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 Motion for Default Judgment
	Case Number: D3-601405-02-06
RGLL, Inc. and GRJH, Inc., RESPONDENTS.	
(Millerton Sunoco)	March 5, 2007

Proceedings

Since the commencement of the captioned administrative enforcement action with service of the February 22, 2006 notice of hearing and a complaint upon RGLL, Inc. (RGLL), Staff has moved to amend the complaint twice. Staff made its first request on September 14, 2006. RGLL did not oppose this request, and I granted it. In a letter dated October 26, 2006, I set November 15, 2006 as the return date for RGLL to file an amended answer to Staff's first amended complaint dated September 14, 2006. Subsequently, with a cover letter dated January 3, 2007, RGLL's counsel enclosed an amended answer dated January 2007. At that time, Staff did not object to RGLL's late-filed answer to the first amended complaint dated September 14, 2006.

With a cover letter dated January 8, 2007, Department staff requested leave, a second time, to amend the September 14, 2006 complaint in order to name GRJH, Inc. (GRJH) as a respondent in this matter. According to Staff, GRJH operates the Millerton Sunoco. In a letter dated January 22, 2007, RGLL responded to Staff's January 8, 2007 request for leave. RGLL did not object to adding GRJH as a party to this action, but asserted that the Respondents (*i.e.*, RGLL and GRJH) would be prejudiced by going forward with the adjudicatory hearing on February 6, 2007. Counsel for RGLL contended that if GRJH became a respondent in this matter, additional time would be needed to prepare for the hearing. Consequently, RGLL requested that the adjudicatory hearing be adjourned from February 6 and 7, 2007.

In a ruling dated January 30, 2007, I granted Staff's second request for leave to the amend the complaint. In addition, the January 30, 2007 ruling adjourned the adjudicatory hearing from February 6 and 7 to March 6 and 7, 2007. Finally, the January

30, 2007 ruling set Monday, February 19, 2007 as the return date for Respondents RGLL and GRJH to answer the second amended complaint dated January 8, 2007. Subsequently, I extended the return date by one day to Tuesday, February 20, 2007 because February 19 was a state and federal holiday (Presidents' Day). I did not receive any answers from Respondents by February 20, 2007.

On February 22, 2007, I received, via hand delivery from Department staff, a cover letter dated February 22, 2007 with a motion for default judgment and supporting papers. The basis for Staff's motion is Respondents' failure to file answers by February 20, 2007. According to its February 22, 2007 cover letter, Staff served a copy of the motion for default judgment upon Respondents' counsel via overnight mail.

Also on February 22, 2007, I received, via hand delivery and by fax, a cover letter dated February 22, 2007 from Respondents' counsel, Matthew Sgambettera, Esq. (Sgambettera & Associates, PC, Clifton Park, NY). In his February 22, 2007 cover letter, Mr. Sgambettera requested leave to file the answers two days after the date established in the January 30, 2007 ruling, as subsequently modified. Enclosed with the February 22, 2007 cover letter from Respondents' counsel were RGLL's answer to the second amended complaint, GRJH's answer to the second amended complaint, and an affidavit of mailing by Gina M. DeMeo sworn to February 22, 2007.

In a letter dated February 23, 2007, I stated that the parties may respond to the motions as provided for by 6 NYCRR 622.6(c)(3) and 622.15(d) within the time prescribed in 622.6(b). I also referred the parties to a ruling dated December 27, 2006 concerning the *Matter of Einhorn Enterprises, LLC and Jonathon Einhorn* (DEC File No. R2-20060501-194).

As noted above, Staff served a copy of its February 22, 2007 motion for default judgment upon Respondents' counsel by overnight mail. Respondents received Staff's February 22, 2007 motion on February 23, 2007. On February 28, 2007, I received a telephone call from Mr. Sanda of Sgambettera & Associates, P.C. The purpose of Mr. Sanda's call was to identify the return date for Respondents' reply to Staff's default motion. Mr. Sanda stated that his law firm received Staff's motion papers by overnight mail on February 23, 2007 (*see also* Mr. Sanda's March 2, 2007 affidavit ¶ 18). I stated that response papers were due by March 2, 2007.

On the morning of March 2, 2007, Mr. Sanda hand delivered a copy of Respondents' reply dated March 2, 2007 to me. Mr. Sanda also brought a copy of Respondents' reply for Mr. Owens, Department staff's counsel. Because Mr. Sanda was not able to contact anyone from the Division of Environmental Enforcement to pick up Mr. Owens' copy, I brought the copy of Respondents' reply to Mr. Owens's office.

In a letter dated March 2, 2007, Mr. Owens objected to Respondents' reply and contended that the reply was due by March 1, 2007 rather than March 2, 2007. Staff requested that I consider its February 22, 2007 motion for default judgment to be unopposed, and grant it.

Time limits for responding to motions are outlined at 6 NYCRR 622.6(b), and refer to the New York State General Construction Law (*see* Article 2, § 20 [Day, computation]). Mr. Owens' computation of the time limit appears to be correct. However, I had already advised Respondents' counsel before March 1, 2007 that the reply was due by March 2, 2007. With respect to filing a reply to Staff's February 22, 2007 default motion, Respondents have complied with the time limit that I provided their counsel.

Staff's motion for default judgment

With a cover letter dated February 22, 2007, Department staff filed a motion for default judgment and supporting papers against RGLL and GRJH. The basis for Staff's motion is that RGLL and GRJH did not file answers to the January 8, 2007 second amended complaint by February 20, 2007. If Staff's default motion is denied, Staff moved in the alternative that RGLL and GRJH be precluded from raising any affirmative defenses at the hearing, which is scheduled to commence on March 6, 2007. In addition, Staff requested clarification of RGLL's status as either an owner or operator of the Millerton Sunoco facility.

Staff's motion papers consist of the following documents. There is a cover letter dated February 22, 2007 with attached Exhibits A through E. Exhibit A is a copy of a letter from Lauren Simons dated February 26, 2003 to Region 3 Department staff. The letter concerns the installation of a new petroleum storage tank and the closure of an existing petroleum storage tank at the Millerton Sunoco facility. Exhibit B is a letter from Mr. Sgambettera dated October 5, 2006 to Mr. Owens, which provided notification to Department staff of the scheduled

removal of an existing petroleum storage tank from the Millerton Sunoco facility on October 10, 2006.

Exhibit C is a letter from Mr. Owens dated October 11, 2006 to Mr. Sgambettera in which Mr. Owens explained that Department staff went to the Millerton Sunoco facility on October 10, 2006 to observe the removal of the tank described in Exhibit B. In his October 11, 2006 letter, Mr. Owens stated that staff went to the facility on October 11, 2006 and that no tank had been removed as of that date. Mr. Owens asked Mr. Sgambettera to advise his client of its obligation to notify the Department before any petroleum storage tanks are removed from the site. Enclosed with Mr. Owens October 11, 2006 letter were a "Tank Removal Notification Form" and several photographs of the Millerton Sunoco facility. According to Mr. Owens, the photographs were taken on October 11, 2006 when staff went to the facility to observe the removal of the existing petroleum storage tank.

Exhibit D is a copy of the *Petroleum Bulk Storage Penalty Schedule* from the Department's *Petroleum Bulk Storage Inspection Enforcement Policy*, which is identified as DEE-22. Exhibit E is a copy of a notice of violation dated July 10, 2001 concerning the Millerton Sunoco facility.

Additional motion papers included a notice of default judgment, a motion for default judgment, an affirmation in support of the motion by Mr. Owens with attachments, and a draft order. All documents are dated February 22, 2007. In the motion for default judgment, Department staff seeks an order from the Commissioner which, among other things, would assess a total civil penalty of $55,000, and direct Respondents to remove a petroleum storage tank from the facility and to remediate petroleum contamination at the facility. Exhibit A attached to Staff's motion for default judgment is a copy of the January 8, 2007 second amended complaint.

In his February 22, 2007 affirmation, Mr. Owens outlined the procedural history of the captioned matter which includes, among other things, service of the notice of hearing and complaint dated February 22, 2006 upon RGLL, as well as the first and second requests for leave to amend the complaint. Mr. Owens also stated that answers to the second amended complaint dated January 8, 2007 were due by February 20, 2007 and, that as of noon on February 23, 2007, Department staff had not received any answers from either RGLL or GRJH. Given these circumstances, Staff moved for a default judgment.

To substantiate the statements in Mr. Owens' February 22, 2007 affirmation, he attached Exhibits A through G. All of these documents are already part of the hearing file. They include: the shipping request form for the February 22, 2006 notice of hearing and complaint (Exhibit A); the signed domestic return receipt (Exhibit B) demonstrating service of Staff's February 22, 2006 notice of hearing and complaint (Exhibit C) upon RGLL; Staff's statement of readiness dated June 28, 2006 (Exhibit D); a copy of Staff's motion papers related to the first amended complaint dated September 14, 2006 (Exhibit E) and the second amended complaint dated January 8, 2007 (Exhibit F); as well as a copy of the January 30, 2007 ruling (Exhibit G).

In a letter dated February 26, 2007, Department staff objected to the request by RGLL and GRJH to extend the time to file their answers to the second amended complaint. Staff renewed its motion for a default judgment. Staff also moved to exclude the affirmative defenses asserted in Respondents' January 2007 answers. In the alternative, Staff moved to clarify Respondents' affirmative defenses.

Respondents' request for leave to extend the time to answer

As noted above, Mr. Sgambettera, counsel for RGLL and GRJH, filed separate answers for each Respondent with a cover letter dated February 22, 2007. In the cover letter, Mr. Sgambettera stated, without offering any details, that his client "found some additional documentation" that caused him to amend the positions stated in the answers to the second amended complaint. As a result, Respondents requested leave to extend the time to answer from February 20, 2007 to February 22, 2007.

With a cover letter dated March 2, 2007, Respondents filed a reply to Staff's motion for default judgment in the form of an affidavit by Mr. Sanda. Respondents challenged Staff's claim that Department staff served its February 22, 2007 default motion at 12:15 p.m. on February 22, 2007 and received Respondents' February 22, 2007 cover letter and answers at 3:26 p.m. on February 22, 2007. Respondents asserted that Department staff received their answers via fax at 11:20 a.m. Respondents asserted that Department staff did not intend to file its default motion until February 23, 2007 because all the dates on Staff's motion papers were changed by hand from February 23, 2007 to February 22, 2007.

Referring to Mr. Sgambettera's February 22, 2007 cover letter, Mr. Sanda reiterated in his March 2, 2007 affidavit that

Respondents "found documentation that altered their Answers and caused a the short delay in filing the same" (¶ 18). According to Mr. Sanda, the documentation was found "at the last minute" (¶ 27), and that after reviewing the documentation, Respondents' counsel revised and filed the answers (*see* ¶ 28).

Respondents will consent to an adjournment of the March 6, 2007 hearing to provide Staff with time to review the answers to the second amended complaint dated February 22, 2007 and to prepare for the hearing. Respondents noted, however, that Staff had previously stated it was ready to proceed with the hearing on February 6 and 7, 2007, when Respondents objected to Staff's January 8, 2007 motion for leave to amend the complaint.

Respondents request that I deny Staff's motion for default judgment, grant Respondents' request for leave to file the answers on February 22, 2007, and accept the answers.

Discussion and Rulings

RGLL

When Staff commenced this enforcement action, James T. Metz represented RGLL as a corporate officer. In response to Staff's February 22, 2006 complaint, Mr. Metz filed a letter dated May 10, 2006 on behalf of RGLL. Therefore, RGLL has appeared and answered the complaint which commenced the captioned enforcement action. As a result, RGLL cannot be found to be in default for failing to answer the January 8, 2007 second amended complaint.

In its January 2007 answer, RGLL generally denied the charges alleged in the September 14, 2006 amended complaint, and asserted four affirmative defenses. RGLL asserted that: (1) the September 14, 2006 amended complaint fails to state any claim; (2) the Department's claims are barred by the doctrines of waiver, estoppel, laches and unclean hands; (3) in the event any violations occurred, RGLL did so based on its reliance on the affirmative representations of Department staff; and (4) any damages that may have occurred were caused by Department staff.

The first three affirmative defenses asserted in the February 22, 2007 answer are identical to those asserted in the January 2007 answer. With respect to the fourth affirmative defense in the February 22, 2007 answer, RGLL asserted that Robert Trotta and Joseph A. Trotta own and operate the Millerton Sunoco. I note that Mr. Metz asserted that Robert Trotta was the land owner in his May 10, 2006 letter. As its fourth affirmative

defense, RGLL asserted in the February 22, 2007 answer that any damages that may have occurred were caused by either Department staff, or Robert Trotta and Joseph A. Trotta.

Accordingly, I grant RGLL's motion for leave to extend the time for it to answer Staff's January 8, 2007 amended complaint (*see* 6 NYCRR 622.6[f]). In addition, I deny Staff's February 22, 2007 motion for default judgment against RGLL.

GRJH

The only basis for Staff's January 8, 2007 request for leave to amend the complaint was to add GRJH as a respondent and allege that GRJH operates the Millerton Sunoco facility. GRJH first became a party to this matter as a result of the January 30, 2007 ruling which granted Staff's request for leave to amend the complaint. Therefore, GRJH's appearance in this action comes by its February 22, 2007 answer to the January 8, 2007 second amended complaint. GRJH filed its answer after it was due on February 20, 2007.

GRJH's February 22, 2007 answer to the second amended complaint, however, is identical to RGLL's February 22, 2007 answer except that in the former answer, GRJH has been substituted for RGLL. As noted above, there are no significant differences between the pleadings in RGLL's February 22, 2007 answer to the second amended complaint and those alleged in RGLL's January 2007 answer to the first amended complaint.

Given the similarity of GRJH's February 22, 2007 answer to RGLL's February 22, 2007 answer, I grant GRJH's motion for leave to extend the time for it to answer Staff's January 8, 2007 amended complaint (*see* 6 NYCRR 622.6[f]). In addition, I deny Staff's February 22, 2007 motion for default judgment against GRJH.

Staff's requests for clarification

In its February 22, 2007 motion, Staff moved, in the alternative if default judgment is denied, for RGLL to clarify its status as either an owner and/or operator of the Millerton Sunoco facility, as well as the duties RGLL's status imposes. In addition, Department staff moved for clarification of RGLL's and GRJH's affirmative defenses. Staff renewed these requests in its February 26, 2007 reply letter.

1. Clarification of RGLL's status

I deny Staff's request that I direct RGLL to clarify its status as either an owner and/or operator of the Millerton Sunoco facility, and the duties RGLL's status imposes. This request is untimely. In the first paragraph of the February 22, 2006 complaint, the September 14, 2006 first amended complaint, and the January 8, 2007 second amended complaint, Staff has asserted that RGLL is the owner and/or operator of the Millerton Sunoco facility. In the first paragraph of the January 2007 answer and the February 22, 2007 answer, RGLL has denied this allegation. Staff has had notice of RGLL's position with respect to this allegation, and a significant amount of time since this matter commenced to obtain clarification from RGLL. Clarification of this issue should have been resolved before Staff filed its June 28, 2006 statement of readiness.

2. Clarification of RGLL's and GRJH's affirmative defenses

As noted above, RGLL and GRJH asserted in their respective February 22, 2007 answers that: (1) the January 8, 2007 amended complaint fails to state any claim; (2) the Department's claims are barred by the doctrines of waiver, estoppel, laches and unclean hands; (3) in the event any violations occurred, RGLL and GRJH did so based on its reliance on the affirmative representations of Department staff; and (4) any damages that may have occurred were caused by either Department staff, or Robert Trotta and Joseph A. Trotta.

Pursuant to 6 NYCRR 622.4(f), Department staff may move for clarification of affirmative defenses on the grounds that they are vague or ambiguous and that Staff has not been placed on notice of the facts or legal theories upon which respondent's defenses are based.

Respondents' March 2, 2007 reply does not respond to Staff's motion, made pursuant to 6 NYCRR 622.4(f), to clarify affirmative defenses.

I reserve ruling on Staff's motion to clarify affirmative defenses. At the hearing, I will hear additional arguments from the parties concerning this matter.

Further Proceedings

The hearing concerning the captioned matter will commence at 10:00 a.m. on March 6, 2007 in Conference Room 1022 at the Department's central office located at 625 Broadway, Albany, New York 12233. If necessary, the hearing will continue on March 7, 2007 at the same location.

_____/s/_____
Daniel P. O'Connell
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Dated: March 5, 2007
Albany, New York

To: **VIA FAX**

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