NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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	Ruling on Department Staff's request for leave to amend the September 14, 2006 amended complaint
	Case Number: D3-601405-02-06
RGLL, Inc. and GRJH, Inc., RESPONDENTS.	
(Millerton Sunoco)	January 30, 2007

Proceedings

Staff from the New York State Department of Environmental Conservation (Department staff) commenced the captioned 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., PO Box 728, Sharon, Connecticut 06069 (RGLL). In the February 22, 2006 complaint, Department staff asserted that RGLL owns and operates a petroleum bulk storage facility (*see* 6 NYCRR 612.1[c][10]) located on Route 44 East, in the Millerton Square Shopping Plaza, Millerton, New York. This facility is referred to as the Millerton Sunoco. Staff alleged in the February 22, 2006 complaint that RGLL violated various provisions of 6 NYCRR parts 612 (Registration of Petroleum Bulk Storage Facilities) and 613 (Handling and Storage of Petroleum). 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 consistent with the requirements outlined in 6 NYCRR 622.9. In the statement of readiness, Staff requested, among other things, that the adjudicatory hearing be scheduled.

Subsequently, with a cover letter dated September 14, 2006, Department Staff requested leave to amend the February 22, 2006 Complaint. Though provided the opportunity, RGLL did not reply to Staff's request for leave. During a telephone conference call on October 26, 2006, I asked Mr. Sgambettera, who is RGLL's legal counsel, whether RGLL filed a reply because as of the date of the telephone conference, I had not received one. Mr. Sgambettera responded by stating that RGLL did not file a response and would

not oppose Staff's request. Because Staff's request was unopposed, I granted it during the telephone conference, and set November 15, 2006 as the return date for RGLL to file an amended answer to Staff's amended September 14, 2006 complaint.

In a letter dated December 12, 2006 sent by certified mail return receipt requested, I scheduled the adjudicatory hearing for January 9 and 10, 2007 at the Department's central office located at 625 Broadway, Albany, New York 12233. At the parties' mutual request, the hearing was adjourned to February 6 and 7, 2007 at the same location.

In a letter dated January 3, 2007, RGLL's counsel confirmed that the hearing had been adjourned to February 6 and 7, 2007, and enclosed an amended answer dated January 2007. In the amended answer, RGLL denied the violations alleged in the September 14, 2006 amended complaint, and asserted four affirmative defenses.

Staff's January 8, 2007 request for leave to amend the September 14, 2006 complaint

With a letter dated January 8, 2007, Department staff requested leave to amend the September 14, 2006 complaint. In this request, Staff seeks leave to name GRJH, Inc. (GRJH) as a respondent in this matter, and alleges that GRJH operates the Millerton Sunoco. With its January 8, 2007 request, Staff included a copy of the proposed amended complaint, which is also dated January 8, 2007.

Staff argues that neither RGLL, nor GRJH would be prejudiced by the proposed amendment. According to Staff, the two companies share the same principal executive office and corporate officers. As a result, Staff claims that both companies have been on notice of the captioned enforcement action since service of the February 22, 2006 notice of hearing and complaint. To support this claim, Department staff attached Exhibits 1, 2 and 3.

Exhibit 1 is a copy of the information posted on the web site for the New York State Department of State, Division of Corporations. According to this information, RGLL is an active foreign (State of Delaware) business corporation. James T. Metz, 25 Mitchell Town Road, PO Box 728, Sharon, Connecticut 06069 is identified as either the Chairman or the Chief Executive Officer, and as the Principal Executive Officer for RGLL.

Similarly, Exhibit 2 is a copy of the information posted on the web site for the New York State Department of State, Division of Corporations. According to this information, GRJH is an active foreign (State of Delaware) business corporation. Alicia H. Metz, 25 Mitchell Town Road, PO Box 728, Sharon, Connecticut 06069 is identified as either the Chairman or the Chief Executive Officer. GRJH, 25 Mitchell Town Road, Sharon, Connecticut 06069 is identified as the Principal Executive Officer.

Exhibit 3 is a Determination dated September 21, 2006 by the New York State Division of Tax Appeals concerning two separate petitions. GRJH and Alicia Metz filed the first petition, and James Metz, Jr. and Margaret Metz filed the second petition. The Division of Tax Appeals considered the petitions jointly. Both petitions sought relief in the form of either revisions of determinations, or refunds of sales and use taxes. Referring to ¶ 1 of the September 21, 2006 Determination, Department staff asserts that James Metz operates GRJH.

Department Staff argues there is adequate time to respond to the proposed amended complaint because the adjudicatory hearing is scheduled to convene 28 days from the date of Staff's January 8, 2007 request for leave. Given this amount of time, Staff contends that RGLL and GRJH would not be prejudiced, and the amendment would therefore be permissible.

Referring to RGLL's May 10, 2006 answer, Staff states that RGLL initially admitted to operating the Millerton Sunoco. Staff points out, however, that RGLL denies being the operator of the Millerton Sunoco in its amended answer filed with the January 3, 2007 cover letter. (*See* ¶ 1 of Staff's February 22, 2006 complaint; *compare* ¶ 1 of Staff's September 14, 2006 amended complaint with ¶ 1 of Respondent's January 2007 answer to amended complaint.) Paragraph 2 of Staff's proposed amended complaint dated January 8, 2007 alleges that GRJH operates the Millerton Sunoco. Staff argues that the apparent contradiction in the answers "clouds" the issue of whether the regulatory requirements outlined in 6 NYCRR parts 612, 613 and 614 that apply to operators would apply to RGLL. Staff concludes by stating that identifying GRJH as a respondent at this point in the proceedings would allow the Commissioner to determine whether GRJH was responsible for operator liability at the upcoming hearing rather than commencing a separate enforcement action against GRJH to consider the same operator liability issues.

RGLL's response

In a letter dated January 22, 2007, RGLL responds to Staff's January 8, 2007 request for leave. Referring to its January 2007 amended answer, RGLL explains that the basis for its denial of the charges alleged in the September 14, 2006 amended complaint is that it owns the Millerton Sunoco, but does not operate it. RGLL does not object to adding GRJH as a party to this action, and agrees that it would be efficient to do so. Nevertheless, RGLL asserts it would be prejudiced by going forward with the adjudicatory hearing on February 6, 2007. Counsel for RGLL claims that he would require additional discovery if GRJH becomes a respondent in this matter and, therefore, would need additional time to prepare for the hearing. If Staff's January 8, 2007 request for leave is granted, RGLL requests that the adjudicatory hearing be adjourned from February 6 and 7, 2007 to the first week in May 2007.

Discussion and Ruling

As noted above, I granted Department staff's first request for leave to amend the complaint during the October 26, 2006 telephone conference call because RGLL did not oppose it. My follow up letter of the same date, provided RGLL with the opportunity to file an amended answer within 20 days of the date of the telephone conference, which was November 15, 2006, and scheduled the adjudicatory hearing for January 9 and 10, 2007. At RGLL's request and with Staff's consent, the adjudicatory hearing was adjourned from January 9 and 10, 2007 to February 6 and 7, 2007. Subsequently, RGLL filed an answer to the September 14, 2006 amended complaint with a cover letter dated January 3, 2007. RGLL has not offered any explanation for why it filed its amended answer after November 15, 2006.

Upon receipt of Staff's January 8, 2007 request for leave to amend the complaint, I sent, by fax and by regular mail, a letter to the parties dated January 12, 2007. In the January 12, 2007 letter, I acknowledged receipt of Staff's January 8, 2007 request, and set January 19, 2007 as the return date for RGLL to reply to Staff's request. RGLL responded in a letter dated January 22, 2007, which I did not receive until January 23, 2007.

In an e-mail message sent to the parties on January 23, 2007, I asked whether Department staff objects to RGLL's proposal not to oppose Staff's second amendment, if the adjudicatory hearing is adjourned to the first week of May 2007. Mr. Owens,

on behalf of Department staff, responded in an e-mail message sent on January 24, 2007. Staff objects to the lengthy adjournment proposed by RGLL, and notes that Staff has already disclosed all discoverable materials relevant to this proceeding to RGLL's counsel.

In a separate e-mail message sent on January 24, 2007 by RGLL's counsel, Mr. Sgambettera stated that he would confer with Mr. Owens about resolving the matter, and requested the opportunity for a telephone conference with me. In my response, I encouraged the parties to confer, and identified the dates and times that I would be available for a conference call with the parties, if one becomes necessary. I initiated a telephone conference call with the parities during the afternoon of January 24, 2007. A resolution was not reached, and I informed the parties that I would be issuing a ruling concerning Staff's January 8, 2007 request.

Pursuant to 6 NYCRR 622.5, pleadings may be amended. A party may amend its pleading once without the ALJ's permission at any time before the period for responding expires, or if no response is required, at least 20 days before the hearing commences (*see* 6 NYCRR 622.5[a]). With the ALJ's permission, a party may amend its pleading at any time prior to the Commissioner's final decision absent prejudice to the ability of any other party to respond, consistent with the CPLR (*see* 6 NYCRR 622.5[b]).

Pursuant to CPLR 3025, pleadings may be amended without leave in a manner similar to what is authorized by 6 NYCRR 622.5(a) (*see* CPLR 3025[a]). They may be amended and supplemented with leave at any time, and leave must be freely given as may be just (*see* CPLR 3025[b]). With leave, pleadings may be amended to conform to the evidence upon such terms as may be just (*see* CPLR 3025[c]).

The regulations provide a respondent with 20 days after service of an amended complaint to serve an answer upon Department staff. Although the ALJ has discretion to extend the time, the regulation is silent about whether the ALJ may shorten the time to answer. (*See* 6 NYCRR 622.4[a].) The regulations require a respondent to "explicitly assert any affirmative defenses together with a statement of facts which constitute the grounds for each affirmative defense asserted" (6 NYCRR 622.4[c]). The regulations state further that affirmative defenses not pleaded in the answer may not be raised in the hearing unless allowed by the ALJ (*see* 6 NYCRR 622.4[d]).

Contrary to Staff's assertion, there is not sufficient time before the adjudicatory hearing convenes on February 6, 2007 to answer the proposed amended complaint if leave to do so is granted. Pursuant to regulation (*see* 6 NYCRR 622.6[b][2][i] and 622.6[c][3]), RGLL was provided until January 19, 2007 to respond to Staff's motion, and I have five days to issue a ruling (*see* 6 NYCRR 622.6[c][4]). Twenty days from the date of this ruling will be February 19, 2007.

By operation of regulation, a respondent is afforded a minimum amount of time to review Staff's complaint and subsequent amendments, develop a defense strategy, and file an answer or amended answer. The opportunity to file an answer with affirmative defenses ensures that Department staff will have adequate notice of a respondent's affirmative defenses, and will have the opportunity to prepare a rebuttal case, if it chooses.

RGLL's request to adjourn the hearing until the first week of May 2007 is not reasonable, however. Staff has made a showing that RGLL and GRJH appear to be closely related companies. Based on this showing, GRJH arguably has had notice of the violations alleged in the September 14, 2007 amended complaint.

Therefore, I grant Staff's request for leave to amend the September 14, 2007 complaint. To provide RGLL and GRJH with the opportunity to answer the second amended complaint and to avoid any prejudice, the adjudicatory hearing scheduled for February 6 and 7, 2007 is adjourned to March 6, 2007 as explained further below. An answer will be due, in hand, twenty days from the date of this ruling, which is February 19, 2007. Failure to file a timely answer will constitute a default and a waiver of the right to a hearing (*see* 6 NYCRR 622.4[a]).

To prepare for the adjudicatory hearing, I will schedule the adjudicatory hearing to commence 15 days from the return date for the answer. That date is March 6, 2007. The hearing will continue on March 7, 2007, if necessary. If counsel for either party has a conflict with these dates, he shall provide opposing counsel and me with an affidavit of engagement by February 16, 2007, and propose alternative dates for the adjudicatory hearing. If any witness for either party has a conflict with these dates, counsel shall notify opposing counsel and me by February 16, 2007, and propose alternative dates for the adjudicatory hearing. If necessary, I will schedule a conference call, subsequent to February 16, 2007, to resolve any scheduling conflicts.

The caption for this matter identifies ECL articles 17 (Water Pollution Control), 19 (Air Pollution Control), 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste), 37 (Substances Hazardous or Acutely Hazardous to Public Health, Safety or the Environment) and 71, as well as Navigation Law article 12 (Oil Spill Prevention, Control and Compensation). Upon review of the second amended complaint, I find no allegations related to ECL articles 19, 27, and 37, and Navigation Law article 12. Although the second amended complaint alleges violations of ECL article 71, that provision of the ECL does not impose an affirmative duty upon the respondents. Rather, ECL article 71 articulates the penalties that the Department may impose for violations of other statutory requirements in the ECL.

Accordingly, the references will to ECL articles 19, 27, 37, and Navigation Law article 12 will be dropped from the caption. GRJH will be added to the caption, as a respondent.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge
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Dated: January 30, 2007
Albany, New York

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