 301 AD2d 583.)

Based on the above identified case law, the court in *Shell* found that the underground storage tanks were installed by Shell, as a tenant, during the term of its lease. In addition, the court found that Shell installed the underground storage tanks solely for the purpose of furthering its business. As a result, the court concluded that the underground storage tanks were trade fixtures and, therefore, were neither a permanent part of the real property nor an improvement to the premises. (See *Shell*, 648 F Supp at 1055.)

The courts, however, have not consistently concluded, as in *Shell* (648 F Supp at 1055), that all underground storage tanks are trade fixtures. As noted above, Respondents rely on *Sunnybrook Realty Co.*, 15 Misc 2d 739; *Drouin*, 209 AD2d 957; and *310 South Broadway Corp.*, 275 AD2d 549 to show that the tank at the Old Millerton Sunoco facility is not a trade fixture. In

*Sunnybrook Realty Co.* (15 Misc 2d at 741 [1959]), the court found that the underground storage tanks were not trade fixtures because they were "imbedded in the land," improved the real property, and could not be removed without injuring the real property and the tanks themselves.

In *Drouin* (209 AD2d at 958), however, the court rejected the tenant's allegation that the landowner owned the underground storage tank. Rather, the court found that the underground storage tank was a trade fixture owned by the tenant, and that while the lease was in effect, the tenant "was in exclusive possession, control, use and operation of the tank" (*Drouin*, 209 AD2d at 958). Based on this finding, the court concluded that the tenant, not the landowner, was responsible for the unpermitted petroleum discharge, which occurred while the lease was in effect, in violation of the Navigation Law and, therefore, liable for all cleanup and removal costs associated with the violation (*Drouin*, 209 AD2d at 959). This conclusion tends to support Department staff's position that the underground storage tank at the Old Millerton Sunoco service station was a trade fixture that RGLL owned while GRJH leased the property from the Trotts.

In *310 South Broadway Corp.* (275 AD2d at 551), the court reviewed the terms of a lease, which authorized the tenant to take only the "movable trade fixtures." The court determined that the storage tanks installed by the tenant were buried and affixed to the real property and, therefore, not moveable trade fixtures. The express terms of the lease agreement concerning the captioned matter (Exh 32), however, make no distinction between "moveable" and "non-moveable" trade fixtures. Because Exh 32 does not distinguish between moveable and non-moveable trade fixtures, I conclude that Respondents reliance on *310 South Broadway* is misplaced because the terms of the lease considered in *310 South Broadway* are different from those in the lease agreement identified as Exh 32.

Contrary to Respondents' arguments, the court's determination in *Golovach* (4 AD3d 730) does not resolve the question of whether the landlord or a tenant owns the underground storage tanks at a service station. The issue before the court in *Golovach* was whether summary judgment had been properly granted. Upon review, the appellate court concluded there was conflicting evidence about the ownership of the leaking underground petroleum storage tank and remanded the matter back to supreme court for a jury to decide ownership (*Golovach*, 4 AD3d at 731). Based on the record of the captioned administrative

enforcement proceeding, the owner of the tank has been determined to be RGLL.

Therefore, I conclude that the underground PBS tank at the Old Millerton Sunoco service station is a trade fixture rather than an improvement that became the property of the landlord (see Paragraph 11 of Exh 32). Based on this conclusion, Respondents retain control of the underground PBS tank as a trade fixture (see *Shell* 648 F Supp, *supra*, and *Drouin* 209 AD2d, *supra*).

B. Transfer and Abandonment

As noted above, RGLL and GRJH jointly operated the Old Millerton Sunoco facility beginning in August 2001. Subsequently, Respondents stopped dispensing gasoline at the Old Millerton Sunoco facility due to the excessive amount of petroleum fumes at the site, which were associated with the unremediated petroleum spills from 1993 (Tr, at 538-539; 634-635). Because the Trotts, as the landlords, took no action to abate the petroleum fumes, Mr. Metz testified that RGLL and GRJH "abandoned" the Old Millerton Sunoco facility either at the end of March or the beginning of April 2003, at the latest (p. 540). Mr. Metz testified further that Respondents did not pay the Trotts rent after February 2003 (Tr, at 540).

Before leaving the site, Ms. Simons testified that RGLL had the petroleum products pumped out of the tank (Tr, at 648), and subsequent inventory monitoring records show there was less than one inch of products left in each compartment of the tank (Tr, at 649; Exh 41), which Staff maintains is significant from a regulatory perspective (Exh 42). Ms. Simons testified further that before RGLL left the site, it locked the fill ports on the tank (Tr, at 637).

The issue now becomes whether RGLL and GRJH continued to own and operate the Old Millerton Sunoco facility after they left the site in April 2003. Staff argues that Respondents were obliged to comply with applicable requirements outlined in 6 NYCRR parts 612, 613 and 614 until the tank at the Old Millerton Sunoco service station is permanently closed or ownership has been transferred. When ownership of the facility changes, the new owner must reregister the facility with the Department within 30 days of the transfer (see 6 NYCRR 612.2[b]).

Respondents argue, however, that their obligation with respect to the requirements outlined in 6 NYCRR parts 612, 613 and 614 ended when they left the site in April 2003. At the



hearing, Mr. Metz testified that when he informed Mr. Trotta that GRJH was terminating the lease agreement and abandoning the site, Mr. Metz and Mr. Trotta agreed that ownership of the improvements on the site, including the underground PBS tank that RGLL installed in 1999, would revert to the landlord (Tr, at 540).

The testimony offered by Mr. Metz concerning the transfer of ownership of the Old Millerton Sunoco facility from Respondents to the Trottas is not credible. Respondents offered no other evidence to substantiate this testimony, such as a written agreement or the testimony of one of the Messrs. Trottas. Moreover, Respondents' behavior, which is documented with other evidence, contradicts this testimony.

For example, in a letter dated February 26 2003 (Exh 4), RGLL advised Department staff that it was going to maintain the interstitial monitoring system at the Old Millerton Sunoco facility until it removed the tank. In February 2003, RGLL anticipated that the tank would be removed by the end of that year (Exh 4). In March 2003, Ms. Simons on behalf of the tank owner, RGLL, filed a PBS application with Department staff for the temporary closure of the Old Millerton Sunoco facility (Exh 39). Also, RGLL had the petroleum products removed from the tank before leaving the site (Tr, at 648) and, more significantly, continued to monitor the inventory and interstitial space from April 2003 until January 2006 (Exh 41). Finally, in a letter dated October 5, 2006 (Exh 14), Respondents' counsel advised Department staff that RGLL was going to remove the underground PBS tank on October 10, 2006 and then file a closure report.

RGLL's actions subsequent to March 2003 belie Mr. Metz's testimony that, based on an unsubstantiated oral agreement, ownership and control of the Old Millerton Sunoco facility transferred from RGLL to the landlord. Consequently, I assign no weight to Mr. Metz's testimony, and rely on the referenced documentary evidence. Moreover, I conclude that some the activities, which RGLL undertook between March 2003 and service of the complaint, are required of operators (see e.g. 6 NYCRR 613.4 [inventory monitoring]). As a result, I find that RGLL continued, not only to own, but to operate the Old Millerton Sunoco facility after Respondents stopped dispensing gasoline in April 2003. I find further that RGLL's ownership and operations of the Old Millerton Sunoco facility continued through service of the complaint.

Finally, when a tenant fails to remove trade fixtures before it leaves the premises, the courts have determined that the

tenant has abandoned the trade fixtures and title to them passes to the landlord (*Modica v Capece*, 189 AD2d 860, 861 [1993] *citing Lewis v Ocean Nav. & Pier Co.*, 125 NY 341, 350 [1891]). These circumstances do not apply to the captioned matter. Based on the record developed at the hearing, RGLL was not a tenant. Also, as outlined above, RGLL continues to own and operate the Old Millerton Sunoco facility. Consequently, ownership of the Old Millerton Sunoco facility did not transfer from RGLL to the Trotts due to RGLL's alleged abandonment of the underground PBS tank as asserted by Respondents.

#### VIII. Liability

The complaint asserts 15 separate violations (see Appendix A). Staff's closing brief and reply, however, do not address the violations asserted in Paragraphs 9 and 10; 23 and 24; 25 and 26; 29 and 30; and 31 and 32. Staff did not formally withdraw the charges alleged in these paragraphs. Nevertheless, all allegations asserted in the complaint are addressed below.

##### A. Facility Registration

Paragraph 6 of the complaint asserts that "Respondents knowingly and willing [sic] failed to register its [sic] facility as required by 6 NYCRR 612.2." In its closing brief (at 9 of 35), Department staff acknowledges that RGLL had a valid registration certificate (Exh 38) that was effective from May 31, 2000 to March 1, 2005. Staff alleges, however, that Respondents failed to renew the registration for the Old Millerton Sunoco facility after it expired in March 1, 2005 in violation of 6 NYCRR 612.2(a)(2).

ECL 17-1009(2) requires all owners to register their PBS facilities with the Department. Pursuant to 6 NYCRR 612.2(a)(1), the owner of any PBS facility having a capacity of over 1,100 gallons must register the facility with the Department within one year of the effective date of the regulations. Section 612.2(a)(2) of 6 NYCRR requires owners to renew the registration every five years until the Department receives written notice that either the facility has been permanently closed, or ownership has been transferred.

In the summer of 1999, RGLL installed a 12,000-15,000 gallon underground PBS tank at the Old Millerton Sunoco service station (Exh 4). Subsequently, RGLL registered the Old Millerton Sunoco facility and obtained a registration certificate from the Department effective until March 1, 2005 (Exh 38).

As discussed in detail above, the Old Millerton Sunoco facility has not been permanently closed, and ownership of the facility was not transferred. Consequently, RGLL was required to renew the registration, pursuant to 6 NYCRR 612.2(a)(2), prior to the March 1, 2005 expiration date. The January 20, 2006 and September 12, 2006 NOV's (Exhs 9 and 27<sup>4</sup>, respectively) show that the renewal registration for the Old Millerton Sunoco facility is overdue.

I find that Department staff's inspections demonstrate that RGLL did not renew the registration for the Old Millerton Sunoco facility. As noted above, Exh 16 is the facility information report for the Old Millerton Sunoco facility. A note on the report shows that it was printed on March 4, 2007, just prior to the commencement of the administrative hearing. The report (Exh 16) shows that the registration expired on March 1, 2005. Therefore, I conclude that RGLL violated 6 NYCRR 612.2(a)(2) by not renewing the Old Millerton Sunoco facility. This violation commenced with the expiration of the initial registration on March 1, 2005 and has continued.

#### B. Inventory Records

Paragraphs 7 and 8 of the complaint assert that RGLL and GRJH violated ECL 17-1005 and 6 NYCRR 613.4 when they failed to maintain inventory records for the Old Millerton Sunoco facility. ECL 17-1005(1)(b) requires the Department to promulgate regulations that provide for daily measurements and inventory records for petroleum at each facility using a gauge, stick, or automated system. Pursuant to 6 NYCRR 613.4(a), the operator of an underground PBS tank must keep daily inventory records for the purpose of detecting leaks. Operators must maintain these records for at least five years, and upon request make them available to the Department for review (see 6 NYCRR 613.4[c]).

The January 20, 2006 and September 12, 2006 NOV's (Exhs 9 and 27, respectively) note that RGLL failed to keep the inventory records required by 6 NYCRR 613.4(a). With a cover letter dated April 20, 2007 (Exh 36), Respondents' counsel enclosed what is identified as Exh 41 in the hearing record. Exhibit 41 is a set

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<sup>4</sup> The September 12, 2006 NOV (Exh 27) is based on information presented in Mr. Amato's August 28, 2006 inspection report (Exh 25). On the August 28, 2006 inspection report, Mr. Amato noted a violation of 6 NYCRR 612.2(a)(2), which Staff reported to RGLL in the NOV dated September 12, 2006.

of inventory and interstitial monitoring records for the Old Millerton Sunoco facility from April 2003 to January 2006.

Exhibit 41 shows that RGLL monitored the inventory in the underground PBS tank every week. The regulations (see 6 NYCRR 612.4[a][1]), however, require operators to maintain daily, rather than weekly, inventory records. As discussed further below, the underground PBS tank at the Old Millerton Sunoco service station is not permanently closed. Therefore, the owner and operators of the Old Millerton Sunoco facility are required to comply with the applicable regulations (see 6 NYCRR 613.9[a]), which include keeping daily inventory records.

The requirement at 6 NYCRR 613.4(a)(1) applies to operators. The record shows that RGLL jointly operated the Old Millerton Sunoco facility with GRJH beginning in August 2001. Although GRJH left the Old Millerton Sunoco facility in April 2003, Exh 41 shows that RGLL continued the operational requirement to keep inventory records albeit on a weekly, rather than a daily, basis until January 2006. Therefore, RGLL violated 6 NYCRR 613.4(a)(1) when it failed to keep daily inventory records for the Old Millerton Sunoco facility. Based on Exh 41, this violation continued from April 2003 to January 2006. The September 12, 2006 NOV (Exh 27) demonstrates that the violation continues.

C. Notice of Substantial Modification

Paragraphs 9 and 10 of the complaint assert that RGLL and GRJH violated 6 NYCRR 612.2 when they failed to notify the Department of substantial modifications at the facility.<sup>5</sup> Paragraph 9 of the complaint states in full that:

"6 NYCRR 612.2 requires that the owner and/or operator of a petroleum bulk storage facility notify the Department of substantial modification at the facility."

Paragraph 10 of the complaint states in full that:

"[r]espondents failed to notify the Department of substantial modifications at the facility."

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<sup>5</sup> Staff does not address this alleged violation in either its closing or reply briefs.

Section 612.2 of 6 NYCRR concerns the registration of facilities. Pursuant to 6 NYCRR 612.2(d), owners must notify the Department 30 days prior to substantially modifying the facility. A definition of the term "substantially modified facility" is provided at 6 NYCRR 612.1(c)(27), and occurs when (1) one or more stationary tanks are added to a facility; (2) an existing tank has been replaced, reconditioned or permanently closed; or (3) a leaking storage tank has been replaced, repaired or permanently closed. According to 6 NYCRR 612.1(c)(27), the repair, replacement or installation of a piping system or other equipment does not substantially modify a facility.

The January 20, 2006 NOV (Exh 9) states that RGLL did not notify the Department of a substantial modification to the Old Millerton Sunoco facility. According to the January 20, 2006 NOV, Staff enclosed a PBS application and directed RGLL to use the form "to correctly inform the Department of the substantial modifications." The January 20, 2006 NOV, however, does not offer any more details about the nature of the modification.

Mr. Bendell testified at length about the January 20, 2006 NOV and the accompanying set of photographs identified in the hearing record as Exh 10 A-E (Tr, at 74-85, 96-99). During his testimony, Mr. Bendell did not mention the alleged violation of 6 NYCRR 612.2(d) concerning substantial modifications to the Old Millerton Sunoco facility.

Although the PBS facility information report (Exh 16) shows there are two tanks at the facility, which could suggest that an underground PBS tank was added, Exhs 4 and 38, as well as the testimony offered by Department staff and Respondents' witnesses show that RGLL installed only one underground PBS tank at the Old Millerton Sunoco service station in 1999.

Exhibit 27 is the September 12, 2006 NOV. It is based on Mr. Amato's inspection on August 28, 2006, and Mr. Amato's inspection report is identified as Exh 25. The September 12, 2006 NOV (Exh 27) is silent about the substantial modification identified in the January 20, 2006 NOV.

During the hearing, Staff offered no proof to show that Respondents either added other underground PBS tanks, or replaced, reconditioned or permanently closed the underground PBS tank installed in 1999. Finally, at the time of the January 19, 2006 inspection, Staff does not allege that the underground PBS tank at the Old Millerton Sunoco service station was leaking and that it needed to be replaced, repaired or permanently closed.

Therefore, Staff did not demonstrate that RGLL violated 6 NYCRR 612.2(d) as alleged in Paragraphs 9 and 10 of the complaint.

D. Registration Certificate (Display)

Paragraphs 11 and 12 of the complaint assert that RGLL and GRJH violated 6 NYCRR 612.2 when they failed to display a registration certificate at the Old Millerton Sunoco facility. Pursuant to 6 NYCRR 612.2(e), operators must file a complete registration application and fee with the Department, and after obtaining the registration certificate, display it on the premises at all times.

As previously noted, Exh 38 is a copy of the registration certificate for the Old Millerton Sunoco facility. The Department issued the certificate on May 31, 2000, and the certificate expired on March 1, 2005. The certificate identifies one fiberglass-coated, steel tank with a capacity of 15,000 gallons.

The January 20, 2006 NOV (Exh 9) and the September 12, 2006 NOV (Exh 27) note that the registration certificate was not displayed at the Old Millerton Sunoco facility when Department staff inspected the facility on January 19, 2006 and August 28, 2006. Both NOVs direct RGLL to submit a photo to Department staff to show that RGLL is displaying the registration certificate.

When Staff conducted the January 19, 2006 inspection, Respondents had stopped dispensing gasoline and left the site of the Old Millerton Sunoco service station. Before leaving, RGLL did not permanently close the underground PBS tank, and kept weekly inventory records and monitored the interstitial space through January 3, 2006 (Exh 41). Until an underground PBS tank is permanently closed, however, it remains subject to all requirements (see 6 NYCRR 613.9[a][2]) such as the registration of the tank and the display of the certificate as required by 6 NYCRR 612.2(e). Therefore, I conclude that RGLL violated 6 NYCRR 612.2(e) when it failed to display the registration for the Old Millerton Sunoco facility. This violation was observed during the January 19, 2006 site visit, and had not been corrected when Staff inspected the site some seven months later on August 28, 2006. Moreover, the violation is ongoing because the underground PBS tank at the Old Millerton Sunoco service station has not been permanently closed.

E. Registration Certificate (Current and Valid Information)

The previous charge discussed in § VIII(D) considered whether Respondents duly displayed a registration certificate, as required by the regulations. Paragraphs 13 and 14 of the complaint assert that RGLL and GRJH violated 6 NYCRR 612.2 because the registration information for the Old Millerton Sunoco facility is not "current and valid." As previously noted, operators must display a current and valid registration certificate on the premises at all times pursuant to 6 NYCRR 612.2(e). Staff contends in Paragraph 14 of the complaint that "Respondents failed to have a registration certificate with current and valid information at the facility."

After the January 19, 2006 inspection, Staff's January 20, 2006 NOV (Exh 9) states that Respondents did not display the registration certificate, and that the information in the certificate is not "current and valid." The September 12, 2006 NOV has a similar statement concerning the August 28, 2006 inspection.

I previously concluded that RGLL did not renew the registration for the underground PBS tank at the Old Millerton Sunoco service station after it expired on March 1, 2005 (§ VIII[A]), and was not displaying a certificate in January 19, 2006 (§ VIII[D]) in violation of requirements outlined in 6 NYCRR 612.2. By failing to renew the tank registration subsequent to the March 1, 2005 expiration of the original registration (see Paragraphs 5 and 6 of the complaint), RGLL could not have displayed a "current and valid" certificate at the Old Millerton Sunoco facility (see Paragraphs 11 and 12 of the complaint) as required by 6 NYCRR 612.2(e). The latter violation is ongoing because the underground PBS tank at the Old Millerton Sunoco service station has not been permanently closed.

Staff did not show how the alleged violation asserted in Paragraphs 13 and 14 of the January 8, 2006 second amended complaint is different from those asserted in the Paragraphs 5 and 6, and 11 and 12. I conclude that the alleged violation asserted in Paragraphs 11 and 12 is the same as that asserted in Paragraphs 13 and 14.

F. Leak Detection Equipment (Complaint Paragraphs: 15 and 16; 17 and 18; 25 and 26; and 29 and 30)<sup>6</sup>

1. Installation of Leak Detection Equipment

Paragraphs 25 and 26 of the complaint assert that RGLL and GRJH violated 6 NYCRR 614.5 because they failed to "install" a leak monitoring system at the Old Millerton Sunoco facility. Pursuant to 6 NYCRR 614.5(a), all new underground tanks must have one of three specified leak monitoring systems. The first acceptable monitoring system is a double-walled tank with monitoring of the interstitial space. The second is an in-tank monitoring system, and the third is an observation well or wells.

The requirements outlined in 6 NYCRR 614.5 apply to "all new tanks," and do not distinguish whether the owner or the operator is responsible for complying with these requirements. Accordingly, the operator, the owner, or both may be held liable for violations of the requirements outlined in 6 NYCRR 614.5.

The Old Millerton Sunoco facility consists of one double-walled, underground tank, divided into two storage compartments. With respect to acceptable monitoring systems, Mr. Bendell explained that an example of an electronic monitoring system for this type of tank is the Veeder-Root (Tr, at 82) where a sensor or probe is placed in the interstitial space to detect the presence of any liquid between the inner tank walls and the outer wall (Tr, at 83).

Ms. Simons testified that RGLL installed a Veeder-Root system to monitor the interstitial space of the PBS tank at the Old Millerton Sunoco service station, and that after Respondents stopped dispensing gasoline at the Old Millerton Sunoco service station, RGLL monitored the interstitial space until January 2006 (Tr, at 644-645; Exh 41). Exhibit 10-E is a picture of the Veeder-Root console on the wall of the kiosk at the Old Millerton Sunoco service station (Tr, at 450). Mr. Amato took the collection of photographs identified as Exh 10 during his January 19, 2006 inspection (Exh 9).

When Mr. Cummings inspected the Old Millerton Sunoco facility on March 1, 2007, he took a series of photographs that

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<sup>6</sup> In its closing and reply briefs, Staff does not address the violations alleged in Paragraphs 25 and 26, and 29 and 30 of the complaint.



are identified in the hearing record as Exh 17 A-W (Tr, at 446). Exhibit 17-L is a photograph of the interstitial port, and depicts the probe from the Veeder-Root electronic monitoring system (Tr, at 456). Although the March 1, 2007 inspection post-dates service of the complaint, Exh 17-L corroborates the other evidence in the record concerning the presence of the Veeder-Root monitoring system at the Old Millerton Sunoco facility.

The first element of the violation alleged in Paragraphs 25 and 26 of the complaint is whether Respondents installed any one of the three acceptable leak detection systems at the Old Millerton Sunoco facility. The photographic evidence discussed above shows that RGLL installed a Veeder-Root system to monitor the interstitial space of the Old Millerton Sunoco facility. In addition, the photographic evidence corroborates Ms. Simons testimony concerning the installation and presence of an electronic monitoring system.

The second element relevant to the alleged violation relates to when RGLL installed the Veeder-Root system. Mr. Bendell's unrefuted observation, as recorded in the July 10, 2001 NOV (Exh 26), is that no leak detection system was in place at the time of the May 18, 2001 inspection. In addition, Respondents' witness offered no testimony about when RGLL installed the Veeder-Root system at the Old Millerton Sunoco facility. Consequently, based on the evidence available in the record, I find that RGLL installed the Veeder-Root monitoring system after Staff's May 18, 2001 inspection and before the January 19, 2006 site inspection. As noted in § V of the hearing report, Staff does not rely on Exh 26 as the basis for any of the violations alleged in the January 8, 2006 second amended complaint (Tr, at 69, 71).

Based on the foregoing, I conclude that Staff failed to demonstrate that RGLL violated 6 NYCRR 614.5(a). Rather, the hearing record shows that on January 19, 2006, Staff observed an acceptable leak monitoring system at the Old Millerton Sunoco facility. Therefore, the Commissioner should dismiss the charge alleged in Paragraphs 25 and 26 of the complaint.

## 2. Maintenance of the Leak Detection Equipment

Paragraphs 15 and 16 of the complaint assert that RGLL and GRJH violated 6 NYCRR 613.3 because they did not "maintain leak detection equipment" at the Old Millerton Sunoco facility. The alleged violation asserted in Paragraphs 17 and 18 is similar. In Paragraph 18, Staff asserts that "Respondents failed to

monitor leak detection equipment at the facility," pursuant to 6 NYCRR 614.5 and 6 NYCRR 613.5(b)(3).

Section 613.3 of 6 NYCRR is entitled *Overfill Prevention and Secondary Containment Systems*. The subsections of 6 NYCRR 613.3 relate to (1) transfer of product from delivery vehicles to storage tanks (see 6 NYCRR 613.3[a]); (2) color coding fill ports (see 6 NYCRR 613.3[b]); and (3) specifications for valves, gauges and secondary containment systems (see 6 NYCRR 613.3[c]). Section 613.3(d) of 6 NYCRR states that "[t]he owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order."

As noted in the previous section, 6 NYCRR 614.5(a) requires that all new underground tanks must have one of three specified leak monitoring systems: (1) a double-walled tank with monitoring of the interstitial space; (2) an in-tank monitoring system; or (3) an observation well or wells. With respect to the Old Millerton Sunoco facility, RGLL installed a double walled tank and the Veeder-Root system to monitor the interstitial space. Pursuant to 6 NYCRR 614.5(b), the interstitial space must be monitored for tightness once per week.

Finally, 6 NYCRR 613.5(b) requires the owner or operator of a corrosion-resistant underground tank, which is exempt from the tightness testing requirements at 6 NYCRR 613.5(a)(2)(iii), to monitor for traces of petroleum at least once per week. The hearing record, however, does not include any additional information about the characteristics of underground PBS tank at the Old Millerton Sunoco service station to determine the applicability of this requirement. Absent any information concerning this threshold issue, this report makes no conclusions about Respondents' compliance with 6 NYCRR 613.5(b).

The gist of Department staff's allegations asserted in Paragraphs 15 and 16; and 17 and 18 of the complaint appears to be that RGLL did not maintain the Veeder-Root interstitial monitoring system for the Old Millerton Sunoco facility. The January 20, 2006 NOV (Exh 9) refers to 6 NYCRR 613.3(d), and notes that RGLL is not properly maintaining the leak detection equipment for the Old Millerton Sunoco facility. During the January 19, 2006 inspection, Staff observed that the monitoring equipment was not working. The NOV directed RGLL to submit documentation to Department staff to show that the system has been repaired. Staff also directed RGLL to submit "the last four monitoring reports."

In the closing brief (at 26 of 35) regarding Paragraph 16 of the complaint, Staff refers to the requirement at 6 NYCRR 613.3(d), and argues that the Veeder-Root interstitial monitoring system for the Old Millerton Sunoco facility constitutes "other equipment for spill prevention" that must be kept in "good working order." In the closing brief (at 28 of 35) regarding Paragraph 18 of the complaint, Staff refers to the requirements at 6 NYCRR 614.5(b) and 6 NYCRR 613.5(b)(3), and argues that Respondents did not "monitor the leak detection equipment at the Facility."

The requirement to install a leak monitoring system for new tanks reasonably implies that the operator and owner must also maintain the selected system due to the periodic reporting requirements. For example, 6 NYCRR 614.5(b) requires the interstitial space of double-walled tanks, like the one installed at the Old Millerton Sunoco service station, to be monitored weekly. However, Department staff has not demonstrated that RGLL's failure to maintain the Veeder-Root system at the Old Millerton Sunoco facility has resulted in multiple violations.

Staff's multiple references to different regulations show that several applicable provisions require owners or operators to maintain leak monitoring systems. With respect to these various maintenance requirements, the elements of proof are the same. Therefore, I conclude that RGLL has violated the applicable regulatory requirements to maintain an interstitial monitoring system at the Old Millerton Sunoco facility. Although RGLL has not complied with multiple provisions, RGLL's lack of compliance should be considered a single violation that commenced when Department staff inspected the facility on January 19, 2006 and has continued until service of the complaint. The violation is continuous because RGLL has yet to permanently close the underground PBS tank.

### 3. Monitoring the Interstitial Space

Paragraphs 29 and 30 of the complaint assert that RGLL and GRJH violated 6 NYCRR 614.5 because they did not "monitor the interstitial space." Pursuant to 6 NYCRR 614.5(b), the interstitial space of double-walled tanks must be monitored for tightness using pressure monitoring, vacuum monitoring, electronic monitoring, manual sampling once per week, or an equivalent method.

As noted above, 6 NYCRR 614.5(b) provides owners and operators with several options to monitor the interstitial space.

In addition to using an electronic system, Messrs. Bendell and Cummings described how to manually monitor the interstitial space of the Old Millerton Sunoco facility with a dip stick (Tr, at 83; 452).

Ms. Simons testified that RGLL installed a Veeder-Root system to monitor the interstitial space of the PBS tank at the Old Millerton Sunoco service station, and that after Respondents stopped dispensing gasoline from the Old Millerton Sunoco service station, RGLL continued to monitor the interstitial space until January 3, 2006 (Tr, at 644-645; Exh 41), and then stopped. Consequently, I find that when Staff inspected the facility on January 19, 2006, RGLL was not using any of the systems outlined in 6 NYCRR 614.5(a) to monitor the interstitial space at the Old Millerton Sunoco facility. RGLL's failure to monitor after January 3, 2006 is a violation of 6 NYCRR 614.5(b), and this violation continued until service of the complaint.

#### G. As-Built Plans

Paragraphs 19 and 20 of the complaint assert that RGLL and GRJH violated 6 NYCRR 614.7 because they did not have "as-built plans" available at the Millerton Sunoco service station when Department staff inspected the facility. Section 614.7 of 6 NYCRR relates to the installation of underground facilities and requires compliance with the New York State uniform fire prevention and building code, and the manufacturer's instructions. Pursuant to 6 NYCRR 614.7(d), the owner must maintain an accurate drawing or as-built plans that show the size and location of any new underground PBS tank and piping system. These plans must include a statement by the installer that the system has been installed in compliance with the referenced fire and building code, the manufacturer's instructions, and the requirements outlined in 6 NYCRR part 614.

The January 20, 2006 NOV (Exh 9) states that RGLL did not have as-built plans available for review at the Old Millerton Sunoco facility when Staff was at the service station on January 19, 2006. The January 20, 2006 NOV directs RGLL to submit a copy of the as-built plans and the required statement from the installer within 30 days from the date of the NOV.

The requirement at 6 NYCRR 614.7(d) applies to the owner of a PBS facility. Therefore, RGLL violated 6 NYCRR 614.7(d) when it failed to provide the as-built plans to Department staff either during the January 19, 2006 inspection, or subsequently as

directed in the January 20, 2006 NOV. To date, RGLL has not complied with this requirement, and the violation continues.

H. Testing Tank Tightness

Paragraphs 21 and 22 of the complaint assert that RGLL and GRJH violated 6 NYCRR 613.5 because they failed to test the tightness of the underground PBS tank at the Old Millerton Sunoco service station. Section 613.5 of 6 NYCRR outlines the testing and monitoring requirements for underground storage tanks. This requirement applies to those who own PBS facilities.

Generally, periodic testing for recently installed new tanks, such as the Old Millerton Sunoco facility, can be deferred, or altogether avoided, as long as the tank owner complies with certain regulatory criteria. In its closing brief (at 30 of 35), Department staff argues that RGLL was required to test the tightness of the Old Millerton Sunoco facility because RGLL failed to keep inventory records properly. To support this argument, Staff refers to 6 NYCRR 613.7, which states, in part, that Department staff may order a tank operator or owner to test the tightness of a tank if the operator or owner fails to kept accurate inventory records.

While noting a violation of 6 NYCRR 613.4 regarding inventory records, the January 20, 2006 NOV (Exh 9) also states that the Old Millerton Sunoco facility has not undergone a system test as required by 6 NYCRR 613.5(a)(1)(i). The NOV directed RGLL to test the system for tightness, and to report the results to Department staff within 30 days.

Department staff has demonstrated that RGLL violated the periodic testing requirements outlined in 6 NYCRR 613.5(a)(1)(i). As discussed above (see § VIII[B]), RGLL failed to keep daily inventory records as required by 6 NYCRR 613.4(a)(1). Therefore, pursuant to the authority provided by 6 NYCRR 613.7, Department staff may order RGLL to test the underground PBS tank at the Old Millerton Sunoco service station for tightness. Department staff ordered this test in the January 20, 2006 NOV, and directed RGLL to provide the test results to Department staff. At the hearing, no one offered any tightness testing results. This violation commenced with Staff's January 19, 2006 inspection and continues to date.

I. Secondary Containment

Paragraphs 23 and 24 of the complaint assert that RGLL and GRJH violated 6 NYCRR 614.4 because they failed to have secondary containment for the tank at the Old Millerton Sunoco service station.<sup>7</sup> Section 614.4 of 6 NYCRR outlines the minimum standards for secondary containment for underground storage tanks. Pursuant to 6 NYCRR 614.4(a), new tanks must have one of the following characteristics: (1) a double wall; (2) a vault; (3) cut-off walls; or (4) an impervious underlayment. The requirements outlined at 6 NYCRR 614.4 apply to "all new tanks." Moreover, the regulations at 6 NYCRR 614.4 do not distinguish whether the owner or the operator is responsible for complying with these requirements. Accordingly, the operator, owner, or both may be held liable for violations of the requirements outlined at 6 NYCRR part 614.4.

The January 20, 2006 NOV (Exh 9) states that the underground PBS tank at the Old Millerton Sunoco service station does not have any secondary containment. The NOV states further that the tank must be double walled, or installed in either an excavation liner or a vault. The NOV directs RGLL to submit documentation to Department staff about the underground PBS tank.

At hearing, Ms. Simons testified that RGLL installed a stainless steel, fiberglass-coated tank in 1999, and subsequently installed the Veeder-Root system to monitor the underground PBS tank (Tr, at 637; Exh 4). Also, Department staff testified that the Veeder-Root system could be used, in part, to monitor the interstitial space of the underground PBS tank at the Old Millerton Sunoco service station (Tr, at 451, 456). From this testimony, it can reasonably be inferred that the underground PBS tank at the Old Millerton Sunoco service station is double-walled.

Though not the documentation requested by Staff in the January 20, 2006 NOV, the hearing record shows that RGLL complied with the requirement at 6 NYCRR 614.4(a)(1) by installing a double-walled tank. As a result, no violation has been demonstrated. Accordingly, the Commissioner should dismiss the charge alleged against Respondents concerning their lack of compliance with 6 NYCRR 614.4.

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<sup>7</sup> Staff does not address this alleged violation in either its closing or reply briefs.

J. Color Coded Fill Ports

1. Fill Ports

Paragraphs 27 and 28 of the complaint assert that RGLL and GRJH violated 6 NYCRR 613.3 because they "failed to appropriately label the fill ports" for the PBS tank at the Old Millerton Sunoco service station. Pursuant to 6 NYCRR 613.3(b)(1), the owner or operator must mark all fill ports to identify the petroleum product in the storage tank. The colors and symbols, which are established by the American Petroleum Institute, are specified at 6 NYCRR 613.3(b)(2 and 3).

When Mr. Bendell inspected the Old Millerton Sunoco facility on May 18, 2001, he observed that the fill ports were not properly color coded, and advised RGLL of his observations in the NOV dated July 10, 2001 (Tr, at 98; Exh 26). At the hearing, Mr. Bendell reviewed Exh 10-C. Exhibit 10-C is a photograph taken by Mr. Amato during his January 19, 2006 inspection of the Old Millerton Sunoco facility.

Based on his review of Exh 10-C, Mr. Bendell testified that the fill ports were not color coded (Tr, at 97). He testified further that one fill port at the Old Millerton Sunoco facility should be white with a black cross, and that the other should be red with a white cross (Tr, at 98). The fill ports depicted in Exh 10-C are not marked in the manner described by Mr. Bendell.

Staff received a letter from Respondents' counsel dated October 5, 2006, which advised that Respondents were going to remove the tank on October 10, 2006 (Exh 14). Based on this notice by Respondents' counsel, Mr. Amato went to the Old Millerton Sunoco service station on October 10, 2006, to observe the removal of the underground PBS tank (Tr, at 126), and took a series of photographs (Exh 12 A-D). During the hearing, Mr. Bendell reviewed Exh 12-B, which depicts the fill ports for the underground PBS tank (Tr, at 127). The labeling on the fill ports at the time of Mr. Amato's October 10, 2006 inspection did not improve from his January 19, 2006 inspection.

At the hearing, neither Mr. Metz nor Ms. Simons offered any testimony about how the fill ports for the Old Millerton Sunoco facility were marked, if at all, at the time of Staff's inspections.

Based on the foregoing, I find that the fill ports at the Old Millerton Sunoco facility were not properly color coded at

the time of Staff's January 19, 2007 inspection. I conclude, therefore, that RGLL violated 6 NYCRR 613.3(b). Based on Exh 12-B, which documents Mr. Amato's January 10, 2006 inspection, this violation continued.

## 2. Label Requirements

In its closing brief (pp. 18-19 of 35), Staff refers to Paragraph 28 of the complaint, and alleges that Respondents violated 6 NYCRR 614.3(a). For this alleged violation, Staff seeks a civil penalty of \$400.

Section 614.3(a) of 6 NYCRR outlines the label requirements for new underground tanks. This information may be stenciled directly on the tank, or presented on a label or plate that must be permanently affixed to the tank. The required information includes, among other things (1) a statement that the tank conforms with 6 NYCRR 614; (2) the standard of design; (3) the petroleum products stored in the tank; (4) the year the tank was manufactured; and (5) the dimensions of the tank. Pursuant to 6 NYCRR 614.3(a)(2), the information required by 6 NYCRR 614.3(a) must be presented on a second label that is affixed to the fill port so that a petroleum carrier can see the information before petroleum products are transferred into the underground PBS tank.

The January 20, 2006 NOV (Exh 9) states that the underground PBS "tank(s) does not have the appropriate labeling at the fill port." The NOV refers to 6 NYCRR 614.3(a)(1) and 614.3(a)(2), and states that the second label is not affixed to the fill ports on the underground PBS tank at the Old Millerton Sunoco service station.

Although a violation of 6 NYCRR 614.3(a) is cited in the January 20, 2006 NOV (Exh 9), there is no reference in the complaint to 6 NYCRR 614.3 and its subparagraphs. Service of the notice of hearing and complaint commences an administrative enforcement proceeding, not mailing a NOV (see 6 NYCRR 622.3[a][1]). Therefore, Respondents did not receive any notice in the complaint of an alleged violation of 6 NYCRR 614.3.

Staff asserts, for the first time in its closing brief, that Respondents violated 6 NYCRR 614.3(a). In addition, I note that Staff did not offer any evidence at the hearing to prove this new allegation other than Exh 9. The testimony and photographic evidence presented during the hearing, as discussed above in § VIII(J)(1), concerns the requirements for color coding



fill ports outlined in 6 NYCRR 613.3(b) and not the labeling requirements at 6 NYCRR 614.3.

Because Staff's presentation at the hearing focused on a violation of 6 NYCRR 613.3, as expressly asserted in Paragraphs 27 and 28 in the complaint, Respondents did not have the opportunity to develop a factual record about an allegation concerning a violation of 6 NYCRR 614.3 (b). Accordingly, this report makes no findings of fact or conclusions about an alleged violation of 6 NYCRR 614.3(a) and 614.3(b).

K. Spill Prevention Equipment (6 NYCRR 613.3[d])

Paragraphs 31 and 32 of the complaint assert that RGLL and GRJH violated 6 NYCRR 613.3 because they failed to maintain spill prevention equipment at the Old Millerton Sunoco facility.<sup>8</sup> As noted in § VIII(F), 6 NYCRR 613.3 outlines the requirements for overflow prevention and secondary containment systems for PBS tanks.<sup>9</sup> In particular, the subsections of 6 NYCRR 613.3 relate to (1) transfer of product from delivery vehicles to storage tanks (see 6 NYCRR 613.3[a]); (2) color coding fill ports (see 6 NYCRR 613.3[b]); (3) specifications for valves, gauges and secondary containment systems (see 6 NYCRR 613.3[c]); and (4) maintenance of spill prevention equipment (see 6 NYCRR 613.3[d]). Pursuant to 6 NYCRR 613.3(d), the owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order.

Mr. Amato's inspection report from his August 28, 2006 visit to the Old Millerton Sunoco service station (Exh 25) notes a violation of 6 NYCRR 613.3(d) because the sump and fill port catch basin for the underground PBS tank is not maintained. The September 12, 2006 NOV (Exh 27)<sup>10</sup> states that liquids have accumulated in the sump, and notes that the owner and operator is required to keep all gauges, valves and other equipment for spill prevention in good working order. The NOV directs RGLL to clean

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<sup>8</sup> Staff does not address this alleged violation in either its closing or reply briefs.

<sup>9</sup> Section VIII(F) (Leak Detection) of this report addresses the violations asserted in Paragraphs 15 and 16; 17 and 18; 25 and 26; and 29 and 30 of the complaint.

<sup>10</sup> The 6 NYCRR 613.3(d) violation noted in the January 20, 2006 NOV (Exh 9) is discussed in § VIII(F).

out the sumps and to submit a photograph to Department staff to demonstrate compliance with requirement.

Staff's proof concerning this allegation consists of Mr. Amato's August 28, 2006 inspection report (Exh 25), the September 12, 2006 NOV (Exh 27), and a photograph taken by Mr. Amato on October 10, 2006 (Exh 12-A). For the hearing, Mr. Amato did not testify about his August 28, 2006 and October 10, 2006 site visits. Rather, Mr. Bendell testified about the content of the September 12, 2006 NOV (Tr, at 116) and the photograph identified as Exh 12-A (Tr, at 127). With respect to the September 12, 2006 NOV, Mr. Bendell testified that (1) the purpose of a sump is to collect and contain small amounts of petroleum products that may spill during transfer; (2) it is supposed to be kept dry; and (3) the sump was not dry on January 19, 2006, according to the NOV (Tr, at 116). With respect to Exh 12-A, Mr. Bendell testified that it "shows an unmaintained dispenser sump" (Tr, at 127).

Violations concerning RGLL's lack of compliance with the requirement outlined in 6 NYCRR 613.3(d) are addressed above in § VIII(F). I find that RGLL's failure to maintain the sump is another example of RGLL's failure to comply with 6 NYCRR 613.3(d). Department staff has not made a convincing argument that the circumstances associated with sump maintenance should be considered a separate and distinct violation from those already found in § VIII(F). Accordingly, the Commissioner should consider this charge to be part of a continuing violation of 6 NYCRR 613.3(d).

#### L. Closure

Paragraphs 33 and 34 of the complaint assert that RGLL and GRJH violated 6 NYCRR 613.9 because they did not permanently close the tank at the Old Millerton Sunoco service station. Section 613.9 of 6 NYCRR outlines the requirements for closing out-of-service PBS tanks. Tanks may be temporarily closed (see 6 NYCRR 613.9[a]), or permanently closed (see 6 NYCRR 613.9[b]). If a tank is temporarily closed, it remains subject to all requirements of 6 NYCRR parts 612 and 613, which include, among other things, periodic tightness testing, inspection, registration and reporting requirements (see 6 NYCRR 613.9[a][2]). Pursuant to 6 NYCRR 613.9(c), the owner of a tank must notify the Department at least 30 days prior to permanently closing the tank.

The September 12, 2006 NOV states that the underground PBS tank at the Old Millerton Sunoco service station has not been

permanently closed, and directs RGLL to do so in compliance with the requirements outlined at 6 NYCRR 613.9(b). Based on the case law discussed in § VI concerning the operator and owner of the Old Millerton Sunoco facility, and the factual circumstances of RGLL's continued monitoring of the underground PBS tank, RGLL owns the tank. Consequently, RGLL is responsible for complying with the requirements at 6 NYCRR 613.9 concerning the closure of the tank. Therefore, RGLL violated 6 NYCRR 613.9 by failing to permanently close the Old Millerton Sunoco facility. This violation has continued since April 2003.

## IX. Relief

For violations of ECL article 17, titles 1 through 11, inclusive, and title 19, as well as implementing regulations, which include 6 NYCRR parts 612, 613 and 614, ECL 71-1929 provides for a maximum civil penalty of \$37,500 per day for each violation. Staff requests, in the complaint, a total civil penalty of \$55,000, and an order from the Commissioner that would direct Respondents to permanently close the tank at the Old Millerton Sunoco service station by removing it, consistent with the requirements outlined in 6 NYCRR 613.9.

### A. Civil Penalty

In its closing brief (at 1 of 35), Staff requested an additional civil penalty of \$6,100 for the first time in this proceeding. Therefore, the total requested civil penalty would increase from \$55,000 to \$61,100 (\$55,000 + \$6,100). Staff argues that the Commissioner has the discretion to grant Staff's request for additional civil penalties.

In its closing brief, Staff provides a detailed civil penalty calculation based on the violations alleged in the complaint.<sup>11</sup> For the civil penalty calculation, Staff relies, in part, on the guidance provided by Division of Environmental Enforcement Policy No. 22 (DEE-22) entitled, *PBS Inspection Enforcement Policy*, issued May 21, 2003. DEE-22 includes a schedule that recommends civil penalties for violations of the requirements outlined in 6 NYCRR parts 612, 613 and 614.

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<sup>11</sup> Although Staff requests \$61,100 in its closing brief, the sum of the civil penalty amounts apportioned for each allegation is actually \$70,100. The discrepancy is not explained in Staff's papers. Respondents did not object to either amount.

According to DEE-22, the recommended civil penalties outlined in the schedule do not apply to the resolution of violations where, as here, an administrative enforcement hearing has been held. Under such circumstances, and to facilitate fair and consistent enforcement efforts, however, the recommended civil penalties in DEE-22 identify minimum benchmarks.

With a reference to ECL 71-1929, the complaint provides Respondents with notice of the potential maximum civil penalty for each alleged violation (see Paragraph 35 of the complaint). Nevertheless, Staff limited its initial request in the complaint to \$55,000. The discussion that follows addresses the civil penalties that Department staff requested for each demonstrated violation.

#### 1. Registration Renewal

In its closing brief (at 10-11 of 35), Department staff requests a civil penalty of \$10,100 for Respondents' failure to renew the registration for the Old Millerton Sunoco facility after it expired on March 1, 2005. Staff correctly notes that tank registration and periodic renewals are the cornerstone of the PBS program.

Department staff argues that because Respondents operate other PBS facilities in New York State, they are more familiar with the applicable regulatory requirements than someone who operates one storage facility.<sup>12</sup> Consequently, Staff asserts that Respondents' level of culpability or knowledge of the applicable requirements is high. I agree, and the Commissioner should consider this aggravating factor to be significant in determining the appropriate civil penalty with respect to this and the other demonstrated violations.

With respect to the Old Millerton Sunoco facility, Department staff argues that after each inspection, Respondents received a NOV which advised Respondents that the registration

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<sup>12</sup> Respondents' other PBS facilities include the New Millerton Sunoco facility. A group of PBS facilities, other than the New Millerton Sunoco facility, were the subject of a previous administrative enforcement action (see *Matter of RGLL, Inc., James Metz, and Lauren Simons* [DEC File No. R4-2004-0330-41], Commissioner's Decision and Order dated January 21, 2005). The document is available on the Department's web site at [www.dec.ny.gov](http://www.dec.ny.gov).

for the underground PBS tank at the Old Millerton Sunoco facility needed to be renewed (see Exhs 9, 18, 25 and 27).

In addition, Staff also contends that RGLL obtained an economic benefit from not renewing the registration of the Old Millerton Sunoco facility. With reference to 6 NYCRR 612.3(a), Staff contends that the renewal registration fee for an underground PBS tank with a capacity between 1,000 to 2,000 gallons is \$50.<sup>13</sup>

Based on the aggravating factors identified above, Staff requests that the Commissioner double the civil penalty recommended in DEE-22, which is \$5,000, and also double the \$50 registration fee. Therefore, the total civil penalty would be \$10,100. I conclude that Staff's civil penalty request for this violation is reasonable, and recommend the same to the Commissioner.

## 2. Inventory Records

For Respondents' failure to maintain inventory records in violation of ECL 17-1005(1)(b) and 6 NYCRR 613.4(a) (see Paragraphs 7 and 8 of the complaint), Department staff proposes, in its closing brief (at 20-25), a civil penalty of \$15,000. With reference to 6 NYCRR 613.4(a)(1), Staff notes that the purpose of keeping inventory records is to detect leaks. Therefore, this requirement is vital to protecting the State's water resources, and the failure to comply with this requirement justifies a substantial civil penalty.

Staff identifies three aggravating factors to support the requested civil penalty for this violation. First, Staff asserts that Respondents do not properly maintain inventory records at their other New York facilities. Second, Staff contends that the violation at the Old Millerton Sunoco facility continued for six years. Third, Staff asserts that the violation is knowing and intentional.

Exhibits 11, 28 and 35 relate to Staff's assertion that Respondents do not properly maintain inventory records at their other facilities in New York State. Exhibit 11 is a copy of a NOV dated September 12, 2006 concerning Mr. Amato's August 28,

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<sup>13</sup> The renewal fee for a 12,000-15,000 gallon tank, such as the Old Millerton Sunoco facility, is \$250 (see 6 NYCRR 612.3[a]).

2006 inspection of the New Millerton Sunoco facility. As noted above, Respondents commenced operations at the second, newer facility in Millerton across the street from the Old Millerton Sunoco service station shortly after leaving the Old Millerton Sunoco facility in the spring of 2003. During the August 28, 2006 inspection of the New Millerton Sunoco facility, the operator did not provide Mr. Amato with the required inventory records (Exh 11).

Exhibit 28 is a letter dated September 12, 2006 from Ms. Simons on behalf of RGLL to Mr. Amato. In her September 12, 2006 letter, Ms. Simons states that she was made aware of Mr. Amato's August 28, 2006 inspection, and explains that the New Millerton Sunoco facility does maintain inventory records. With her September 12, 2006 letter, Ms. Simons enclosed copies of the 10-day reconciliation records, which are identified in the hearing record as Exh 35.

At the New Millerton Sunoco facility, there are three storage tanks, according to Exh 35. Regular gasoline is stored in the first tank, and its capacity is 15,000 gallons. Ultra gasoline is stored in the second tank, and its capacity is 5,000 gallons. Diesel gasoline is stored in the third tank, and its capacity is 5,000 gallons. Ms. Simons provided two 10-day inventory reconciliation worksheets for each of the three tanks at the New Millerton Sunoco facility. The first worksheet for each tank records the inventory from August 5, 2006 to August 10, 2006, which is for a period of 5 days. The second worksheet for each tank records the inventory from August 11, 2006 to August 20, 2006, which is a 10-day period.

Staff argues that the proffered inventory records do not comply with 6 NYCRR 613.4 because the records show only a five-day period and not the required 10-day period. As noted above, although the first sheet is for five days, the second sheet is for 10 days. The more significant issue with respect to Exh 35, however, is that Ms. Simons did not offer any records for August 28, 2006, which was the date of Staff's inspection. In other words, the worksheets for the next 10 days (*i.e.*, August 21, 2006 to August 31, 2006) should have been completed before Ms. Simons sent her September 12, 2006 letter and enclosures to Mr. Amato. The absence of the 10-day worksheet for the August 21, 2006 to August 31, 2006 period is conspicuous particularly when Staff identified such documents at the April 4, 2007 hearing session, and Respondents were provided the opportunity to submit these and any other exculpatory documents after the hearing concluded (see § IV [Additional Exhibits]). Therefore, the Commissioner should

consider Respondents' failure to provide a set of inventory records for the New Millerton Sunoco facility relative to Staff's August 28, 2006 inspection to be an aggravating factor that supports Staff's request.

The second aggravating factor concerns the duration of the violation, and Staff argues that the violation continued for six years. According to Staff, Respondents began operations in 1999 with the installation of the underground PBS tank at the Old Millerton Sunoco service station. Subsequently, Department staff inspected the facility on May 18, 2001 (see Exh 26 [July 10, 2001 NOV]). The next inspection was January 19, 2006 (see Exh 9), which is about 5½ years later. Inventory records for the Old Millerton Sunoco facility were not available to either Mr. Bendell during his May 18, 2001 inspection or Mr. Amato during his January 19, 2006 inspection. As Staff claims, the duration of the violation has been about six years.

With respect to the third aggravating factor, Department staff argues, as before, that Respondents operate other PBS facilities in New York State, and are more familiar with the applicable regulatory requirements than someone who operates one storage facility. Consequently, Staff argues that Respondents' level of culpability or knowledge of the applicable requirements is high. I agree, and the Commissioner should consider this aggravating factor to be significant in determining the appropriate civil penalty with respect to this violation.

Based on the foregoing discussion, a substantial civil penalty for this violation is warranted. I recommend that the Commissioner assess a civil penalty of \$10,000 against RGLL for violating ECL 17-1005(1)(b) and 6 NYCRR 613.4(a). This recommendation is reduced from the amount that Department staff requests in the closing brief so that the total civil penalty sought in the complaint is not exceeded. In the event that the Commissioner chooses to assess the additional civil penalties that Staff requests in the closing brief, the Commissioner could assess a civil penalty of \$15,000 for this violation.

### 3. Registration Certificate (Display)

RGLL violated 6 NYCRR 612.2(e) when it failed to display the registration for the Old Millerton Sunoco facility. Staff initially observed the violation during the January 19, 2006 site visit, and RGLL had not corrected this violation when Staff inspected the site some seven months later on August 28, 2006. The violation is ongoing because the underground PBS tank at the

Old Millerton Sunoco service station has not been permanently closed.

For this violation, Department staff requests a civil penalty of \$200 (closing brief at 16 of 35), which is double the civil penalty recommended in DEE-22. Staff notes that Respondents received notices of violation, which identified the requirement to display the registration certificate (see Exhs 9, 18, 25 and 27).

For RGLL's alleged failure to have a current and valid registration, Staff requested a civil penalty of \$2,000 (closing brief at 14 of 35), which is double the civil penalty recommended in DEE-22. To justify this request, Department staff relies on the aggravating factors related to RGLL's ownership and operation of other underground PBS facilities in New York State, and the NOV's concerning the Old Millerton Sunoco facility.

In § VIII(D), I concluded that RGLL violated 6 NYCRR 612.2(e) (see Paragraphs 11 and 12 of the complaint). In § VIII(E), I concluded that the violations alleged in Paragraphs 11 and 12, and 13 and 14 of the complaint are essentially the same because the displayed certificate must be current and valid (see 6 NYCRR 612.2[e]).

In order to display a current and valid registration certificate as required by 6 NYCRR 612.2(e), the owner of an underground PBS facility must file a timely renewal application and obtain a certificate from Department staff. With respect to the Old Millerton Sunoco facility, RGLL did not timely renew its registration and, as discussed above, the Commissioner should assess a civil penalty of \$10,100. For failing to display a current and valid certificate at the Old Millerton Sunoco facility after March 1, 2005, the Commissioner should assess RGLL an additional civil penalty of \$2,000.

#### 4. Leak Detection Equipment

The alleged violations concerning the leak detection equipment at the Old Millerton Sunoco facility are discussed in § VIII(F). The charges are asserted in Paragraphs 15 and 16; 17 and 18; 25 and 26; and 29 and 30 of the complaint.

##### (a) Installation of Leak Detection Equipment

The alleged violation concerning RGLL's failure to install leak detection equipment at the Old Millerton Sunoco facility is



asserted in Paragraphs 25 and 26 of the complaint. For the reasons outlined in § VIII(F)(1), I found that RGLL installed a Veeder-Root system at the Old Millerton Sunoco facility, and concluded that RGLL had complied with 6 NYCRR 614.5(a). In its closing brief, Staff does not discuss this alleged violation and, accordingly, does not request any civil penalty.

(b) Maintenance of Leak Detection Equipment

With respect to the maintenance of leak detection equipment at the Old Millerton Sunoco facility, Department staff has requests a civil penalty of \$5,000 for the violation asserted in Paragraphs 15 and 16 of the complaint (closing brief at 27-28 of 35), and an additional civil penalty of \$5,000 for the violation asserted in Paragraphs 17 and 18 (closing brief at 29 of 35).

This hearing report finds that RGLL stopped using the Veeder-Root system at the Old Millerton Sunoco facility, and monitored the interstitial space manually once a week from April 2003 until January 3, 2006 (Exh 41). When Staff inspected the Old Millerton Sunoco facility on January 19, 2006 (Exh 9), RGLL had not operated the Veeder-Root system since April 2003 and had stopped manually monitoring the interstitial space in violation of various provisions of the regulations including 6 NYCRR 613.3(d) and 6 NYCRR 614.5(a). RGLL is required to maintain the leak detection equipment at the Old Millerton Sunoco facility because the underground PBS tank has not been permanently closed (see 6 NYCRR 613.9[a][2]). Based on the aggravating factors identified by Department staff, the Commissioner should assess a substantial civil penalty of at least \$5,000.

(c) Monitoring the Interstitial Space

Staff does not discuss the allegations presented in Paragraphs 29 and 30 of the complaint in its closing brief. Paragraphs 29 and 30 assert that Respondents violated 6 NYCRR 614.5 because they did not monitor the interstitial space. When Staff inspected the Old Millerton Sunoco facility on January 19, 2006, RGLL was not using any of the systems outlined in 6 NYCRR 614.5(a) to monitor the interstitial space of the underground PBS tank. Consequently, RGLL's failure to monitor after January 3, 2006 is a violation of 6 NYCRR 614.5(b) that has continued.

For violations of 6 NYCRR 614.5(b), the schedule for DEE-22 recommends a civil penalty of \$250 per tank for pre-hearing settlement purposes. For the other violations, Staff has offered a reasonable explanation for doubling the civil penalty

recommended in DEE-22, and that rationale should be applied here. Accordingly, I recommend that the Commissioner assess a civil penalty of \$500 for this violation.

5. As-built Plans

RGLL violated 6 NYCRR 614.7(d) when it failed to provide the as-built plans to Department staff either during the January 19, 2006 inspection, or subsequently as directed in the January 20, 2006 NOV. To date, RGLL has not complied with this requirement, and the violation continues.

In its closing brief (at 20 of 35), Department staff requests a civil penalty of \$2,000. To support this civil penalty request, Department staff reasonably relies on the aggravating factors already discussed. Accordingly, the Commissioner should assess the full amount requested by Department staff for this demonstrated violation.

6. Testing Tank Tightness

Department staff has demonstrated that RGLL violated the periodic testing requirements outlined in 6 NYCRR 613.5(a)(1)(i). As discussed in § VIII(B), RGLL failed to keep daily inventory records as required by 6 NYCRR 613.4(a)(1). Therefore, pursuant to the authority provided by 6 NYCRR 613.7, Department staff may order RGLL to test the underground PBS tank at the Old Millerton Sunoco service station for tightness. Department staff ordered this test in the January 20, 2006 NOV (Exh 9), and directed RGLL to provide the test results to Department staff. At the hearing, no one offered any tightness testing results. This violation commenced with Staff's January 19, 2006 inspection and continues to date.

In its closing brief (at 33 of 35), Department staff requests a civil penalty of \$20,000. The requested civil penalty is double the amount recommended in DEE-22. For this violation, I recommend that the Commissioner assess a civil penalty of \$15,000. This recommendation is reduced from the amount that Department staff requests in the closing brief so that the total civil penalty sought in the January 8, 2006 second amended complaint is not exceeded. In the event that the Commissioner chooses to assess the additional civil penalties that Staff requests in the closing brief, the Commissioner could assess a civil penalty of \$20,000 for this violation.

7. Color Coded Fill Ports

In its closing brief (at 17-18 of 35), Staff proposes a civil penalty of \$400 for Respondents' failure to properly color code the fill ports in violation of 6 NYCRR 613.3(b) (see Paragraphs 27 and 28 of the complaint). To justify the requested civil penalty, Staff argues there are aggravating factors associated with Respondents' non-compliance with NOV's, and the duration of the violations. Staff also asserts that Respondents knowingly and intentionally violated 6 NYCRR 613.3(b). Staff has provided a reasoned elaboration for its request with respect to this violation, and the Commissioner should adopt it.

If the Commissioner chooses to assess the additional civil penalties that Staff requests in the closing brief, the Commissioner could increase the civil penalty from \$400 to \$500 for this violation.

8. Closure

RGLL violated 6 NYCRR 613.9 by failing to close the Old Millerton Sunoco facility properly. This violation has continued since RGLL left the Old Millerton Sunoco service station in April 2003.

For this violation, Department staff requested a civil penalty of \$10,000 (closing brief at 34 of 35). Staff relies on the previously discussed aggravating factors to support this request. In addition to the requested civil penalty for this violation, Staff requests that the Commissioner order RGLL to permanently close the Old Millerton Sunoco facility by removing it consistent with the requirements outlined at 6 NYCRR 613.9(b).

9. Civil Penalty Calculation

Based on the foregoing discussion, I recommend that the Commissioner assess a total civil penalty of \$55,000. This is the full amount sought in the complaint. If the Commissioner decides to assess the additional amount that Staff requests in its closing brief, the Commissioner could assess the alternative civil penalty amount, as outlined above.

B. Remediation - Tank Closure

In the complaint and in its closing brief (at 34 of 35), Department staff requests an order from the Commissioner that

would direct Respondents to permanently close the underground PBS tank at the Old Millerton Sunoco service station consistent with the requirements in 6 NYCRR 613.9(b). Based on the discussion in § VI, RGLL continues to own the underground PBS tank at the Old Millerton Sunoco service station.

The hearing record includes evidence that RGLL intended to permanently close the Old Millerton Sunoco facility by removing the underground PBS tank that it installed in 1999. The environmentally prudent course of action would be to permanently close the underground PBS tank that RGLL installed at the Old Millerton Sunoco service station in 1999, and complete the remediation of the site as it relates to the 1993 petroleum spill (see Exh 13). Accordingly, the Commissioner should order RGLL to remove the underground PBS tank that it installed at the Old Millerton Sunoco service station in 1999.

### **Conclusions**

#### Trade Fixture

1. The underground PBS tank at the Old Millerton Sunoco service station is a trade fixture and not an improvement that became the property of the landlord. (See *Shell* 648 F Supp, *supra*, and *Drouin* 209 AD2d, *supra*).

#### Facility Registration

2. The requirements outlined at ECL 17-1009(2) and 6 NYCRR 612.2(a)(1) require the owner of a PBS facility to register the facility with the Department. Section 612.2(a)(2) of 6 NYCRR requires owners to renew the registration every five years until the Department receives written notice that either the facility has been permanently closed, or ownership has been transferred. RGLL violated 6 NYCRR 612.2(a)(2) by not timely renewing the Old Millerton Sunoco facility. This violation commenced with the expiration of the initial registration on March 1, 2005 and has continued.

#### Inventory Records

3. Pursuant to 6 NYCRR 613.4(a), the operator of an underground PBS tank must keep daily inventory records for the purpose of detecting leaks. In addition, operators must maintain these records for at least five years, and upon request make them available to Department staff for review pursuant to 6

NYCRR 613.4(c). RGLL violated 6 NYCRR 613.4(a)(1) when it failed to keep daily inventory records for the Old Millerton Sunoco facility.

Notice of Substantial Modification

4. Pursuant to 6 NYCRR 612.2(d), an owner must notify Department staff 30 days prior to substantially modifying the facility. The allegations asserted in Paragraphs 9 and 10 of the January 8, 2007 second amended complaint fail to state a cause of action because the nature of the substantial modification is not alleged, and the time when the alleged modification took place is not specified. Staff did not demonstrate that RGLL substantially modified the Old Millerton Sunoco facility at the time of Staff's inspections.

Registration Certificate (Display)

5. Pursuant to 6 NYCRR 612.2(e), operators must file a registration application and fee with the Department, and after obtaining the registration certificate, display it on the premises at all times. RGLL violated 6 NYCRR 612.2(e) when it failed to display the registration for the Old Millerton Sunoco facility. The violation has continued since January 19, 2006 because RGLL did not timely renew the registration, and the underground PBS tank at the Old Millerton Sunoco service station has not been permanently closed.

Registration Certificate (Current and Valid Information)

6. Operators must display a "current and valid" registration certificate on the premises at all times pursuant to 6 NYCRR 612.2(e). By failing to renew the tank registration subsequent to the March 1, 2005 expiration of the original registration, RGLL could not have displayed a "current and valid" certificate at the Old Millerton Sunoco facility as required by 6 NYCRR 612.2(e).
7. However, Staff did not show how the alleged violation asserted in Paragraphs 13 and 14 of the January 8, 2006 second amended complaint is different from those asserted in the Paragraphs 5 and 6, and 11 and 12. I conclude that the alleged violation asserted in Paragraphs 11 and 12 is the same as that asserted in Paragraphs 13 and 14.

Leak Detection Equipment

8. RGLL installed the Veeder-Root monitoring system before the January 19, 2006 site inspection. Therefore, Staff failed to demonstrate that RGLL violated 6 NYCRR 614.5(a).
9. RGLL violated the applicable regulatory requirements to maintain an interstitial monitoring system at the Old Millerton Sunoco facility. Although RGLL has not complied with multiple provisions (e.g., 6 NYCRR 613.3[d] and 6 NYCRR 614.5), RGLL's lack of compliance should be considered a single violation that commenced when Department staff inspected the facility on January 19, 2006 and has continued because RGLL has yet to permanently close the underground PBS tank.
10. When Staff inspected the Old Millerton Sunoco facility on January 19, 2006, RGLL was not using any of the systems outlined in 6 NYCRR 614.5(a) to monitor the interstitial space of the underground PBS tank. RGLL's failure to monitor the interstitial space after January 3, 2006 is, therefore, a violation of 6 NYCRR 614.5(b) that has continued.

As-built Plans

11. Section 614.7 of 6 NYCRR relates to the installation of underground facilities and requires compliance with the New York State uniform fire prevention and building code, and the manufacturer's instructions. Pursuant to 6 NYCRR 614.7(d), the owner must maintain an accurate drawing or as-built plans that show the size and location of any new underground PBS tank and piping system. RGLL violated 6 NYCRR 614.7(d) when it failed to provide the as-built plans to Department staff either during the January 19, 2006 inspection, or subsequently as directed in the January 20, 2006 NOV. To date, RGLL has not complied with this requirement and, therefore, the violation continues.

Testing Tank Tightness

12. Section 613.5 of 6 NYCRR outlines the testing and monitoring requirements for underground storage tanks. Table 1 at 6 NYCRR 613.5(a)(1) requires owners to periodically test the tightness of the underground storage tanks. Department staff demonstrated that RGLL violated the periodic testing requirements outlined in 6 NYCRR 613.5(a)(1)(i) because RGLL

failed to keep daily inventory records as required by 6 NYCRR 613.4(a)(1).

13. Pursuant to the authority provided by 6 NYCRR 613.7, Department staff ordered this test in the January 20, 2006 NOV, and directed RGLL to provide the tightness test results to Department staff. Because RGLL has not complied with this directive, the violation of 6 NYCRR 613.5(a)(1) commenced with Staff's January 19, 2006 inspection and continues to date.

#### Secondary Containment

14. Section 614.4 of 6 NYCRR outlines the minimum standards for secondary containment for "all new tanks," and does not distinguish among operators or owners a responsible for complying with these standards. Staff offered no evidence that Respondents failed to comply with the 6 NYCRR 614.4 secondary containment standards. Accordingly, no violation has been demonstrated.

#### Color Coded Fill Ports

15. Pursuant to 6 NYCRR 613.3(b)(1), the owner or operator must mark all fill ports to identify the petroleum product in the storage tank. The colors and symbols, which are established by the American Petroleum Institute, are specified at 6 NYCRR 613.3(b)(2) and (3). The fill ports at the Old Millerton Sunoco facility were not properly color coded at the time of Staff's January 19, 2006 inspection. Therefore, RGLL violated 6 NYCRR 613.3(b).

#### Spill Prevention (6 NYCRR 613.3)

16. Pursuant to 6 NYCRR 613.3(d), the owner or operator of a PBS facility must keep all related gauges, valves and other equipment for spill prevention in good working order. Violations concerning RGLL's lack of compliance with the requirement outlined in 6 NYCRR 613.3(d) are addressed above in § VIII(F). RGLL's failure to maintain the sump is another example of its failure to comply with 6 NYCRR 613.3(d) (see Conclusion No. 10).

#### Closure

17. Section 613.9 of 6 NYCRR outlines the requirements for closing out of service storage tanks. Based on the case law

discussed in § VI, and the factual circumstances of RGLL's continued monitoring of the underground PBS tank, RGLL owns the Old Millerton Sunoco facility. Consequently, RGLL is responsible for complying with the requirements at 6 NYCRR 613.9. Therefore, RGLL violated 6 NYCRR 613.9 by failing to properly close the Old Millerton Sunoco facility.

### **Recommendations**

1. The Commissioner should grant GRJH's second motion *in limine*, and dismiss the charges alleged in the January 8, 2007 second amended complaint against GRJH. GRJH had stopped operating the Old Millerton Sunoco facility prior to Staff's January 19, 2006 inspection.
2. Based on the forgoing discussion, the Commissioner should dismiss, with prejudice, the charges alleged in Paragraphs 9 and 10, 23 and 24, as well as 25 and 26 of the January 8, 2007 second amended complaint.
3. The Commissioner should conclude that RGLL violated various provisions of 6 NYCRR parts 612, 613 and 614 as discussed in §VIII of the hearing report.
4. For the foregoing violations, the Commissioner should assess a total civil penalty of at least \$55,000 against RGLL.
5. The Commissioner should direct RGLL to permanently close the Old Millerton Sunoco facility by removing the underground PBS tank that RGLL installed in 1999.

Appendix A: January 8, 2007 second amended complaint.  
Appendix B: Exhibit List.



STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of  
Articles 17, 19, 27, 37 and 71 of the Environmental  
Conservation Law ("ECL") of the State of  
York and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State of  
New York and Article 12 of the Navigation Law by:

**SECOND AMENDED  
COMPLAINT**

Case Number: D3-601405-02-06

RGLL, Inc., and GRJH, Inc.,  
Respondents.

**SECOND AMENDED COMPLAINT**

The New York State Department of Environmental Conservation (the "Department"), in this administrative proceeding instituted pursuant to Titles 3 and 10 of Article 17 of the Environmental Conservation Law ("ECL"), alleges the following as and for a complaint against Respondents, RGLL, Inc., and GRJH, Inc.,:

1. Respondent, RGLL, Inc., is the operator and/or owner of a petroleum bulk storage facility (the "facility"), located at Millerton Square Shopping Plaza, Route 44 East, Millerton, New York 12546.
2. Respondent, GRJH, Inc., is the operator of the facility.
3. 6 NYCRR 612.1(c)(10) defines a "storage facility" as one or more stationary tanks which have a combined storage capacity of over eleven hundred (1,100) gallons of petroleum at the same site.
4. The facility has three registration numbers, 3-172049, 3-408689, and 3-601405, for the facility.
5. ECL §17-1009 and 6 NYCRR 612.2 require that the owner and/or operator of a petroleum bulk storage facility, as defined in 6 NYCRR 612.1(c)(10), register such facility with the Department.
6. Respondents knowingly and willing failed to register its facility as required by 6 NYCRR 612.2.

Appendix A

RGLL, INC. and GRJH, INC.,  
(Old Millerton Sunoco)  
Case Number: D3-601405-02-06

7. ECL §17-1005 and 6 NYCRR 613.4 require that the operator of an underground storage tank keep daily inventory records for the purpose of detecting leaks. Records must be kept for each tank and must include measurements of bottom water levels, sales, use, deliveries, inventory on hand and losses or gains. Inventory records must be maintained and made available for Department inspection for a period of not less than five years.
8. Respondents failed to maintain inventory records for underground storage tanks, as required under 6 NYCRR 613.4 and ECL 17-1005.
9. 6 NYCRR 612.2 requires that the owner and/or operator of a petroleum bulk storage facility notify the Department of substantial modifications at the facility.
10. Respondents failed to notify the Department of substantial modifications at the facility.
11. 6 NYCRR 612.2 requires that the owner and/or operator display a registration certificate at the facility.
12. Respondents failed to display a registration certificate at the facility.
13. 6 NYCRR 612.2 requires that the owner and/or operator have a registration certificate with current and valid information at the facility.
14. Respondents failed to have a registration certificate with current and valid information at the facility.
15. 6 NYCRR 613.3 requires that the owner and/or operator maintain leak detection equipment at the facility.
16. Respondents failed to maintain leak detection equipment at the facility.
17. 6 NYCRR 614.5 and 6 NYCRR 613.5(b)(3) requires that the owner and/or operator monitor leak detection equipment at the facility.
18. Respondents failed to monitor leak detection equipment at the facility.
19. 6 NYCRR 614.7 require that the owner and/or operator have as-built plans for the tank at the facility.
20. Respondents failed to have as-built plans at the facility.
21. 6 NYCRR 613.5 requires that the owner and/or operator tightness test the tank at a facility.

22. Respondents failed to tightness test the tank at a facility.
23. 6 NYCRR 614.4 requires tanks to have secondary containment.
24. Respondents failed to have secondary containment.
25. 6 NYCRR 614.5 requires that the owner and/or operator install a leak monitoring system at a facility.
26. Respondents failed to install a leak monitoring system at the facility.
27. 6 NYCRR 613.3 requires that all fill ports be appropriately marked.
28. Respondents failed to appropriately label the fill ports at the facility.
29. 6 NYCRR 614.5 requires that the owner and/or operator monitor the interstitial space of tank(s) at a facility.
30. Respondents failed to monitor the interstitial space of its tank at the facility.
31. 6 NYCRR 613.3 requires that the owner and/or operator maintain spill prevention equipment at a facility.
32. Respondents failed to maintain spill prevention equipment at the facility.
33. 6 NYCRR 613.9 requires that the owner and/or operator permanently close out-of-service tanks at a facility.
34. Respondents failed to permanently close the out-of-service tank at the facility.
35. ECL §71-1929 provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation of Titles 1 through 11 inclusive and Title 19 of Article 17, or the rules or regulations promulgated thereto by the Commissioner of the Department.

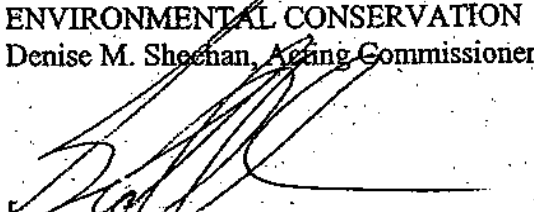
WHEREFORE, the Department requests the following relief:

- A. Commissioner's Order pursuant to 6 NYCRR Part 622:
  - I. Finding Respondents in violation of the ECL Article 17 and implementing regulations.

- II. Requiring payment of a civil penalty in the amount of FIFTY FIVE THOUSAND (\$55,000) DOLLARS.
- III. Ordering Respondents to remove the tank at the facility in accordance with 6 NYCRR 613.9.
- IV. Such other and further relief as the Commissioner of NYS Department of Environmental Conservation shall deem just and appropriate.

DATED: Albany, New York  
8 January 2007

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION  
Denise M. Sheehan, Acting Commissioner



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Scott W. Owens  
Senior Attorney  
New York State Department of  
Environmental Conservation  
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Albany, New York 12233-5500  
(518) 402-9512

Exhibit List

Matter of alleged violations by RGLL, Inc. and GRJH, Inc.  
 March 6 and 7, 2007  
 April 4, 2007

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
1	NYSDEC Spill Report Form Spill No. 9213766 Spill date: 03/11/1993	✓	✓	Department Staff	Exhibits 1-25, inclusive, received by stipulation
2	NYSDEC Spill Report Form Spill No. 9310395 Spill date: 11/28/1993	✓	✓	Department Staff	
3	Letter dated February 20, 2003 from Vincent P. McCabe, NYS DEC Region 3 to Lauren Simons	✓	✓	Department Staff	
4	Letter dated February 26, 2003 from Ms. Simons to Mr. McCabe	✓	✓	Department Staff	
5	Letter dated May 10, 2006 from James T. Metz to Mary E. Reynolds, Esq, NYS DEC	✓	✓	Department Staff	

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
 Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
6	Letter dated October 16, 2000 from Jean M. Neubeck, Hydrogeologist, Alpha Geoscience to Mr. McCabe	✓	✓	Department Staff	
7	Letter dated April 17, 2003 from Ms. Neubeck to Mr. McCabe Attachments: Photograph dated December 1998; Summary of Ground Water Analytical Data (Table); and two figures	✓	✓	Department Staff	
8	Letter dated May 1, 2003 from Ms. Neubeck to Mr. McCabe with attached Figures 1 and 2	✓	✓	Department Staff	
9	Notice of Violation dated January 20, 2006 from R. Daniel Bendell, P.E., NYS DEC Region 3 to RGLL, Inc.	✓	✓	Department Staff	
10A - E	Series of 5 photographs dated January 19, 2006	✓	✓	Department Staff	
11	Notice of Violation dated September 12, 2006 from Mr. Bendell to Millerton Sunoco	✓	✓	Department Staff	RE: "New" Millerton Sunoco

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
12A - D	Series of 4 photographs dated October 10, 2006	✓	✓	Department Staff	
13	Letter dated October 6, 2006 from Scott W. Owens, Esq., NYSDEC to Matthew J. Sgambettera, Esq., Sgambettera and Associates, PC	✓	✓	Department Staff	
14	Letter dated October 5, 2006 from Mr. Owens to Mr. Sgambettera	✓	✓	Department Staff	
15	Letter dated October 11, 2006 from Mr. Owens to Mr. Sgambettera with attached photographs (4) and blank "Tank Removal Notification Form"	✓	✓	Department Staff	
16	NYSDEC, Facility Information Report Site: Millerton Sunoco (Millerton Square Shopping Plaza) Printed on March 4, 2007	✓	✓	Department Staff	
17A - W	Series of 23 photographs dated March 1, 2007	✓	✓	Department Staff	

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
18	NYSDEC Comprehensive Petroleum Bulk Storage Inspection Report Dated: March 1, 2007 Facility No. 2561 RGLL, Inc.	✓	✓	Department Staff	
19	Copy of a Domestic Return Receipt Article No. 7000-1530-0004-2934-9126	✓	✓	Department Staff	
20	Letter dated September 29, 2006 from Mr. Sgambettera to Mr. Owens with attached e-mail message dated September 28, 2006 from Ms. Neubeck to Mr. Sgambettera and Alicia Metz	✓	✓	Department Staff	
21	Revised Remedial Action Plan (RAP) dated September 28, 2006 by Alpha Geoscience (8 pages) plus Figure 1 and Appendix A entitled, "Ground Water Sampling Protocol"	✓	✓	Department Staff	
22	Notice regarding application for petroleum bulk storage (PBS) registration with attached PBS application	✓	✓	Department Staff	

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List



Exhibit No.	Description	ID	Rec'd	Offered by	Notes
23	Copy of a Domestic Return Receipt Article No. 7005-0390-0005-4038-6538	✓	✓	Department Staff	
24	Cove letter dated December 7, 2006 from Mr. Sgambettera to Barbara Yukoweic, NYSDEC Region 3 Tank registration information (8 pages)	✓	✓	Department Staff	
25	NYSDEC Comprehensive Petroleum Bulk Storage Inspection Report Dated: August 28, 2006 Facility No. 2561 RGLL, Inc.	✓	✓	Department Staff	
26	Notice of Violation dated July 10, 2001 from Wayne Wadsworth, NYSDEC Region 3 to RGLL, Inc.	✓	✓	Department Staff	
27	Notice of Violation dated September 12, 2006 from Mr. Bendell to RGLL, Inc.	✓	✓	Department Staff	RE: "Old" Millerton Sunoco

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
28	Cover letter dated September 12, 2006 from Ms. Simons to Robert Amato, NYSDEC Region 3 with attached Notice of Violation dated August 28, 2006	✓	✓	Department Staff	
29	Deed, Dutchess County Liber No. 1389 of deeds at page 570	✓	✓	Respondent	
30	Cover letter dated March 9, 2007 and attached Title Search and Deed (Exhibit 29)	✓	✓	Respondent	
31	Notice of Violation dated July 1, 200 from Barbara Yukoweic, NYSDEC Region 3 to JT Metz and RGLL, Inc.	✓		Department Staff	Excluded pursuant to 6 NYCRR 622.7(c)(3) Tr. pp. 465-466
32	Lease Agreement dated October 1999	✓	✓	Respondents	
33	Letter dated March 10, 2003 from James T. Metz, GRJH, Inc. to Robert Trotta	✓	✓	Respondents	

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
34	Cover letter dated July 13, 2000 from Ms. Newbeck to Mr. McCabe, NYSDEC Region 3 with attached Report entitled, "Underground Storage Tank Closure and Subsurface Investigation Report dated July 11, 2006	✓	✓	Department Staff	
35	New York State Daily Inspection Logs dated August 2006 - September 2006 and 10 Day Inventory Reconciliation Work Sheets from August 5, 2006 - August 30, 2006	✓	✓	Respondent	Exhibit 28 is the cover letter to Exhibit 35 (Tr. p. 656)
36	Cover letter dated April 20, 2007 from Mr. Sgambettera to Mr. Owens	✓	✓	Respondent	For Exhibits 36-41, see Hearing Transcript pp. 622-629. April 4, 2007
37	Petroleum Bulk Storage Application Sections A and B (undated)	✓	✓	Respondent	

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
38	Petroleum Bulk Storage Registration Certificate Issued: May 31, 2000 Expires: March 1, 2005	✓	✓	Respondent	
39	Petroleum Bulk Storage Application Sections A and B, dated March 4, 2003 Signed by Lauren Simons PBS No. 3-601405	✓	✓	Respondent	
40	Alpha Geoscience Telephone Log Caller: JM Neubeck Called: Ed Moore Re: Requirements for temporary closure of USTs	✓	✓	Respondent	
41	Inventory and Interstitial Monitoring Records Millerton Sunoco Facility April 2003 - January 3, 2006	✓	✓	Respondent	
42	Tank Volume Calculations	✓	✓	Department Staff	Attached as Exhibit 38 to Staff's Closing Brief

Appendix B

Matter of RGLL, Inc. and GRJH, Inc.  
Exhibit List