

**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)

-by-

ORDER

KENDRICK GRIMSHAW, SR.,

DEC Case No.
R6-20171122-61

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Kendrick Grimshaw, Sr., violated Environmental Conservation Law (ECL) article 17 and 6 NYCRR part 613 at a petroleum bulk storage (PBS) facility owned by respondent and located at 305 Pyrites Russell Road, Russell, St. Lawrence County, New York (facility).

Respondent was personally served with the notice of hearing, complaint and exhibits on April 22, 2018 (*see* Return of Service of Deputy Sheriff J. Dunnebacke dated April 22, 2018). In the complaint, Department staff alleges that respondent:

- failed to renew the expired registration for the facility in violation of ECL 71-1009(2) and 6 NYCRR 613-1.9(c);¹
- failed to permanently close aboveground storage tanks at the facility that have been out-of-service for more than a year in violation of 6 NYCRR 613-4.5(a)(3); and,
- failed to permanently close underground storage tanks at the facility that have been out-of-service for more than a year in violation of 6 NYCRR 613-2.6(a)(3).

Based on these alleged violations, Department staff seeks a Commissioner's order directing respondent to:

- within ten (10) days, submit a PBS registration application together with current and back registration fees in the amount of \$1,500 to re-register the facility;
- within thirty (30) days, execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy to the Department

¹ Counsel for Department staff noted at the prehearing conference that the regulations at issue in this proceeding, 6 NYCRR part 613, became effective in October 2015. Prior to that time, 6 NYCRR former part 612 governed the registration of PBS facilities.

- together with notice of the date upon which closure of the tanks is scheduled to begin as required by 6 NYCRR 613-2.6(b)(1) and 613-4.5(b)(1);
- within sixty (60) days, permanently close the tanks at the facility in accordance with 6 NYCRR 613-2.6(b)(2) and 613-4.5(b)(2), (3), and (4);
 - within ninety (90) days, submit a PBS application showing that the tanks at the facility have been permanently closed, as required by 6 NYCRR 613-2.6(b)(1) and 613-2.5(b)(1);
 - within one hundred fifty (150) days, submit a tank closure report and site assessment, as required by 6 NYCRR 613-2.6(c); and,
 - impose upon respondent a civil penalty in the amount of thirty thousand dollars (\$30,000), of which fifteen thousand dollars (\$15,000) would be payable to the Department within ten (10) days, and the remaining fifteen thousand dollars (\$15,000) would be suspended contingent upon respondent's compliance with the terms of the order.

The matter was assigned to Administrative Law Judge (ALJ) D. Scott Bassinson of the Department's Office of Hearings and Mediation Services. ALJ Bassinson prepared the attached report, which I adopt as my decision in this matter, subject to my comments below.²

As set forth in the record, respondent failed to answer the complaint and failed to appear at the pre-hearing conference scheduled on May 23, 2018 (*see* Hearing Report at 2). At the pre-hearing conference, Department staff made an oral motion for a default judgment (*id.*). Staff provided proof of personal service of the notice of hearing and complaint and attached exhibits on the respondent (*id.*; *see also* Return of Service of Deputy Sheriff J. Dunnebacke dated April 22, 2018). As a result of respondent's failure to answer or appear in this matter, staff is entitled to a judgment in default pursuant to 6 NYCRR 622.15.

Furthermore, Department staff presented its case on the merits at the pre-hearing conference, calling one witness and introducing four exhibits. Evidence in the hearing record demonstrates that respondent violated ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the PBS registration for the facility which expired in 2007 (*see* Hearing Report at 3-4; *see also* Hearing Exhibit 1 at D [DEC letter dated April 20, 2007 noting incomplete PBS registration application]). In addition, staff proved by a preponderance of the evidence that respondent failed to permanently close three aboveground storage tanks and four underground storage tanks at the facility that have been out of service for more than a year in violation of 6 NYCRR 613-4.5(a)(3) and 613-2.6(a)(3) (*see* Hearing Report at 3-4; *see also* Hearing ediol recording).³

ECL 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff seeks an order imposing a civil

² Although the ALJ identified his report as a Default Summary Report, the report states that testimony was taken and, accordingly, the report will be referenced as a Hearing Report (*see* Hearing Report at 3-4 [noting the testimony of Ronald Novak]).

³ The references in the Hearing Report to ECL § 613-2.6(a)(3) are corrected to 6 NYCRR 613-2.6(a)(3) (*see* Hearing Report at 4, 5).

penalty in the amount of thirty thousand dollars (\$30,000), fifteen thousand dollars (\$15,000) of which is to be suspended contingent upon respondent's completion of specified corrective actions relating to the closure of PBS tanks at the facility.

Department staff's requested civil penalty of thirty thousand dollars (\$30,000) is supported and appropriate and I hereby impose a civil penalty of thirty thousand dollars (\$30,000). However, respondent, whose last known address is in North Carolina, advised Department staff by letter dated September 1, 2017 that he was financially unable to pay to resolve the problems at the facility (*see* Hearing Exhibit 3). In consideration of the expense associated with the permanent closure of seven tanks at the facility and based on the record before me, I am suspending twenty-five thousand dollars (\$25,000) of the thirty thousand dollar (\$30,000) civil penalty contingent upon respondent complying with the terms of this order.⁴ The payable portion of the penalty, that is five thousand dollars (\$5,000), shall be due ninety (90) days after service of this order upon respondent.

Furthermore, based on record evidence, I am providing respondent with additional time to meet certain of the obligations imposed by this order. The time frames established by this order, including those for the performance of corrective action, may be extended by Department staff upon good cause shown by respondent.

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for a default judgment against respondent Kendrick Grimshaw, Sr., pursuant to 6 NYCRR 622.15, is granted. By failing to answer or appear in this proceeding, respondent Kendrick Grimshaw, Sr., waived his right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Kendrick Grimshaw, Sr., is adjudged to have violated the following statutory and regulatory provisions at his petroleum bulk storage facility located at 305 Pyrites Russell Road, Russell, New York, St. Lawrence County:
 - ECL 17-1009(2) and 6 NYCRR 613-1.9(c) by failing to renew the registration of his petroleum bulk storage facility;
 - 6 NYCRR 613-4.5(a)(3) by failing to permanently close three (3) aboveground petroleum bulk storage tanks that have been out of service for more than twelve months; and,
 - 6 NYCRR 613-2.6(a)(3) by failing to permanently close four (4) underground petroleum bulk storage tanks that have been out of service for more than twelve months.

⁴ At the hearing, Department staff testified that the cost to close the tanks would be in the range of \$18,000 to \$24,000 (*see* Hearing ediorol recording).

- III. Respondent Kendrick Grimshaw, Sr., shall be assessed a civil penalty in the amount of thirty thousand dollars (\$30,000). Respondent shall pay the sum of five (5) thousand dollars (\$5,000) within ninety (90) days of the service of this order upon him. Payment of the civil penalty shall be made 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." The balance of the civil penalty (that is, twenty-five thousand dollars [\$25,000]), shall be suspended on the condition that respondent complies with the terms of this order. In the event Department staff determines that the respondent has failed to comply with the terms of this order, the suspended sum of twenty-five thousand dollars (\$25,000) shall be due within thirty (30) days of service upon respondent of written notice by Department staff.
- IV. Within thirty (30) days of service of this order upon respondent Kendrick Grimshaw, Sr., respondent shall submit to the Department a complete petroleum bulk storage application for the facility, plus applicable and past due registration fees to the Department in the amount of fifteen hundred dollars (\$1,500).
- V. Within thirty (30) days of service of this order upon respondent Kendrick Grimshaw, Sr., respondent must execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy of the contract to the Department together with notice of the date upon which closure of the tanks is scheduled to begin.
- VI. Within ninety (90) days of service of this order upon respondent Kendrick Grimshaw, Sr., respondent must permanently close the tanks at the facility and submit a petroleum bulk storage application to the Department.
- VII. Within ninety (90) days of service of this order upon respondent Kendrick Grimshaw, Sr., respondent must submit a revised petroleum bulk storage application to the Department showing that the tanks at the facility have been permanently closed, as required by 6 NYCRR 613-2.6(b)(1) and 613-4.5(b)(1).
- VIII. Within one hundred and fifty (150) days of service of this order upon respondent Kendrick Grimshaw, Sr., respondent must submit a tank closure report and site assessment to the Department, in accordance with 6 NYCRR 613-2.6(c).
- IX. All time frames established by this order, including those for the performance of corrective action, may be extended by Department staff upon good cause shown by respondent.

- X. Respondent Kendrick Grimshaw, Sr., shall send the petroleum bulk storage applications, applicable registration fees, the penalty payment, and all other required submissions to the following address:

Office of General Counsel - Region 6
NYS Department of Environmental Conservation
317 Washington Street
Watertown, New York 13601
Attn: April L. Sears, Program Aide

Any questions regarding this order are to be directed to Barbara McGinn, Acting Regional Attorney at the above-referenced address.

- XI. The provisions, terms, and conditions of this order shall bind respondent Kendrick Grimshaw, Sr., his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Albany, New York
Dated: August 6, 2019

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

In the Matter of the 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”)

**DEFAULT
SUMMARY
REPORT**

-by-

KENDRICK GRIMSHAW, SR.,

DEC Case No.
R6-20171122-61

Respondent.

I. Background

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (“Department”) that respondent Kendrick Grimshaw, Sr. (“respondent”) violated (i) ECL § 17-1009(2) and 6 NYCRR § 613-1.9(c) by failing to renew the registration for the petroleum bulk storage (“PBS”) facility that he owns, located at 305 Pyrites-Russell Road in the town of Russell, New York, after the registration for the facility expired; (ii) 6 NYCRR § 613-4.5(a)(3) by failing to permanently close aboveground storage tanks at the facility that have been out-of-service for more than a year; and (iii) 6 NYCRR § 613-2.6(a)(3), by failing to permanently close underground storage tanks at the facility that have been out-of-service for more than a year.

Staff requests that the Commissioner issue an order:

A. Directing respondent to:

1. Within 10 days,¹ submit a PBS registration application together with “current and back” registration fees in the amount of \$1,500;
2. Within 30 days, execute a contract with a qualified tank contractor for permanent closure of the tanks at the facility and submit a copy to the Department together with notice of the date upon which closure of the tanks is scheduled to begin as required by 6 NYCRR §§ 613-2.6(b)(1) and 613-4.5(b)(1);
3. Within 60 days, permanently close the tanks at the facility in accordance with 6 NYCRR §§ 613-2.6(b)(2) and 613-4.5(b)(2), (3), and (4);

¹ Staff does not identify the commencement of the periods during which respondent must take certain actions. Typically, and as recommended herein, deadlines begin running from the date of service of the Commissioner’s order on a respondent.

4. Within 90 days, submit a PBS application showing that the tanks at the facility have been permanently closed, as required by 6 NYCRR §§ 613-2.6(b)(1) and 613-4.5(b)(1);²
 5. Within 150 days, submit a tank closure report and site assessment, as required by 6 NYCRR § 613-2.6(c);
- B. Imposing upon respondent a civil penalty in the amount of thirty thousand dollars (\$30,000), of which fifteen thousand dollars (\$15,000) would be payable to the Department within ten (10) days, and the remaining fifteen thousand dollars (\$15,000) would be suspended contingent upon respondent's compliance with the terms of the order.

A pre-hearing conference was held before the undersigned on May 23, 2018 in the Department's Region 6 offices in Watertown, New York. Randall Young, Esq. represented Department staff. No one appeared on behalf of respondent. At the pre-hearing conference, counsel for Department staff made a motion for default judgment, stating that respondent was served personally with the notice of hearing and complaint, and noting respondent's failure to serve an answer to the complaint and failure to appear at the pre-hearing conference. Counsel called one witness in support of staff's motion for a default, and submitted four exhibits into the record along with a proposed order. The exhibits are listed in Appendix A attached hereto.

II. Discussion

A. Liability

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 a 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 administrative law judge ("ALJ") for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the

² The complaint refers to the aboveground storage tank post-closure application requirement as "613-2.5(b)(1)." This is clearly a typographical error. The correct citation, as set forth in the text above, is "613-4.5(b)(1)."

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 its 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 N.Y.2d 62, 70-71 (2003)); see also State v Williams, 44 A.D.3d 1149, 1151-1152 (3d Dep’t 2007) and CPLR 3215(f).

The record in this proceeding establishes that: (i) the notice of hearing and complaint were served upon respondent personally by a deputy sheriff of Pamlico County, North Carolina, see Return of Service; see also Hearing Record; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for May 23, 2018, as directed in the notice of hearing served with the complaint; and (iii) staff has submitted a proposed order. Based upon the foregoing, the Department has satisfied the requirements for a default as set forth at 6 NYCRR § 622.15.

At the pre-hearing conference, staff witness Ronald Novak, a professional engineer employed as Regional Petroleum Bulk Storage Supervisor and record custodian in the Region 6 Division of Remediation, provided sworn testimony on the record in support of staff’s motion for a default judgment.

Mr. Novak testified, among other things, that the facility’s PBS registration had expired on March 24, 2007, and had not been renewed. Mr. Novak also testified that he conducted inspections of the facility in 2010 and 2017. During the 2010 inspection, Mr. Novak learned that the store at the site had been closed since 2004, and four of the eight registered tanks had been sold and removed from the site, and were registered at a different facility. The other four registered tanks remained at the site. See Testimony of R. Novak. In addition, he learned that three unregistered aboveground storage tanks are located at the site. Id.

When Mr. Novak inspected the site again in 2017, the store building had been torn down and removed from the site, the four underground storage tanks remained at the site, and the building containing the three unregistered tanks remained standing, but was locked. Id.

1. First Cause of Action

The first cause of action alleges that respondent violated ECL § 17-1009(2) and 6 NYCRR § 613-1.9(c)³ by failing to renew the PBS registration for the facility. According to the complaint, the PBS registration for the facility, which respondent had obtained in May 2002, expired on March 24, 2007. In 2007, Department staff rejected respondent’s application to

³ At the pre-hearing conference, counsel for staff noted that the violations, which continue to the present, began prior to the repeal and replacement of 6 NYCRR Parts 612 and 613. The complaint asserts violations under both the statute, ECL § 17-1009, and the current Part 613 regulations. Staff correctly noted that the violations continue, and the relief requested is appropriate under the statute and regulations cited.

renew the registration because it did not include tightness tests for two of the tanks at the facility. Respondent did not resubmit the application, and the facility registration remains expired. See Complaint at ¶¶ 13-16, and Complaint Exs. C (PBS Certificate No. 6-131180, reflecting expiration date of March 24, 2007) and D (Department cover memorandum dated April 20, 2007, rejecting PBS facility renewal application, and attaching PBS application dated March 19, 2007); see also Testimony of Ronald Novak.

Department staff has submitted proof of facts sufficient to support the viability of the first cause of action.

2. Second Cause of Action

The second cause of action alleges that respondent violated 6 NYCRR § 613-4.5(a)(3) by failing to permanently close aboveground storage tanks at the facility that have been out of service for more than a year. Mr. Novak testified that the store at the site had been closed since 2004, that he had “no doubt whatsoever” that the tanks remaining at the site had been out of service for more than a year but had not been permanently closed. See Testimony of Ronald Novak.

Department staff has submitted proof of facts sufficient to support the viability of the second cause of action.

3. Third Cause of Action

The third cause of action alleges that respondent violated ECL § 613-2.6(a)(3) by failing to permanently close four underground storage tanks at the facility that have been out of service for more than a year. Mr. Novak testified that the store at the site had been closed since 2004, that he had “no doubt whatsoever” that the tanks remaining at the site had been out of service for more than a year but had not been permanently closed. See Testimony of Ronald Novak.

Department staff has submitted proof of facts sufficient to support the viability of the third cause of action.

Based upon the foregoing, I conclude that Department staff has submitted proof of facts sufficient to support the viability of the three causes of action in the complaint. I therefore recommend that the Commissioner grant staff’s motion for a default judgment against respondent Kendrick Grimshaw, Sr.

III. Civil Penalty

Department staff seeks a total civil penalty in the amount of thirty thousand dollars (\$30,000), with half suspended contingent upon respondent’s compliance with the Commissioner’s order. ECL § 71-1929(1) provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Because respondent’s violations have all continued for several years, the total statutory maximum penalty would be several million dollars. Staff’s requested penalty is authorized and appropriate on this record.

IV. Remedial Relief

Department staff requests that the Commissioner's order require respondent to conduct the following activities within certain time frames:

- submit a PBS registration application together with current and back registration fees;
- effectuate proper and permanent closure of the tanks at the facility through the use of a qualified contractor;
- submit a PBS application showing that the tanks at the facility have been permanently closed; and
- submit a tank closure report and site assessment

I recommend that the Commissioner grant staff's requested relief.

V. Recommendations

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

A. Holding that respondent Kendrick Grimshaw, Sr. violated:

1. ECL § 17-1009(2) and 6 NYCRR § 613-1.9(c) by failing to renew the PBS registration for the facility;
2. 6 NYCRR § 613-4.5(a)(3) by failing to permanently close aboveground storage tanks at the facility that have been out of service for more than a year; and
3. ECL § 613-2.6(a)(3) by failing to permanently close four underground storage tanks at the facility that have been out of service for more than a year

B. Assessing against respondent Kendrick Grimshaw, Sr. a civil penalty in the amount of thirty thousand dollars (\$30,000), of which fifteen thousand dollars (\$15,000) would be suspended contingent on respondent's compliance with all terms of the order. The payable portion of the civil penalty, fifteen thousand dollars (\$15,000), should be paid within ten (10) days of service of the Commissioner's order on respondent Kendrick Grimshaw, Sr.; and

C. Directing respondent Kendrick Grimshaw, Sr. to perform the following actions:

1. Within 10 days of service on respondent of the Commissioner's order, respondent must submit a PBS registration application together with "current and back" registration fees in the amount of \$1,500;
2. Within 30 days of service on respondent of the Commissioner's order, respondent must execute a contract with a qualified tank contractor for

permanent closure of the tanks at the facility and must submit a copy to the Department together with notice of the date upon which closure of the tanks is scheduled to begin as required by 6 NYCRR §§ 613-2.6(b)(1) and 613-4.5(b)(1);

3. Within 60 days of service on respondent of the Commissioner's order, respondent must permanently close the tanks at the facility in accordance with 6 NYCRR §§ 613-2.6(b)(2) and 613-4.5(b)(2), (3), and (4);
4. Within 90 days of service on respondent of the Commissioner's order, respondent must submit a PBS application showing that the tanks at the facility have been permanently closed, as required by 6 NYCRR §§ 613-2.6(b)(1) and 613-4.5(b)(1); and
5. Within 150 days of service on respondent of the Commissioner's order, respondent must submit a tank closure report and site assessment, as required by 6 NYCRR § 613-2.6(c).

Dated: June 8, 2018
Albany, New York

/s/
D. Scott Bassinson
Administrative Law Judge

APPENDIX A

Matter of Kendrick Grimshaw, Sr.

DEC Case No. R6-20171122-61

EXHIBITS IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

Exhibit	Description
1	Complaint dated April 10, 2018, attaching Exhibit A-E
2	Notice of Violation dated August 14, 2017
3	Letter from Kendrick Grimshaw dated September 1, 2017, with attachments
4	2018 Town Tax Roll, Town of Russell, New York