

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER

DEC File No. 20-22
R9-20200609-36

-by-

KIRK TYLER d/b/a KCR ENTERPRISES,

Respondent.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department) that Kirk Tyler d/b/a KCR Enterprises (respondent) violated New York State's petroleum bulk storage (PBS) regulations at its facility located at 34 South Main Street, Cassadaga, Chautauqua County, New York (facility). Specifically, staff alleges that respondent violated 6 NYCRR 613-1.9(d)(1), by failing to register its petroleum bulk storage facility within thirty (30) days of the date it acquired the property, and 6 NYCRR 613-2.6(a)(3), by failing to permanently close the one thousand gallon underground storage tank at the facility, which tank has been out-of-service for more than 12 months.

Administrative Law Judge (ALJ) Lara Q. Olivieri of the Department's Office of Hearings and Mediation Services was assigned to this matter and prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter (*see* Default Summary Report at 4 [Finding of Fact No. 14]; *see* Affirmation of Teresa J. Mucha, Esq., dated January 12, 2021, ¶ 2). Department staff subsequently submitted a motion for default judgment under cover letter dated January 12, 2021 (*see* Default Summary Report at 1).

As a consequence of respondent's failure to answer in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. The pleadings and the papers submitted with and in support of the motion provide sufficient facts to enable me to determine that staff has a viable claim that respondent failed to register its PBS

facility within thirty (30) days of the date it acquired the facility and failed to permanently close the underground storage tank at the facility, which has been out-of-service for more than 12 months (*see* Motion for Default, Exhibit D [Affidavit of Patrick Diez, sworn to January 11, 2020] [Diez Affidavit], ¶¶ 15, 24). Accordingly, respondent is in violation of 6 NYCRR 613-1.9(d)(1) and 6 NYCRR 613-2.6(a)(3).

The Department's PBS regulations have been designed to protect the public health and environment from adverse impacts arising from the release of petroleum products. Department staff correctly points out that the requirement to register PBS facilities is one of the "cornerstones" of the PBS regulatory scheme (Motion for Default Judgment, Exhibit D, Diez Affidavit, ¶ 38). Proper registration assists in the oversight of other requirements for a PBS facility (e.g., leak detection, monitoring, and reporting), with the goal of protecting the environment and public health (*see id.*). The requirement to close out-of-service PBS tanks is also critical to the PBS regulatory scheme to prevent petroleum discharges (*see id.* ¶ 39).

Department staff seeks a penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860). ECL 71-1929, which applies to the regulatory violations at issue in this proceeding, provides for a penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. In support of its penalty request, Department staff considered various applicable Department enforcement and penalty policies, respondent's failure to cooperate and respondent's economic benefit of noncompliance (*see* Motion for Default Judgment, Exhibit D, Diez Affidavit, ¶¶ 26-36). The civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860) as requested by Department staff, is authorized and appropriate for the violations established on this motion.

With regard to corrective measures, Department staff seeks an order of the Commissioner directing respondents to permanently close the one thousand gallon underground storage tank at the facility in accordance with the provisions of 6 NYCRR 613-2.6(b)-(e). The proper closure of underground storage tanks is required under part 613 and Department staff's request is consistent with the regulatory requirements. Accordingly, I hereby direct that, within thirty (30) days of the service of this order upon respondent, respondent is to submit a work plan to the Department for Department review and approval to provide for permanent closure of the underground storage tank at the facility. Within sixty (60) days of Department approval of the work plan, respondent Kirk Tyler d/b/a KCR Enterprises shall permanently close the underground storage tank at the facility in accordance with 6 NYCRR 613-2.6(b)-(e). The work plan shall include a schedule and timetable for implementation of the plan and completion of the remedial activities relating to the permanent closure.

In addition, I direct that respondent submit a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees, to the Department within thirty (30) days of the service of this order upon respondent.

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

- I. Department staff's motion for default judgement pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint, respondent Kirk Tyler d/b/a KCR Enterprises waived his right to be heard at hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Kirk Tyler d/b/a KCR Enterprises is adjudged to have violated:
 - A. 6 NYCRR 613-1.9(d) by failing to register the PBS facility within 30 days of acquiring the facility; and
 - B. 6 NYCRR 613-2.6(a)(3) by failing to permanently close the one thousand gallon underground storage tank at the facility that has been out-of-service for more than 12 months.
- III. Within thirty (30) days of service of this order upon respondent Kirk Tyler d/b/a KCR Enterprises, respondent shall submit to the Department a complete registration application for the facility, with applicable registration fees.
- IV. Within thirty (30) days of service of this order upon respondent Kirk Tyler d/b/a KCR Enterprises, respondent shall pay a civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860) by certified check, cashier's check or money order made payable to the "New York State Department of Environmental Conservation."
- V. Within thirty (30) days of service of this order upon respondent Kirk Tyler d/b/a KCR Enterprises, respondent shall submit a work plan to the Department for its review and approval, that addresses the permanent closure of the underground storage tank at the facility in accordance with 6 NYCRR 613-2.6(b)-(e). The work plan shall include a schedule and timetable for implementation of the plan and completion of the remedial activities relating to the permanent closure of the underground storage tank.
- VI. Within sixty (60) days of Department approval of the work plan, respondent Kirk Tyler d/b/a KCR Enterprises shall permanently close the underground storage tank at the facility and submit a revised PBS registration to the Department to reflect the closure of the tank.

VII. Respondent Kirk Tyler d/b/a KCR Enterprises shall submit the penalty payment and all other submissions to the following:

Teresa J. Mucha, Esq.
Associate Attorney
NYSDEC Region 9
270 Michigan Avenue
Buffalo, New York 14203-2915.

VIII. Any questions or other correspondence regarding this order shall also be addressed to Teresa J. Mucha, Esq. at the address referenced in paragraph VII of this order.

IX. The provisions, terms and conditions of this order shall bind respondent Kirk Tyler d/b/a KCR Enterprises and respondent's agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: June 4, 2021
Albany, New York

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), Part 613,

**DEFAULT SUMMARY
REPORT**

-by-

DEC Case No.
R9-20200609-36

KIRK TYLER d/b/a KCR ENTERPRISES,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Kirk Tyler d/b/a KCR Enterprises (respondent) with a notice of hearing and complaint (NOHC) dated August 11, 2020, alleging respondent failed to submit an application to register a petroleum bulk storage (PBS) facility with the Department within thirty days of the property transfer and failed to permanently close an underground storage tank that had been out-of-service for more than twelve months, in violation of ECL article 17 and 6 NYCRR part 613.

Respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint (*see* Motion for Default Judgment, Exhibit E). In addition, respondent failed to appear at a pre-hearing conference scheduled for December 2, 2020 (*see* Motion for Default Judgment, Exhibit H).

By cover letter dated January 12, 2021, staff submitted a written motion for a default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on motion]). Department staff served the motion and supporting papers on respondent by first class mail on January 12, 2021 (*see* Motion for Default Judgment, Exhibit I). Department staff requested a default judgment against respondent finding respondent in violation of: (i) 6 NYCRR 613-1.9(d) for failing to submit an application to initially register a facility with the Department within thirty days after a property transfer; and (ii) 6 NYCRR 613-2.6(a)(3) for failing to

permanently close an underground storage tank (UST) that has been out-of-service for more than twelve months.¹

Department staff requests an order that: (i) finds respondent in violation of the cited regulations; (ii) directs respondent to pay a civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860); and (iii) directs respondent to perform the following corrective actions within thirty days of the effective date of the order: (a) submit a completed PBS application, with fee payment, to the Department to renew the registration for the facility; (b) submit a work plan, for Department review and approval, to permanently close underground storage tanks at the facility in accordance with 6 NYCRR 613-2.6 (b) through (e); and (c) permanently close the underground storage tanks at the facility within 60 days of Department approval of the work plan.

Applicable Regulatory Provisions

Section 613-1.9(d) of NYCRR states:

“(d) Application procedure for initial registration or transfer of ownership.

(1) If ownership of the real property on which a facility is located is transferred, the new facility owner must submit an application to initially register the facility with the department within 30 days after transfer.”

Section 613-2.6(a)(3) of NYCRR states:

“(a) Out-of-service UST systems.

(3) When a UST system is out-of-service for more than 12 months, the facility must permanently close the UST system in accordance with subdivisions (b) through (e) of this section.”

Findings of Fact

The following facts are found based upon the pleadings and papers submitted with and in support of staff’s motion for a default judgment:

1. Respondent Kirk Tyler d/b/a KCR Enterprises purchased a parcel of property on or about June 27, 2013, which is located at 34 South Main Street, Cassadaga, New York, Chautauqua County, Tax Map Parcel Number 199.05-1-24 (site) (*see* Motion for Default Judgment, ¶ 4 and Exhibits A and B).

¹ Part 622 of 6 NYCRR, Uniform Enforcement Hearing Procedures, was repealed and replaced effective September 16, 2020. Department staff commenced this proceeding before the effective date of the current part 622 regulations. Accordingly, jurisdictional service is reviewed and considered pursuant to former part 622. Staff’s default motion papers were submitted after the effective date of the current part 622 and will be reviewed and considered pursuant to the current part 622 regulations.

2. The site is registered in the Department's PBS database as PBS #9-013714 and was previously owned by Peck's Trucking, Inc. (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶ 11, Diez Exhibit A).
3. The site previously had three underground storage tanks and two of the three tanks were closed during the operation of the prior owner. The PBS registration expired on September 2, 1996. (*See* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶ 11, Diez Exhibit A.)
4. Patrick Diez is employed as an Environmental Program Specialist T2 in the Department's Division of Environmental Remediation, Petroleum Bulk Storage unit, in the Department's Region 9 office located in Buffalo, New York (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶ 2).
5. As part of his duties, Mr. Diez is familiar with and administers provisions of ECL article 17 title 10 and 6 NYCRR part 613 pertaining to the regulation of PBS tanks, and assists the regulated community with PBS compliance, conducts inspections of PBS facilities and assists in enforcing violations of the PBS laws and regulations including development of civil penalties (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶¶ 3-4).
6. On May 30, 2018, Mr. Diez inspected the facility and observed several PBS violations (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶¶ 12-13, Diez Exhibits B and C).
7. As part of his inspection, Mr. Diez reviewed the Department's PBS file for the facility and discovered that respondent failed to timely register the facility as required by 6 NYCRR 613-1.9(d)(1) and failed to permanently close an underground storage tank (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶ 14).
8. The PBS underground storage tank was out-of-service for more than twelve months (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit ¶ 15, Diez Exhibit B, Item 8 and page 8).
9. Respondent's PBS underground storage tank was out-of-service since approximately May 30, 2018 (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit ¶ 24).
10. On June 4, 2018, Mr. Diez mailed a notice of violation (NOV) to respondent identifying the violations he observed during his inspection. The NOV advised respondent that a new registration application with corrected information and a schedule for the permanent closure of the PBS underground tank must be submitted to the Department by July 4, 2018. Respondent did not respond to the NOV. (*See* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶¶ 15-17, Diez Exhibit D.)
11. On July 30, 2019, Mr. Diez mailed a second NOV to respondent advising respondent to submit the registration and closure schedule by August 30, 2019. Respondent did not

respond to the NOV. (*See* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶¶ 18-19, Diez Exhibit E.)

12. To date, respondent has not registered the facility or permanently closed the out-of-service PBS underground storage tank (*see* Motion for Default Judgment, Exhibit D - Diez Affidavit, ¶ 25).
13. As shown by affidavits of Pamela Frasier and Susan L. Reynolds, respondent was served by certified mail on August 12, 2020, which was received by respondent on August 15, 2020, with a notice of hearing and complaint dated August 11, 2020, alleging violations of 6 NYCRR 613-1.9(d) and 613-2.6(a)(3), together with a cover letter, for failure to register its PBS facility and for failure to permanently close the PBS underground storage tank at the site located at 34 South Main Street, Cassadaga, New York (*see* Motion for Default Judgment, Exhibits F and G).
14. Respondent failed to file an answer to the complaint, as directed in the notice of hearing (*see* Affirmation of Teresa J. Mucha, Esq., dated January 12, 2021, ¶ 2).

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; *see also* 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain:

- "(1) Proof of service upon respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
- "(2) Proof of respondent's failure to appear or failure to file a timely answer;
- "(3) Consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;
- "(4) A concise statement of the relief requested;
- "(5) A statement of authority and support for any penalty or relief requested; and
- "(6) Proof of mailing the notice required by 6 NYCRR 622.15(d), where applicable"

(6 NYCRR 622.15[b][1] - [6] [effective September 16, 2020]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6

[citations omitted]). In addition, in support of a motion for a default judgment, staff must “provide proof of the facts sufficient to support the claim[s]” alleged in the complaint (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also* CPLR 3215[f]).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent in August 2020 by certified mail (*see* Exhibit F, affidavit of service of Pamela Frasier, sworn to January 5, 2021); (ii) respondent failed to file an answer to the complaint, as directed in the cover letter and notice of hearing served with the complaint; (iii) Department staff’s motion includes a concise statement of the relief requested; (iv) staff’s motion includes a statement of authority and support for the penalty and relief requested; and (v) Department staff provided proof of service of the motion papers on respondent (*see* Exhibit I, affidavit of service of Pamela Frasier, sworn to January 12, 2021). Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff’s submissions in support of the motion for a default judgment provide proof of facts sufficient to enable me to determine that staff has a viable claim that respondent failed to submit an application to initially register a facility with the Department within thirty days after the property transfer, in violation of 6 NYCRR 613-1.9(d); and failed to permanently close the underground storage tank at the facility that has been out-of-service for more than twelve (12) months, in violation of 6 NYCRR 613-2.6(a)(3).

Department staff seeks a civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860). Staff’s submissions on the motion for a default judgment elaborate on the requested penalty, discussing the Department’s Civil Penalty Policy (DEE-1, June 20, 1990) and DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy-Penalty Schedule (*see* Motion for Default Judgment, Exhibit D, Diez Affidavit, ¶¶ 26-39).

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. The statutory maximum penalty for the two violations, as computed by staff, exceeds one hundred and ninety-three million dollars (*see* Motion for Default, Exhibit D, Diez Affidavit, ¶ 29). Department staff discusses the costs avoided by respondent’s noncompliance and the average costs to close PBS tanks.

I find that staff’s request for a civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860) is consistent with the Department’s penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (*see e.g. Matter of 12 Martense Associates LLC*, Order of the Commissioner, December 19, 2011, at 2).

Department staff further requests that respondent perform the following corrective measures to address the violations:

- i. Submit a completed PBS registration application to register the facility;
- ii. Submit a work plan for Department review and approval, for the permanent closure of the underground storage tank at the facility, in accordance with 6 NYCRR 613-2.6(b) through (e); and
- iii. Permanently close the underground storage tank within 60 days of Department approval of the work plan and submit a revised PBS registration to reflect the closure of the tanks.

Department staff states that the corrective actions are necessary to address the PBS violations and to prevent the continuing and potential additional environmental harm from respondent's noncompliance with applicable PBS law and regulations. I conclude that Department staff's request for corrective action is supported by the record and appropriate under the circumstances.

Conclusions of Law

1. Respondent violated 6 NYCRR 613-1.9(d) by failing to submit an application to initially register the facility with the Department within thirty days after the property transfer; and
2. Respondent violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close an underground storage tank that has been out-of-service for more than twelve months.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default judgment, holding respondent Kirk Tyler d/b/a KCR Enterprises in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that respondent Kirk Tyler d/b/a KCR Enterprises:
 - (i) violated 6 NYCRR 613-1.9(d) for failing to submit an application to initially register the facility with the Department within thirty days after the property transfer; and
 - (ii) violated 6 NYCRR 613-2.6(a)(3) by failing to close an underground storage tank that has been out-of-service for more than twelve months.
3. Directing respondent Kirk Tyler d/b/a KCR Enterprises to submit a completed PBS registration application, plus applicable and past due registration fees, to register the facility within thirty (30) days of service of the Commissioner's order;

4. Directing respondent Kirk Tyler d/b/a KCR Enterprises to pay a civil penalty in the amount of seven thousand eight hundred and sixty dollars (\$7,860) within thirty (30) days of service of the Commissioner's order;
5. Directing respondent Kirk Tyler d/b/a KCR Enterprises to submit a work plan, for Department review and approval, for the permanent closure of the underground storage tank at the facility, in accordance with 6 NYCRR 613-2.6(b) through (e) within thirty (30) days of service of the Commissioner's order;
6. Directing respondent Kirk Tyler d/b/a KCR Enterprises to permanently close the underground storage tank and to submit a revised PBS registration to reflect the closure of the tank within sixty (60) days of Department approval of the work plan; and
7. Directing such other and further relief as the Commissioner may deem just and appropriate.

/s/
Lara Q. Olivieri
Administrative Law Judge

Dated: Albany, New York
June 3, 2021

APPENDIX A

Matter of Kirk Tyler d/b/a KCR Enterprises
DEC File No. R9-20200609-36
Motion for Default Judgment

1. Cover letter addressed to Administrative Law Judge Molly T. McBride, of the Department's Office of Hearings and Mediation Services dated January 12, 2021, attaching staff's motion papers dated January 12, 2021 addressed to respondent Kirk Tyler d/b/a KCR Enterprises.
2. Notice of Motion and Motion for Default Judgment, and Affirmation of Teresa J. Mucha, Esq., dated January 12, 2021, attaching the following exhibits:
 - A. Deed dated June 27, 2013, filed with the Chautauqua County Clerk, and recording page dated July 9, 2013.
 - B. Chautauqua County real property database information page.
 - C. KCR Enterprises Facebook informational pages.
 - D. Affidavit of Patrick Diez, dated January 11, 2021, attaching the following exhibits:
 - A) Petroleum Bulk Storage Program's Facility Information Report for site information at 34 South Main Street, Cassadaga, New York, PBS# 9-013714.
 - B) Petroleum Bulk Storage Inspection Form dated May 30, 2018.
 - C) Five photographs dated May 30, 2018.
 - D) Notice of Violation addressed to respondent Kirk Tyler d/b/a KCR Enterprises dated June 4, 2018 with May 30, 2018 PBS Inspection Form attached.
 - E) Notice of Violation addressed to respondent Kirk Tyler d/b/a KCR Enterprises dated July 30, 2019.
 - E. Cover letter addressed to respondent Kirk Tyler d/b/a KCR Enterprises dated August 11, 2020, attaching staff's Notice of Hearing and Complaint dated August 11, 2020.
 - F. Affidavit of Service of Pamela Frasier dated January 5, 2021, attaching the following exhibits:
 - A) USPS Tracking information sheet, tracking number 70200640000064342691.

- B) USPS Tracking information sheet, tracking number 70200640000064342684.
- C) USPS certified mailing green card receipts.

G. Affidavit of Susan L. Reynolds dated January 5, 2021.

H. Letter from Administrative Law Judge Molly T. McBride, of the Department's Office of Hearings and Mediation Services dated December 4, 2020, addressed to respondent Kirk Tyler d/b/a KCR Enterprises.

I. Affidavit of Service of Pamela Frasier dated January 12, 2021.