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

- by -

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

Respondents.

DEC File No. R4-2004-0330-41

COMMISSIONER'S DECISION AND ORDER

January 21, 2005

COMMISSIONER'S DECISION AND ORDER

By service of a motion for order without hearing in lieu of complaint dated May 13, 2004, staff of the New York State Department of Environmental Conservation ("Department") commenced the above-captioned administrative proceeding as against respondents RGLL Inc., James Metz and Lauren Simons ("respondents") (see 6 NYCRR 622.3[b][1], 622.12[a]). Respondents filed an affirmation dated June 12, 2004 in opposition to Department staff's motion. With leave from Administrative Law Judge ("ALJ") Daniel P. O'Connell, Department staff filed a reply dated July 13, 2004. Although provided the opportunity, respondents did not file a sur-reply.

Upon review of the record and the attached ruling and report prepared by ALJ O'Connell, I hereby adopt the ALJ's findings of fact and conclusions subject to my comments below.

Contrary to Department staff's position, respondent RGLL Inc., is an owner within the meaning of Environmental Conservation Law ("ECL") 17-1003(4) and 6 NYCRR 612.1(c)(18) and has duly registered the seven petroleum bulk storage ("PBS") facilities identified in the attached ruling and report. Nothing in ECL article 17 or its implementing regulations renders respondent RGLL's ownership of the facilities, and the responsibilities associated therewith, invalid merely because respondent's authorization to do business in New York State was

annulled by proclamation of the New York Secretary of State on June 26, 2002 (see Secretary of State Certification, Notice of Motion, Exh C). As the ALJ correctly notes, "public or private corporations" are "persons" under the regulations (see 6 NYCRR 612.1[c][20]) and, thus, may be owners under 6 NYCRR 612.1(c)(18) and ECL 17-1003(4). Neither the statute nor the regulations further require that a corporation be domestic or foreign, authorized to do business or not. Thus, any foreign corporation that operates a PBS facility in New York is subject to the ECL and its regulations, whether such operation is authorized by the Secretary of State or not (see, e.g., German-American Coffee Co. v Diehl, 216 NY 57, 63-64 [1915]).

Moreover, no basis exists under the Business Corporation Law ("BCL") to deem respondent RGLL's registration of the seven PBS facilities improper solely on the ground that its authorization to do business in New York has been annulled. The sole penalty for failing to maintain authorization to do business in the State is provided for in BCL § 1312 -- an unauthorized foreign corporation may not maintain an action or proceeding in this State (see Matter of Dunkin' Donuts of America, Inc. v Dunkin Donuts, Inc., 12 Misc 2d 380, 382 [1958], affd 8 AD2d 228 [3d Dept 1959]). Nothing in BCL § 1312 acts to deprive an unauthorized foreign corporation of its legal title to property in the State, or otherwise render the acts of the corporation

invalid (see BCL § 1312[b]; Tuvim v 10 E. 30 Corp., 75 Misc 2d 612, 614 [1971], affd as modified on other grounds 38 AD2d 895 [1st Dept 1972], affd 32 NY2d 541 [1973]). Moreover, the lack of authorization does not absolve a foreign corporation of the obligation to comply with New York laws (see People v Tropical Fruit Corp., 223 AD2d 864, 864 [3d Dept 1928], affd no opn 252 NY 605 [1930]). Accordingly, I dismiss the charge alleging that respondent RGLL violated 6 NYCRR 612.2 by failing to properly register its PBS facilities.

Department staff also seeks to impose individual liability upon two corporate officers of RGLL, respondent James Metz, vice president and chief executive officer of RGLL, and respondent Lauren Simons, secretary of the corporation. Staff failed to carry its burden of demonstrating entitlement to judgment as a matter of law on the issue of respondents Metz and Simons's individual liability, however (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4). In its pleadings -- in this case, staff's motion papers -- the basis for respondent Metz's individual liability is solely his status as vice president and CEO of an unauthorized foreign corporation. Similarly, the sole basis alleged for respondent Simons's individual liability is her status as corporate secretary and the circumstance that she signed the PBS renewals or information corrections after the corporation's authorization

to do business in the State was annulled. Nothing in the ECL or BCL, however, authorizes the imposition of individual liability upon corporate officer solely because the corporation's authorization is annulled.

Moreover, Department staff alleged no other factual basis for imposing individual liability upon the individual respondents. Staff does not allege any facts demonstrating sufficient authority and responsibility on the part of the individual respondents that would expose them to derivative liability (see Matter of Mudd's Vineyard, Ltd., Commissioner's Decision and Order, Aug. 8, 1994, at 5). Staff also fails to allege any facts that would warrant piercing the corporate veil (see Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 140-141 [1993]), or imposing liability based upon wrongful management of the corporation to avoid liabilities (see Matter of Fiorillo v New York State Dept. of Envtl. Conservation, 123 AD2d 151, 153-154 [3d Dept 1987]). Finally, Department staff allege no factual basis for imposing direct liability upon the individual respondents on the ground of their own personal participation in the ECL violations alleged (see Mudd's Vineyard, at 5; see also 6 NYCRR 612.1[c][16] [definition of "operator"]).

The cases Department staff cite to support individual liability for respondents Metz and Simons are inapposite. The

cases cited concern acts of a corporate officer after the corporation was dissolved (see Annicet Assoc., Inc. v Rapid Access Consulting, Inc., 171 Misc 2d 861 [1997]; Brandes Meat Corp. v Cromer, 146 AD2d 666 [2d Dept 1989]; Poritzky v Wachtel, 176 Misc 633 [1941]). It is undisputed in this case that respondent RGLL, Inc., is a fully active Delaware corporation and has not been dissolved by the State of Delaware. Accordingly, Department staff failed to make a prima facie showing that respondents Metz and Simons are individually liable and, thus, the claims insofar as alleged as against the individual respondents are dismissed.

With respect to the remaining violations alleged in the motion as against respondent RGLL, Inc., Department staff established as a matter of law respondent's non-compliance with various other provisions of 6 NYCRR parts 612, 613 and 614. Respondent RGLL's conclusory and unsupported submissions in opposition fail to constitute proof in admissible form sufficient to raise triable issues of substantive fact requiring a hearing (see 6 NYCRR 622.12[e]; Matter of Locaparra, at 4). Accordingly, I affirm the ALJ's ruling.

In its motion, Department staff requested a civil penalty and additional remedial relief to bring the subject facilities into compliance with applicable regulatory requirements. The ALJ recommends a total civil penalty of not

less than fifty-seven thousand dollars ($57,000) apportioned among the various violations. ECL 71-1929 provides that any person who violates any provision or fails to perform any duty imposed by ECL article 17 or any rule, regulation or order issued thereunder, or commits any offense described in ECL article 17 shall be liable for a civil penalty not to exceed thirty-seven thousand five hundred dollars ($37,500) per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation.

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

I. Staff's motion for order without hearing against respondents is denied in part and granted in part.

II. Department staff has established as a matter of law that respondent RGLL, Inc.:

a. violated 6 NYCRR 613.3(d) at the Hudson, Chatham, Valatie, Hillsdale and Claverack facilities by failing to keep the spill prevention equipment at these PBS facilities in good working order;

b. violated 6 NYCRR 613.5(b)(2) at the Chatham facility by failing to monitor the cathodic protection system for the two tanks located there;

c. violated 6 NYCRR 613.8 on two occasions by failing to report a petroleum spill at the East Greenbush facility and one at the Germantown facility within two hours of discovery; and

d. violated 6 NYCRR 614.5 when it failed to monitor the interstitial space of the double-walled tanks at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities.

III. Department staff's claim that respondent RGLL, Inc., violated 6 NYCRR 612.2 by failing to properly register its seven facilities is dismissed. All of Department staff's claims alleged as against respondents James Metz and Lauren Simons, individually, are dismissed.

IV. 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 fifty-seven thousand dollars ($57,000). Payment of the civil penalty of fifty-seven thousand dollars ($57,000) is due and payable within thirty (30) days of service of this order upon respondent. Payment shall be 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 the following address: Ann Lapinski, Esq., Assistant Regional Attorney, Region 4, New York State Department of Environmental Conservation, 1150 North Westcott Road, Schenectady, New York 12306-2014.

V. Within 30 days of the effective date of this order, respondent RGLL, Inc., shall surrender the PBS registrations for the facilities identified in the attached ruling and report, and discontinue operations at these facilities. Respondent is directed to close the tanks at these facilities in a manner consistent with the requirements outlined in 6 NYCRR part 613.

VI. In the alternative to permanent closure of the facilities as required in paragraph V above, within 15 days of the effective date of this order, respondent RGLL, Inc., shall verify all information related to the registration of the seven PBS facilities identified in the attached ruling and report. As necessary, respondent shall file modification forms and include any applicable fees. In addition:

A. Upon receipt of a current and valid PBS certification, respondent RGLL, Inc., shall review and sign the certificate, then post same in a prominent location. If respondent discovers one or more errors or omissions in the various certifications, respondents shall immediately submit a PBS information correction or substantial modification

application form(s) correcting any incorrect information.

B. Respondent RGLL, Inc., or the operators of the seven PBS facilities shall empty all catch basins within two hours after every petroleum delivery, and inspect them daily and, as necessary, clean all catch basins.

C. Within 30 days of the effective date of this order, respondent RGLL, Inc., shall test the cathodic protection system at the Chatham facility, and provide Department staff with copies of the results. If the test results show that either or both of the tanks at the facility are not adequately protected, respondent shall report the test failure to the Department within two hours, and repair, replace or close the affected tank or tanks in accordance with the requirements outlined in 6 NYCRR 613.9(b).

D. Within 15 days of the effective date of this order, respondent RGLL, Inc., shall monitor the interstitial space of the tanks located at the seven PBS facilities, and maintain records as required by the regulations. Within 60 days of the effective date of this order, respondent shall provide Department staff with copies of six (6) weeks of monitoring records.

E. Within 30 days of the effective date of this order, respondent RGLL, Inc., shall keep and maintain all records for each facility identified in the attached ruling and report that are required by the applicable regulations including, but not limited to, leak detection, daily inventory, 10-day reconciliation, cathodic protection monitoring, interstitial space monitoring, and leak detection monitoring.

F. Within 90 days of the effective date of this order, respondent RGLL, Inc., must submit written and photographic documentation to show that the seven PBS facilities are in compliance with all applicable regulations.

VII. Respondent RGLL, Inc., shall provide Department staff with advance notice of any construction activities that may be necessary to bring the facilities identified in the attached ruling and report into compliance. Respondent shall provide Department Staff with written notice at least five days before the proposed activity. If the work schedule changes, respondent shall provide Department staff with notice via fax at least one business day before the originally scheduled activity.

VIII. All communications with Department staff

concerning this order shall be made to Ann Lapinski, Esq., Assistant Regional Attorney, Region 4, New York State Department of Environmental Conservation, 1150 North Westcott Road, Schenectady, New York 12306.

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

For the New York State Department
of Environmental Conservation

_____/s/_____
By: Erin M. Crotty, Commissioner

Dated: Albany, New York
January 21, 2005

TO: (via Certified Mail)
RGLL, Inc.
25 Mitchelltown Road
PO Box 728
Sharon, Connecticut 06069

(via Certified Mail)
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25 Mitchelltown Road
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Sharon, Connecticut 06069

(via Certified Mail)
Lauren Simons
25 Mitchelltown Road
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(via Certified Mail)
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(via Regular Mail)
Ann Lapinski, Esq.
Assistant Regional Attorney
Region 4, New York State
Department of Environmental Conservation
1150 North Westcott Road
Schenectady, New York 12306

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Environmental Conservation Law (ECL) article 17, 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	Ruling and Report on Department Staff's Motion for an Order without Hearing
	DEC Case No. R4-2004-0330-41

RGLL, Incorporated,
James Metz and Lauren Simons,
RESPONDENTS.

September 9, 2004

Proceedings

In lieu of a notice of hearing and complaint, Staff of the Department of Environmental Conservation (Department staff) commenced the captioned enforcement action with service of a motion for order without hearing dated May 13, 2004 upon RGLL, Inc., James T. Metz, Lauren Simons (respondents), and Richard Feirstein, Esq. With the motion, Department staff included an affirmation by Ann Lapinski, Esq., Assistant Regional Attorney, DEC Region 4, dated May 13, 2004, and an affidavit by Edward L. Moore, P.E., Environmental Engineer II, DEC Region 4 sworn to May 13, 2004, with attached Exhibits A, B, C, D, and E. According to the motion, respondents own seven petroleum bulk storage facilities (PBS) at the following locations:

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

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

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

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

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

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

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

With a cover letter dated June 27, 2004, Richard P. Feirstein, Esq. filed an affirmation, dated June 12, 2004, in opposition to Department staff's motion. Attorney Feirstein filed the affirmation on behalf of RGLL, Inc., James Metz, and Lauren Simons.

With leave from Administrative Law Judge (ALJ) Daniel P. O'Connell, Department staff filed a reply dated July 13, 2004, and attached a supplemental affidavit by Edward Moore, P.E., sworn to July 13, 2004. Although provided the opportunity, respondents did not file a sur-reply.

Discussion

Motion for Order without Hearing

To commence an administrative enforcement action, Department staff may move for an order without hearing in lieu of a notice of hearing and complaint pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003).

Alleged Violations and Department Staff's Request for Relief

The violations alleged against respondents are outlined in Attorney Lapinski's affirmation and Mr. Moore's affidavit. They are as follows:

1. Respondents allegedly violated 6 NYCRR 612.2 because the petroleum bulk storage tanks at the seven facilities identified above have not been properly registered since June 2002.

2. Respondents allegedly violated 6 NYCRR 613.3(d) by failing to maintain spill prevention equipment at the Valatie, Hillsdale, Hudson, Chatham, and Claverack facilities based on inspections conducted by Department staff on May 14, and November 6, 2003.

3. Based on an inspection conducted by Department staff on November 6, 2003, respondents allegedly violated 6 NYCRR 613.5(b)(2) by failing to monitor the cathodic protection system at the Chatham facility on an annual basis.

4. Respondents allegedly violated 6 NYCRR 613.8 by failing to notify the Department of a spill, leak or discharge of petroleum product within two hours of its discovery. This violation allegedly occurred at the East Greenbush and Germantown facilities based on an inspection of those facilities on May 22 and 23, 2003, and November 6, 2003, respectively.

5. Respondents allegedly violated 6 NYCRR 614.5 by failing to monitor the interstitial space of the double-walled tanks located at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities based on an inspection conducted by Department staff on November 6, 2003.

For these alleged violations, Department staff seeks an order from the Commissioner that would require respondents to comply with the applicable registration and operation requirements, and would assess a total civil penalty of $114,000. Department staff's motion papers include a civil penalty calculation and justification.

Service

Service of a motion for order without hearing in lieu of a notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (*see* 6 NYCRR 622.3[a][3]). Department staff served the motion for order without hearing upon RGLL, Inc. and Attorney Feirstein by certified mail return receipt requested. To demonstrate service

upon the corporate Respondent, Department staff provided a copy of the signed domestic return receipt.

Department staff personally served the motion for order without hearing upon James Metz and Lauren Simons. Department staff provided an affidavit of personal service by Environmental Conservation Officer (ECO) David C. Wayman sworn to May 31, 2004. According to the affidavit of service, ECO Wayman personally served Mr. Metz on May 20, 2004. ECO Wayman's affidavit states further that Mr. Metz accepted service of Department staff's motion on behalf of Lauren Simons on that same date.

Therefore, I conclude that Department staff served the motion for order without hearing upon respondents in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). Furthermore, as noted above, Attorney Feirstein filed an affirmation in opposition to Department staff's motion. Attorney Feirstein's affirmation states that he is "the attorney for all of the named respondents in the pending motion for an order without hearing" (Paragraph 1 of Feirstein's Affirmation dated June 12, 2004).

Department Staff's Evidence

To demonstrate the alleged violations, Department staff provided an affidavit by Edward Moore sworn to May 13, 2004 with attached Exhibits A, B, C, D and E. According to his affidavit, Mr. Moore and other members of Department staff inspected respondents' facilities on various dates in May and September 2003, or on November 6, 2003. During these inspections, Department staff observed the violations alleged above, according to Department staff's motion papers. The exhibits attached to Mr. Moore's affidavit corroborate the statements made in his affidavit concerning the respondents' responsibilities associated with the operation of the PBS facilities identified above, and the observations made by Department staff during the site inspections. Mr. Moore also provides a calculation and justification for the requested civil penalty.

Exhibit A is a set of PBS program facility information reports. There is a report for each of the seven facilities identified in the motion. Each report lists the tanks at each respective facility, and additional information such as the capacity of each tank, and the product stored in each tank, among other information.

Exhibit B is a set of PBS renewal applications. There is one renewal application for each of the seven facilities identified in the motion.

Exhibit C is a set of records from the New York State Department of State concerning the status of RGLL, Inc. The first record is a certification from the Secretary of State which states that RGLL, Inc. is a Delaware corporation that filed an application for authority to do business in New York on May 28, 1998. The certification states further that authorization was annulled by proclamation of the Secretary of State on June 26, 2002 pursuant to the Tax Law. As a result, RGLL, Inc. is no longer authorized to do business under the laws of New York State. The second record from the Department of State is a copy of RGLL, Inc.'s application for authority. The third record in Exhibit C is copy of the "biennial statement, parts A, B, and C." Parts A and B establish that as of May 2002, James T. Metz is the Chief Executive Office for RGLL, Inc. with a business address at 25 Mitchelltown Road, PO Box 728, Sharon, Connecticut 06069. Part C shows that Lauren Simons is the Secretary for RGLL, Inc.

Exhibit D is a set of notices of violation, and PBS inspection fact sheets for the seven facilities identified in the motion.

Exhibit E is a copy of an order on consent (File No.: R4-1975-97-05) signed by RGLL, Inc.'s representative on May 8, 2000 and the Commissioner's representative on June 19, 2000. The terms and conditions of the order on consent relate, in part, to the seven PBS facilities at issue in this proceeding.

In his supplemental affidavit sworn to July 13, 2004, Mr. Moore provides additional details about the May 2003 inspection of the East Greenbush facility, and his November 6, 2003 inspection of the Chatham facility.

Liability

1. Ownership and Registration (6 NYCRR 612.2)

Department staff alleges that the above identified PBS facilities are not properly registered in violation of 6 NYCRR 612.2. To support this allegation, Department staff relies on the documents presented in Exhibit C, and offers the following argument. Exhibit C establishes that RGLL, Inc. is a Delaware corporation, which on May 28, 1998 applied for, and subsequently obtained, authority to do business in New York. By proclamation

of the New York State Secretary of State dated June 26, 2002, however, RGLL, Inc. lost its authority to do business in New York for failing to comply with the Tax Law. As a result, RGLL, Inc. is no longer authorized to do business in New York.

Because RGLL, Inc. is no longer authorized to do business in New York, Department staff contends that RGLL, Inc. is not a "person" because it is not a legal entity (*see* 6 NYCRR 612.1[c][20]). Because RGLL, Inc. is not a person within the meaning of 6 NYCRR 612.1(c)(20), Department staff contends further that RGLL, Inc. cannot be considered an "owner," who is any person with legal or equitable title to a facility (*see* 6 NYCRR 612.1[c][18]). Given that RGLL, Inc. is neither a person nor an owner, Department staff concludes that RGLL, Inc. cannot properly register the facilities at issue in this proceeding.

RGLL, Inc. argues, however, that being either a New York State corporation or a foreign corporation authorized to do business in New York is not a prerequisite to being considered a "person" within the meaning of 6 NYCRR 612.1(c)(20). RGLL, Inc. asserts that it is an active corporation of the State of Delaware, and that New York State must recognize its status as such. As a Delaware corporation, RGLL, Inc. argues that it is a "person" within the meaning of 6 NYCRR 612.1(c)(20), and contends that it may duly register the facilities identified above, which it has done.

Alternatively, RGLL, Inc. contends that it could easily obtain authorization to do business in New York by filing the appropriate application with the required fee. RGLL, Inc. states that it would agree to terms in an Order on Consent that would require it to obtain authorization to do business in New York in order to resolve the alleged registration violations.

According to Department staff, New York State has authority to prevent a corporation from doing business here. To support its position, Department staff cites *Pohlers v. Exeter Manufacturing Company*, 293 NY 274 (1944) and *Jervis Corp. v. Secretary of State*, 43 Misc 2d 186 (1964). In these cases, the court held that "a foreign corporation may be prevented from doing business in this State and should it be granted leave to conduct its business within the boundaries of this State, conditions may accompany the privilege" (*Jervis* 43 Misc 2d at 186 citing *Pohlers* 293 NY 274).

Citing Business Corporation Law § 1301(a), Department staff also argues that foreign corporations must obtain authorization

to do business in New York. Department staff argues further that Business Corporation Law § 1301(a) must be read in conjunction with the regulatory definitions and requirements outlined in 6 NYCRR part 612 concerning the registration of PBS facilities. According to Department staff, owning and operating such facilities in New York constitutes "doing business" in this state. By operation of statute, Department staff concludes that RGLL, Inc. must be authorized to do business in New York before it can properly register the PBS facilities identified above.

ECL 17-1003(4) defines the term "owner," and the regulations adopt the same definition (*see* 6 NYCRR 612.1[c][18]). The term "person" is not defined in the statute, but there is a definition in the regulations (*see* 6 NYCRR 612.1[c][20]). Owners are required to register their PBS facilities (*see* ECL 17-1009 and 6 NYCRR 612.2). Nothing in ECL article 17, title 10, or the applicable implementing regulations, expressly state or imply that foreign corporations must be authorized to do business in New York as a prerequisite to owning a PBS facility and registering it.

I am not persuaded by Department staff's argument concerning RGLL, Inc.'s status as an owner and person pursuant to 6 NYCRR 612.1(c)(18) and (20), respectively. Whether RGLL, Inc. is in compliance with Business Corporation Law § 1301 is beyond the scope of this administrative proceeding, and the significance that Department staff attaches to RGLL, Inc.'s lack of compliance with this statutory requirement is misplaced. The relevant issue is whether RGLL, Inc. has "legal or equitable title" (*see* 6 NYCRR 612.1[c][18]) to the facilities at issue in this proceeding. If RGLL, Inc. owns PBS facilities, then it has an obligation to register them pursuant to 6 NYCRR 612.2. Department staff offers nothing as part of the motion for order without hearing to show that RGLL, Inc. does not have legal or equitable title to the facilities at issue here.

To the contrary, Department staff's Exhibits A and B establish, among other things, that RGLL, Inc. owns the seven PBS facilities at issue in this proceeding. In addition, Exhibit B shows that Ms. Simons, as a corporate officer of RGLL. Inc., filed PBS renewal applications and fees for each of these facilities. The documents presented in Exhibit B demonstrate that:

1. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Lauren Simons on behalf of RGLL, Inc. for the East Greenbush

Sunoco facility. The renewal application included a fee of $250.

2. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Fairview Sunoco facility in Hudson. The renewal application included a fee of $250.

3. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms facility in Chatham. The renewal application included a fee of $250.

4. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms facility in Valatie. The renewal application included a fee of $250.

5. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms in Hillsdale. The renewal application included a fee of $250.

6. On September 3, 2002, Department staff received a PBS renewal application dated August 28, 2002 from Ms. Simons on behalf of RGLL, Inc. for the Bricktavern Sunoco facility in Claverack. The renewal application included a fee of $250.

7. On May 5, 2003, Department staff received a PBS renewal application dated March 30, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Germantown Sunoco facility in Germantown. The renewal application included a fee of $250.

On each renewal application (*see* Exhibit B), RGLL, Inc. is identified as the owner of the facility, and under "Type of Owner," No. 5 is checked, which describes the owner as "Corporate/Commercial." Nowhere on the forms does it state that any owner, and in particular that any corporate or commercial owner, must be authorized to do business in New York pursuant to the Business Corporation Law. Therefore, based on Exhibits A and B, I conclude that RGLL, Inc. has properly registered the

facilities identified above pursuant to the requirements outlined in 6 NYCRR 612.2 by duly filing with the Department PBS renewal applications and the applicable fee. Accordingly, I deny Department staff's motion for order without hearing concerning the alleged violations of 6 NYCRR 612.2, and recommend that the Commissioner dismiss the related charge.

Based on Department staff's theory that RGLL, Inc. is not a "person" (*see* 6 NYCRR 612.1[c][20]) and, therefore, not an "owner" (*see* 6 NYCRR 612.1[c][18]) of the PBS facilities identified above, Department staff asserts that James Metz, who is the Chief Executive Officer of RGLL, Inc., and Lauren Simons, who is the Secretary of RGLL, Inc., should be held individually liable for the violations alleged in the motion for order without hearing. The basis, in part, for Department staff's assertion is that these individual respondents are officers of a corporation that is not authorized to do business in New York State. Nothing in the ECL or Business Corporation Law, however, authorizes the imposition of individual liability upon corporate officers solely because the corporation's authorization has been annulled.

In addition, Department staff cites three cases for the proposition that Mr. Metz and Ms. Simons may be held individually liable (*see Annicet Assoc., Inc. v Rapid Access Consulting, Inc.*, 171 Misc 2d 861 [1997]; *Brandes Meat Corp. v Cromer*, 146 AD2d 666 [2d Dept 1989]; *Poritzky v Wachtel*, 176 Misc 633 [1941]). These cases, however, relate to acts of corporate officers after their respective corporations were dissolved. With respect to the captioned matter, there is no dispute that RGLL, Inc. is an active Delaware corporation. Therefore, I conclude that Department staff failed to make a prima facie showing that Mr. Metz and Ms. Simons should be held individually liable. Accordingly, the Commissioner should dismiss the charges alleged against these individuals. The remaining violations alleged in the motion against RGLL, Inc. are discussed below.

2. Overfill Prevention and Secondary Containment (6 NYCRR 613.3[d])

The bases for Department staff's allegation that RGLL, Inc. violated 6 NYCRR 613.3(d) by failing to maintain spill prevention equipment at the Valatie, Hillsdale, Hudson, Chatham, and Claverack facilities are inspections conducted by Mr. Moore and other members of Department staff whom he supervises, and the information presented in Exhibit D.

Mr. Moore inspected the Valatie facility on May 14, 2003, and subsequently sent a notice of violation dated May 28, 2003 to Ms. Simons (*see* Exhibit D, No. 4). The May 28, 2003 notice of violation states that the sumps and fill port catch basins for Tanks 1A, 2A, and 3A are not being maintained properly because they contained liquid and debris at the time of the inspection. The notice states further that the sumps and basins must be inspected on a regular basis to check for any liquids (water and product), and as necessary, the sumps and basins must be cleaned out.

Exhibit D, No. 5 shows that Richard Schowe from DEC Region 4 initially inspected the Hillsdale facility on September 11, 2003, and later sent a notice of violation dated September 23, 2003 to Ms. Simons. The September 23, 2003 notice of violation states that the sumps and fill port catch basins for Tanks 1, 2, and 3 are not being maintained properly because they contained liquid and debris at the time of the inspection. The notice states further that the sumps and basins must be inspected on a regular basis to check for any liquids (water and product), and as necessary, the sumps and basins must be cleaned out. According to his affidavit, Mr. Moore re-inspected the Hillsdale facility on November 6, 2003.

Mr. Schowe inspected the Hudson, Chatham, and Claverack facilities on November 6, 2003 (*see* Exhibit D, Nos. 2, 3 and 6, respectively). In his affidavit, Mr. Moore summarizes the observations made by Mr. Schowe during the November 6, 2003 inspections. Mr. Schowe observed that the sump and fill port catch basin for Tank 1 at the Hudson facility was not properly maintained. Mr. Schowe also observed that the sumps and fill port catch basins for Tanks 1 and 2 at the Chatham facility were not properly maintained. During his November 6, 2003 inspection of the Claverack facility, Mr. Schowe observed that the sumps and fill port catch basins for Tanks 1, 2, and 3 were not properly maintained.

With respect to the requirements outlined at 6 NYCRR 613.3 concerning overfill protection and secondary containment systems, RGLL, Inc. denies the violations alleged against it. However, it did not submit any evidence to support its position. Absent such a showing, therefore, RGLL, Inc. failed to demonstrate the presence of any material issues of fact, which require adjudication. (*See Richard Locaparra, d/b/a/ L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner [June 16, 2003].)

Accordingly, I grant Department staff's motion for order without hearing with respect to the alleged violations of 6 NYCRR 613.3(d). Based on inspections conducted by Department staff on the dates noted above, I conclude that RGLL, Inc. violated 6 NYCRR 613.3(d) at the Valatie, Hillsdale, Hudson, Chatham, and Claverack facilities by failing to keep the spill prevention equipment at these PBS facilities in good working order.

3. Tank Tightness Testing (6 NYCRR 613.5[b][2])

In the motion for order without hearing, Department staff alleges that RGLL, Inc. violated 6 NYCRR 613.5(b)(2) by failing to monitor the cathodic protection system at the Chatham facility on an annual basis. This allegation is based on Mr. Schowe's November 6, 2003 inspection. The Chatham facility has two registered tanks identified as Tank 1 and Tank 2. Tank 1 has a capacity of 12,000 gallons, and the capacity of Tank 2 is 4,000 gallons. (*See* Exhibit A, and Exhibit D, No. 3.)

Based on Mr Moore's notes on the inspection fact sheet for the Chatham facility (*see* Exhibit D, No. 3), RGLL, Inc. did not monitor the cathodic protection system for Tanks 1 and 2 on an annual basis. According to Mr. Moore's supplemental affidavit, Department staff requested monitoring records during the November 6, 2003 inspection and were informed that no records were kept on site.

RGLL, Inc. denies the allegation and asserts that Tanks 1 and 2 are monitored and maintained with an electrical current as required by the regulations. RGLL, Inc. requests a hearing because it did not receive a copy of any report concerning the November 6, 2003 inspection.

With respect to the requirements outlined at 6 NYCRR 613.5(b)(2) concerning cathodic protection systems, RGLL, Inc.'s denial is not sufficient to demonstrate the presence of any material issues of fact, which require adjudication (*see Richard Locaparra, d/b/a/ L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner [June 16, 2003]). Although RGLL, Inc. contends that it monitors and maintains the protection system, it did not include any monitoring records to support its contention, though given the opportunity on two occasions. Accordingly, I grant Department staff's motion for order without hearing with respect to the alleged violation of 6 NYCRR 613.5(b)(2). Based on the inspection conducted by Department staff on November 6, 2003, I conclude that RGLL, Inc. violated 6 NYCRR 613.5(b)(2) at the Chatham facility by failing

to monitor the cathodic protection system for the two tanks located there.

4. Reporting Spills and Discharges (6 NYCRR 613.8)

Department staff alleges that an unreported petroleum spill occurred at the East Greenbush facility on May 22 and that an unreported petroleum spill occurred at the Germantown facility on November 6, 2003 in violation of 6 NYCRR 613.8. After inspecting the East Greenbush facility on May 22, 23 and 27, 2003, Mr. Moore sent a notice of violation dated May 28, 2003 to Ms. Simons. According to the May 28, 2003 notice of violation (*see* Exhibit D, No. 1) and Mr. Moore's supplemental affidavit sworn to July 13, 2003, Mr. Moore observed an accumulation of gasoline in the top sump and fill port catch basin on May 22, 2003. According to the May 28, 2003 notice of violation and the supplemental affidavit, the spill observed on May 22, 2003 had not been remedied when Mr. Moore returned to the East Greenbush facility on the afternoon of May 23, 2003. In the notice of violation, Mr. Moore notes that the catch basin had been cleaned up when he returned to the facility on May 27, 2003.

Mr. Schowe inspected the Germantown facility on November 6, 2003. According to the inspection fact sheet (*see* Exhibit D, No. 7), gasoline had collected in the top sumps and fill port catch basins of Tanks 1, 2 and 3, and RGLL, Inc. did not report this spill to the Department within two hours of discovery.

With respect to the reporting requirements outlined at 6 NYCRR 613.8, RGLL, Inc. denies the violations alleged against it. However, it did not submit any evidence to support its position. Absent such a showing, RGLL, Inc. failed to demonstrate the presence of any material issues of fact, which require adjudication. (*See Richard Locaparra, d/b/a/ L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner [June 16, 2003].)

In Department staff's reply to Attorney Feirstein's affirmation, Department staff argues that petroleum product in a catch basin is considered a spill because the product is outside the ordinary storage vessel (*see* 6 NYCRR 612.1[c][24]). Department staff contends that a catch basin is not an ordinary storage vessel. According to Department staff, RGLL, Inc. knew that the accumulation of petroleum product in a catch basin is considered a spill because Mr. Moore informed Ms. Simons of Department staff's position during his May 22, 2003 inspection of

the East Greenbush facility (*see* Paragraph 3 of Mr. Moore's supplemental affidavit sworn to July 13, 2004).

Accordingly, I grant Department staff's motion for order without hearing with respect to the alleged violations of 6 NYCRR 613.8. Based on inspections conducted by Department staff on the dates noted above, I conclude that RGLL, Inc. violated 6 NYCRR 613.8 on two occasions by failing to report a petroleum spill within two hours of discovery at the East Greenbush facility and at the Germantown facility.

5. Monitoring New Underground Tanks (6 NYCRR 614.5)

Department staff alleges that RGLL, Inc. violated 6 NYCRR 614.5 by failing to monitor the interstitial space of the double-walled tanks located at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities. These allegations are based on inspections conducted by Department staff on September 11 and November 6, 2003.

After inspecting the Hillsdale facility on September 11, 2003, Mr. Schowe sent a notice of violation dated September 23, 2003 to Ms. Simons (*see* Exhibit D, No. 5). According to the September 23, 2003 notice of violation, Tanks 1, 2 and 3 at the Hillsdale facility are not monitored electronically. Therefore, Mr. Schowe states that the interstitial space must be monitored on a weekly basis to detect leaks (*see* 6 NYCRR 614.5[b]), and that monitoring records must be maintained. No monitoring records were available for Mr. Schowe's review when he inspected the Hillsdale facility on September 11, 2003.

Mr. Moore inspected the Hudson, Chatham, Claverack, and Germantown facilities on November 6, according to his affidavit. Based on Ms. Lapinski's reply, the tanks at these facilities are not monitored electronically. Therefore, the interstitial space must be monitored on a weekly basis to detect leaks (*see* 6 NYCRR 614.5[b]), and that monitoring records must be maintained. No monitoring records were available for Mr. Moore's review when he inspected these facilities on November 6, 2003.

RGLL, Inc. denies that it violated 6 NYCRR 614.5, and asserts that it has duly monitored the interstitial space of the double-walled tanks at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities. In the Department staff's reply, Ms. Lapinski states that Department staff would reconsider this allegation if RGLL, Inc. produces records to show it has duly monitored the interstitial space of the double-walled tanks at

its facilities. To date, however, RGLL, Inc. has not provided the monitoring records or any other proof to demonstrate its assertion (*see Richard Locaparra, d/b/a/ L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner [June 16, 2003].)

Consequently, I find there are no material issues of fact concerning the alleged violations of 6 NYCRR 614.5 by RGLL, Inc. Accordingly, I grant Department staff's motion with respect to this allegation. Absent any proof to the contrary, I conclude that RGLL, Inc. violated 6 NYCRR 614.5 when it failed to monitor the interstitial space of the double-walled tanks at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities.

Relief

Department staff seeks a total civil penalty of $114,000, and provides a reasoned elaboration about how the requested civil penalty was calculated. The Department staff also requests an order from the Commissioner that would direct RGLL, Inc. to take steps at each of the identified facilities to bring them into compliance with the applicable requirements outlined in 6 NYCRR parts 612, 613 and 614.

1. Civil Penalty

Prior to May 15, 2003, ECL 71-1929 authorized a civil penalty of $25,000 per day for each violation of the requirements outlined in 6 NYCRR parts 612, 613 and 614. ECL 71-1929 was subsequently amended, and after May 15, 2003, the authorized civil penalty increased to $37,500 per day for each violation. According to Department staff, the total statutory maximum civil penalty for all the violations alleged in the motion at all seven facilities at issue in this proceeding would be $148,575,000. Department staff, however, has requested a total civil penalty of $114,000.

To calculate the requested civil penalty, Department staff relied on the guidance outlined in Enforcement Guidance Memorandum (EGM) DEE-22, dated May 21, 2003 entitled, *PBS Inspection Enforcement Policy,* and the attached civil penalty schedule (*see* Paragraph 14[d] of Mr. Moore's May 13, 2004 affidavit at 9). The penalty schedule identifies provisions of 6 NYCRR parts 612, 613 and 614; lists potential violations associated with these regulatory provisions; and recommends a

civil penalty for each potential violation.[1] Using this guidance, Department staff calculated a base civil penalty amount of $57,000 for the violations alleged in the motion.

Depending on the type of violation, EGM DEE-22 recommends assessing civil penalties either on a per tank basis or for the entire facility. Although none of the potential violations of 6 NYCRR parts 612, 613 and 614 listed in the guidance are identified as "continuous," the duration of a violation and its continuous nature may be considered aggravating factors in calculating the appropriate civil penalty, according to EGM DEE-22. In the motion papers, Department staff identifies a number of aggravating factors that the Commissioner should consider in determining the appropriate civil penalty. Upon consideration of these factors, Department staff argues that the base amount should be doubled from $57,000 to $114,000.

Of the total base civil penalty ($57,000) calculated by Department staff, $28,000 (7 facilities x $4,000 per facility) is related to whether the facilities at issue in this proceeding were properly registered pursuant to 6 NYCRR 612.2. For the reasons discussed above, I concluded that the PBS facilities were properly registered, and recommended that the Commissioner dismiss this charge. If the Commissioner adopts this recommendation, the Commissioner has two options with respect to the civil penalty calculation. First, the total base civil penalty could be reduced by $28,000. Alternatively, the Commissioner could re-apportion the $28,000 among the remaining violations.

The apportionment proposed by Department staff is consistent with EGM DEE-22. Based on the following discussion, however, the base civil penalty should be revised from $29,000 ($57,000 - $28,000) to $28,500. For failing to maintain the catch basins in violation of 6 NYCRR 613.3(d), Department staff requested $1,000 per facility. As noted above, violations of 6 NYCRR 613.3(d) occurred at five facilities. Therefore, the total civil penalty

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[1] According to DEE-22 (*see* § V), the recommended civil penalty ranges outlined in the PBS Penalty Schedule do not apply to the resolution of violations, where as here, an enforcement proceeding has been commenced. Because Department staff has moved for an order without hearing, the requested civil penalty is twice the civil penalties outlined in the PBS Penalty Schedule attached to DEE-22.

for these violations would be $5,000 (5 facilities x $1,000 per facility).

For violating 6 NYCRR 613.5(b)(2) by failing to monitor the cathodic protection system at the Chatham facility, Department staff requested a civil penalty of $500 per tank. Department staff's calculation is based on three tanks at the Chatham facility. However, there are only two tanks (*see* Exhibit A, and Exhibit D, No. 3). Therefore, the corrected civil penalty for these violations would be $1,000 (2 tanks x $500 per tank) rather than $1,500 (3 tanks x $500 per tank).

For failing to report petroleum spills to the Department in a timely manner in violation of 6 NYCRR 613.8, Department staff requested a civil penalty of $5,000 for each of the two spills (one at East Greenbush and one at Germantown) for a total civil penalty of $10,000 (2 unreported spills x $5,000 per spill).

For violating 6 NYCRR 614.5 by failing to monitor the interstitial space of the double-walled tanks located at the Hudson, Chatham, Hillsdale, Claverack and Germantown facilities, Department staff requested a civil penalty of $2,500 per facility. For five violations of 6 NYCRR 614.5, the total civil penalty would be $12,500 (5 facilities x $2,500 per facility).

The aggravating factors asserted by Department staff include: (1) the continuous nature of the violations, (2) the number of facilities that RGLL, Inc. owns or operates, and (3) an Order on Consent dated June 19, 2000, which resolved similar allegations at these and other facilities owned or operated by RGLL, Inc. Department staff included the June 19, 2000 Order on Consent with the motion for order without hearing as Exhibit E. Attorney Feirstein's opposing affirmation did not comment about the proposed civil penalty calculation.

Department staff's civil penalty calculation is reasonable based on the circumstances identified above. Accordingly, the Commissioner should assess a total civil penalty of not less than $57,000 ($28,500 revised base civil penalty x 2).

2. Regulatory Compliance

Department staff proposes two compliance alternatives. First, Department staff requests that the Commissioner direct RGLL, Inc. to surrender the PBS registrations for the facilities at issue in this proceeding, and discontinue operations at these facilities.

In the alternative, Department staff requests an order that directs RGLL, Inc. to verify the information related to the registration of the seven PBS facilities. As necessary, RGLL, Inc. should file modification forms and include any applicable fees. In addition, the Commissioner should direct RGLL, Inc. and its employees to empty all catch basins within two hours after every petroleum delivery, and inspect them daily and, as necessary, clean all catch basins.

With respect to the Chatham facility, RGLL, Inc. should be directed to test the cathodic protection system, and provide Department staff with copies of the results. If the test results show that either or both of the tanks are not adequately protected, RGLL, Inc. should report the test failure to the Department within two hours, and repair, replace or close the effected tank or tanks in accordance with the requirements outlined in 6 NYCRR 613.9(b).

With respect to the Hudson, Chatham, Hillsdale, Claverack and Germantown facilities, RGLL, Inc. should be directed to monitor the interstitial space and maintain records as provided by the regulations. RGLL, Inc. should be directed to provide Department staff with copies of these records.

For each facility at issue in this proceeding, RGLL, Inc. should be directed to keep and maintain all records required by the applicable regulations including, but not limited to, leak detection, daily inventory, 10-day reconciliation, cathodic protection monitoring, interstitial space monitoring, leak detection monitoring and any other applicable maintenance record. Department staff has requested that RGLL, Inc. be directed to submit written and photographic documentation to show that the facilities are in compliance with all applicable regulations.

Finally, Department staff requests advance notice of any construction activities that may be necessary to bring the facilities into compliance. Department staff requests that notice be provided in writing at least five days before the proposed activity. If the work schedule changes, Department staff requests that Respondent provide notice via fax at least one business day before the originally scheduled activity.

Findings of Fact

The facts established as a matter of law are:

1. With a cover letter dated May 13, 2004, Department staff served a motion for order without hearing, dated the same, and supporting papers upon RGLL, Inc. by certified mail return receipt requested. The US Postal Service subsequently returned the signed domestic return receipt to the Department. On May 20, 2004, Environmental Conservation Officer David C. Wayman personally served the May 13, 2004 motion for order without hearing upon James Metz and Lauren Simons.

2. RGLL, Inc. is a Delaware corporation with business offices located at 25 Mitchelltown Road (PO Box 728), Sharon, Connecticut 06069. James Metz is the Chief Executive Officer of RGLL, Inc., and Lauren Simons is the Secretary.

Ownership and Registration (6 NYCRR 612.2)

3. RGLL, Inc. owns the following seven petroleum bulk storage facilities. RGLL, Inc. has registered each facility with the Department, and recently renewed the registration for these facilities as follows.

   A. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Lauren Simons on behalf of RGLL, Inc. for the East Greenbush Sunoco facility. The renewal application included a fee of $250. The East Greenbush facility has one tank in service.

   B. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Fairview Sunoco facility in Hudson. The renewal application included a fee of $250. The Hudson facility has one tank in service.

   C. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms facility in Chatham. The renewal application included a fee of $250. The Chatham facility has two tanks (Tank 1 and Tank 2).

   D. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms facility in Valatie. The renewal application

included a fee of $250. The Valatie facility has three tanks (Tanks 1A, 2A, and 3A).

E. On January 30, 2003, Department staff received a PBS renewal application dated January 22, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Cobble Pond Farms facility in Hillsdale. The renewal application included a fee of $250. The Hillsdale facility has three tanks (Tanks 1, 2 and 3).

F. On September 3, 2002, Department staff received a PBS renewal application dated August 28, 2002 from Ms. Simons on behalf of RGLL, Inc. for the Bricktavern Sunoco facility in Claverack. The renewal application included a fee of $250. The Claverack facility has three tanks (Tanks 1, 2 and 3).

G. On May 5, 2003, Department staff received a PBS renewal application dated March 30, 2003 from Ms. Simons on behalf of RGLL, Inc. for the Germantown Sunoco facility in Germantown. The renewal application included a fee of $250. The Germantown facility has three tanks (Tanks 1, 2 and 3).

Overfill Prevention and Secondary Containment (6 NYCRR 613.3[d])

4. Edward L. Moore, P.E., Environmental Engineer II from the Department's Region 4 office, inspected the Valatie facility on May 14, 2003, and subsequently sent a notice of violation dated May 28, 2003 to Ms. Simons. During his inspection, Mr. Moore observed that the sumps and fill port catch basins for Tanks 1A, 2A, and 3A were not maintained properly because they contained liquid and debris.

5. Richard Schowe from the Department's Region 4 office initially inspected the Hillsdale facility on September 11, 2003, and Mr. Moore re-inspected the Hillsdale facility on November 6, 2003. After inspecting the Hillsdale facility on September 11, 2003, Mr. Schowe sent a notice of violation dated September 23, 2003 to Ms. Simons. During his September 11, 2003 inspection, Mr. Schowe observed that the sumps and fill port catch basins for Tanks 1, 2, and 3 were not being maintained properly because they contained liquid and debris.

6. Mr. Schowe inspected the Hudson, Chatham and Claverack facilities on November 6, 2003. Mr. Schowe observed that

the sump and fill port catch basin for Tank 1 at the Hudson facility was not properly maintained because it contained liquid and debris. With respect to the Chatham facility, Mr. Schowe observed that the sumps and fill port catch basins for Tanks 1 and 2 were not properly maintained because they also contained liquid and debris. During his inspection of the Claverack facility, Mr. Schowe observed that the sumps and fill port catch basins for Tanks 1, 2, and 3 were not properly maintained because they contained liquid and debris.

Tank Tightness Testing (6 NYCRR 613.5[b][2])

7. The Chatham facility has two registered petroleum bulk storage tanks identified as Tank 1 and Tank 2. Tank 1 has a capacity of 12,000 gallons, and the capacity of Tank 2 is 4,000 gallons. Mr. Schowe inspected the Chatham facility on November 6, 2003. On November 6, 2003, no records were available at the facility to show that RGLL, Inc. monitors the cathodic protection system for the tanks on an annual basis.

Reporting Spills and Discharges (6 NYCRR 613.8)

8. On May 22, 23 and 27, 2003, Mr. Moore inspected the East Greenbush facility, and subsequently sent a notice of violation dated May 28, 2003 to Ms. Simons. During his inspection, Mr. Moore observed an accumulation of gasoline in the top sump and fill port catch basin on May 22, 2003. On May 23, 2003, Mr. Moore observed, for a second day, that the spill he saw on May 22, 2003 had not been remedied. The Department has no record that RGLL, Inc. reported this spill within two hours of discovery.

9. Mr. Schowe inspected the Germantown facility on November 6, 2003, and observed that gasoline had collected in the top sumps and fill port catch basins at Tanks 1, 2 and 3. The Department has no record that RGLL, Inc. reported this spill within two hours of discovery.

Monitoring Underground Tanks (6 NYCRR 614.5)

10. Tanks 1, 2 and 3 at the Hillsdale facility are double-walled tanks that are not monitored electronically. As a result, the interstitial space must be monitored on a weekly basis to detect leaks (*see* 6 NYCRR 614.5[b]). After inspecting the Hillsdale facility on September 11, 2003, Mr. Schowe

sent a notice of violation dated September 23, 2003 to Ms. Simons. No records to document the weekly monitoring of the interstitial space were available for Mr. Schowe's review when he inspected the Hillsdale facility on September 11, 2003.

11. The tanks at the Hudson, Chatham, Claverack, and Germantown facilities are double-walled, but are not monitored electronically. Therefore, the interstitial space must be monitored on a weekly basis to detect leaks (*see* 6 NYCRR 614.5[b]). When Mr. Moore inspected the Hudson, Chatham, Claverack, and Germantown facilities on November 6, 2003, no monitoring records were available for Mr. Moore's review.

Conclusions

1. Department staff establishes as a matter of law that service of the motion for order without hearing upon RGLL, Inc. was in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).

2. Because RGLL, Inc. has "legal or equitable title" (*see* 6 NYCRR 612.1[c][18]) to the PBS facilities at issue in this proceeding, it is obliged, pursuant to ECL 17-1009 and 6 NYCRR 612.2, to register them with the Department. Whether RGLL, Inc. is in compliance with Business Corporation Law § 1301 is beyond the scope of this administrative proceeding. Nothing in ECL article 17, title 10, or the applicable implementing regulations, expressly state or imply that foreign corporations must be authorized to do business in New York as a prerequisite to owning a PBS facility and registering it.

3. RGLL, Inc. has properly registered the facilities at issue in this proceeding, pursuant to the requirements outlined in 6 NYCRR 612.2, by duly filing PBS renewal applications and the applicable fees with the Department.

4. There is no basis to conclude that James T. Metz and Lauren Simons should be held individually liable, as corporate officers of RGLL, Inc., for the violations alleged in the motion for order without hearing.

5. With respect to the remaining violations alleged in the May 13, 2004 motion for order without hearing, Department staff has established as a matter of law that there are no

material issues of fact related to RGLL, Inc.'s non-compliance with various provisions of 6 NYCRR parts 612, 613, and 614, or the requested relief.

6. Department staff established as a matter of law that RGLL, Inc. violated 6 NYCRR 613.3(d) at the Hudson, Chatham, Valatie, Hillsdale and Claverack facilities by failing to keep the spill prevention equipment at these PBS facilities in good working order.

7. Department staff established as a matter of law that RGLL, Inc. violated 6 NYCRR 613.5(b)(2) at the Chatham facility by failing to monitor the cathodic protection system for the two tanks located there.

8. Department staff established as a matter of law that RGLL, Inc. violated 6 NYCRR 613.8 on two occasions by failing to report a petroleum spill at the East Greenbush facility and one at the Germantown facility within two hours of discovery.

9. Department staff established as a matter of law that RGLL, Inc. violated 6 NYCRR 614.5 when it failed to monitor the interstitial space of the double-walled tanks at the Hudson, Chatham, Hillsdale, Claverack, and Germantown facilities.

Rulings

1. I deny Department staff's motion for order without hearing with respect to the allegation that the petroleum bulk storage facilities at issue in the proceeding are not properly registered in violation of 6 NYCRR 612.2 because RGLL, Inc. is not authorized to business in New York.

2. I also deny Department staff's request to conclude that Mr. Metz and Ms. Simons should be held individually liable for the violations alleged in the motion.

3. I grant Department staff's motion for order without hearing against RGLL, Inc. with respect to the remaining violations alleged in the May 13, 2004 motion for order without hearing. There are no material issues of law or fact related to RGLL, Inc.'s liability or the relief requested by Department staff. Therefore, an adjudicatory hearing is not necessary. Pursuant to 6 NYCRR 622.12(d), I submit this

ruling as my report to the Commissioner consistent with the requirements outlined in 6 NYCRR 622.18.

Recommendations

1. The Commissioner should conclude that RGLL, Inc. is an owner as that term is defined at 6 NYCRR 612.1(c)(18), and conclude further that the facilities at issue in this proceeding are duly registered pursuant to 6 NYCRR 612.2. The Commissioner should dismiss, with prejudice, the charge alleged in Department staff's May 13, 2004 motion for order without hearing that the facilities are not properly registered in violation of 6 NYCRR 612.2.

2. The Commissioner should dismiss all charges alleged against Mr. Metz and Ms. Simons as corporate officers of RGLL, Inc.

3. With respect to the remaining violations alleged in Department staff's May 13, 2004 motion for order without hearing, the Commissioner should conclude there are no material issues of law or fact related to RGLL, Inc.'s liability or the requested relief, and grant the motion.

4. The Commissioner should assess a civil penalty of not less than $57,000, and require RGLL, Inc. either to surrender the PBS registration for the facilities at issue in this proceeding or, in the alternative, operate them in a manner consistent with the applicable requirements outlined in 6 NYCRR parts 612, 613 and 614.

/s/
Daniel P. O'Connell
Administrative Law Judge