

**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 -

LES CLARK MINISTRIES, INC.,

Respondent.

ORDER

DEC Case No.
R9-20190508-35

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation (Department or DEC) alleges that respondent Les Clark Ministries, Inc. violated two petroleum bulk storage (PBS) regulations at its PBS facility located at 9114 School Street, Rushford, Allegany County, New York. Specifically, staff alleges that respondent violated: (a) 6 NYCRR 613-1.9(d), by failing to timely file an application to register the PBS facility within 30 days of January 22, 2016 (the date of the transfer of ownership of the facility to respondent); and (b) 6 NYCRR 613-2.6(a)(3), by failing to permanently close an underground PBS tank storage system that had been out of service for more than twelve (12) months.

Administrative Law Judge (ALJ) Molly T. McBride 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, subject to my comments below.

As set forth in the ALJ's hearing report, respondent failed to file an answer to staff's complaint dated September 3, 2019 or to staff's amended complaint dated September 13, 2019, and failed to appear for the adjudicatory hearing scheduled for January 30, 2020 (*see* Default Summary Report at 3 [Findings of Fact Nos. 8 and 10]; Hearing Transcript at 4-5). At the January 30, 2020 hearing, Department staff moved for a default judgment and presented proof of the violations alleged in the amended complaint.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff be granted a default judgment against respondent (*see* Default Summary Report at 5). I concur that the Department is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

With respect to staff's first cause of action alleging a violation of 6 NYCRR 613-1.9(d), the facility was transferred to respondent on January 22, 2016 (*see* Amended Complaint, ¶ 13; Hearing Exhibit 7 [deed]). The pleadings and proof presented at the hearing provide sufficient facts to enable me to determine that respondent failed to file an application to register the PBS facility with the Department within 30 days of transfer of the facility to it.

In addition, with respect to the second cause of action, the record demonstrates that the underground storage tank system¹ was out-of-service for more than twelve (12) months and that respondent failed to permanently close it in accordance with 6 NYCRR 613-2.6(a)(3) (*see* Hearing Transcript at 4, 20).² During a DEC staff inspection of the facility in March 2019, the aboveground diesel tank (Tank #1A) that is listed on this facility's PBS Facility Information Report was not there (*see* Hearing Transcript at 14).

Prior to the commencement of this proceeding, Department staff sent respondent two letters regarding the PBS registration and tank removal requirements, but respondent failed to reply (*see* Hearing Exhibit 17 [Department correspondence dated April 12, 2018] and Hearing Exhibit 16 [Department correspondence dated July 2, 2018]; *see also* Hearing Transcript at 17-19).

Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000), and the ALJ recommended that respondent Les Clark Ministries, Inc. be directed to pay this amount. ECL 71-1929 (1) provides that any person who violates any provisions of, or who fails to perform any duty imposed by titles 1 through 11 and title 19 of article 17 or the rules and regulations promulgated thereto (which encompasses the regulations at issue here) shall be liable for a penalty not to exceed thirty-seven thousand five hundred dollars per day for each violation, as well as injunctive relief.

The civil penalty of five thousand dollars (\$5,000) that Department staff is requesting is consistent with applicable statutory authority, the Department's Civil Penalty Policy (DEE-1), dated June 20, 1990, Petroleum Bulk Storage Enforcement Policy (DEE-22) dated May 21, 2003, and administrative precedent (*see* Hearing Transcript at 21-24 [addressing penalty calculation in this proceeding]; *see also* Hearing Exhibit 18). Based on the record before me, the

¹ "Underground storage tank system or UST system" is defined to mean "a tank system that has ten percent or more of its volume beneath the surface of the ground or is covered by materials" (6 NYCRR 613-1.3[br]). The PBS Facility Information Report lists two underground PBS storage tanks that have not been closed (*see* Hearing Exhibit 11).

² The Amended Complaint states that respondent failed to permanently close three (3) tanks, designated as numbers 1, 2 and 3, that had been out-of-service for more than twelve months (*see* Amended Complaint ¶ 21). The PBS Facility Information Report listed three (3) non-closed tanks albeit with different designating numbers (*see* Hearing Exhibit 11 [Tank #1 [underground fuel oil tank of 8,000 gallon capacity], Tank #1A [aboveground diesel tank of 1,000 gallon capacity], and Tank #4 [underground fuel oil tank of 8,000 gallon capacity]; *see also* Hearing Exhibits 16 and 17 [Department correspondence identifying two of the tanks at issue as Tank #4 and Tank #1A]; Exhibit 13 [photograph of the label for Tank #4 taken during staff's onsite inspection, which in contrast to PBS Facility Information Report, indicates the contents are "#2 Diesel"]; Hearing Transcript at 15-16 [referencing underground Tank #4 as remaining at the site]). For purposes of this order, the tank number designations as set forth in the PBS Facility Information Report are used.

recommended penalty is authorized and appropriate for respondent's (a) failure to transfer the registration following its acquiring the property, and (b) failure to close an out-of-service underground storage tank system.

In addition, Department staff has requested that I direct respondent to perform the following corrective actions within thirty (30) days of the effective date of the order:

- submit a completed bulk storage registration application for the facility with “the appropriate registration fee of [five hundred dollars]”; and
- submit a work plan, for Department review and approval, for the permanent closure of the underground storage tank system at the PBS facility in accordance with 6 NYCRR 613-2.6(b). Staff further requests that respondent be directed to permanently close the underground storage tank system within sixty (60) days of Departmental approval of the work plan.

(See Amended Notice of Hearing and Complaint, Wherefore Clause, paragraphs III and IV.) Department staff's request is appropriate and authorized. In considering the corrective actions to be undertaken, I note that staff testified that the aboveground tank at the facility was not observed during staff's 2019 inspection. Respondent is directed to provide documentation to the Department regarding the removal and disposition of the aboveground tank listed on the site's PBS Facility Information Report.

With respect to the corrective actions, the time period shall be measured from the date of the service of this order upon respondent. Department may, at its discretion, extend the time period for completion of the corrective actions upon good cause shown by respondent. Respondent must submit any request for an extension in writing with appropriate supporting documentation.

I encourage respondent to discuss the preparation and development of the work plan with Department staff prior to the work plan's submission to the Department.

Upon review of the record and the corrective action that respondent is being directed to undertake including closing the out-of-service storage tank system at the facility without delay, I am suspending two thousand dollars (\$2,000) of the five thousand dollar (\$5,000) civil penalty. This suspension is contingent upon respondent's compliance with the terms and conditions of this order, including completing the corrective actions to the satisfaction of Department staff and paying the non-suspended portion of the penalty (that is, three thousand dollars [\$3,000]). I hereby direct that respondent submit the non-suspended portion of the civil penalty of three thousand dollars (\$3,000) 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 a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Les Clark Ministries, Inc. waived its right to be heard at the hearing.
- II. Based on the pleadings and papers submitted with and in support of Department staff's motion, respondent Les Clark Ministries, Inc., is determined to have violated:
 - A. 6 NYCRR 613-1.9(d), by failing to submit a PBS registration application with respect to the transfer of the ownership of the facility located at 9114 School Road, Rushford, New York within 30 days of that transfer of ownership to respondent; and
 - B. 6 NYCRR 613-2.6(a)(3), by failing to permanently close the underground storage tank system at the facility that has been out of service for more than 12 months.
- III. Within thirty (30) days of the service of this order upon respondent Les Clark Ministries, Inc., respondent shall submit to the Department a completed bulk storage registration application for the facility with a registration fee of five hundred dollars (\$500).
- IV. Within thirty (30) days of service of this order upon respondent Les Clark Ministries, Inc. respondent shall submit a work plan, for Department review and approval, for the permanent closure of the underground petroleum bulk storage tank system in accordance with 6 NYCRR 613-2.6(b). Respondent is directed to close the underground storage tank system within sixty (60) days of Department approval of the work plan.
- V. Within thirty (30) days of service of this order upon respondent Les Clark Ministries, Inc., respondent shall provide to the Department documentation regarding the removal and disposition of the aboveground tank listed on the PBS Facility Information Report for this location.
- VI. Respondent Les Clark Ministries, Inc., is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000), to be paid within thirty (30) days of the service of this order upon respondent, of which two thousand dollars (\$2,000) shall be suspended contingent upon respondent's compliance with the terms and conditions of the order, including but not limited to completing the corrective actions to the satisfaction of Department staff and paying the non-suspended portion of the penalty (that is, three thousand dollars [\$3,000]). Payment of the non-suspended portion of the civil penalty is to be by certified check, cashier's check or

money order made payable to the New York State Department of Environmental Conservation at the address referenced in paragraph VII of this order. In the event that respondent fails to comply with any of the terms and conditions of the order, the suspended portion of the penalty (that is, two thousand dollars [\$2,000]) shall become immediately due and payable and shall be submitted to the Department in the same form and to the same address as the non-suspended portion of the penalty.

- VII. The application and closure documents as well as the civil penalty shall be sent to the following address:

New York State Department of Environmental Conservation
Division of Environmental Remediation
Region 9 Office
270 Michigan Avenue
Buffalo, New York 14203-2915
Attn: Veronica Kreutzer.

- VIII. Any questions or other correspondence regarding this order shall also be addressed to Veronica Kreutzer at the address referenced in paragraph VII of this order.

- IX. The provisions, terms and conditions of this order shall bind respondent Les Clark Ministries, Inc., 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: September 10, 2021
Albany, New York

**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 Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**DEFAULT SUMMARY
REPORT**

- by -

Les Clark Ministries, Inc.

DEC Case No.
R9-20190508-35

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Les Clark Ministries, Inc. (respondent) with an amended notice of hearing and complaint dated September 13, 2019,¹ alleging a violation of 6 NYCRR 613-1.9(d) for failing to submit a petroleum bulk storage (PBS) facility registration application to transfer the ownership of the facility located at 9114 School Street, Rushford, New York (facility) within thirty (30) days of transfer of ownership; and a violation of 6 NYCRR 613-2.6(a)(3) for failing to permanently close an underground storage tank (UST) system at the facility that was out of service for more than twelve (12) months.

The amended complaint seeks an order of the Commissioner (1) finding respondent in violation of 6 NYCRR 613-1.9(d) and 613-2.6(a)(3); (2) directing respondent to submit a completed PBS registration application and the appropriate fee of \$500; (3) directing respondent to submit a work plan, for Department review and approval, for the permanent closure of the USTs in accordance with 6 NYCRR 613-2.6(b); (4) directing respondent to permanently close the USTs within 60 days of the Department approved work plan; (5) assessing a civil penalty in the amount of five thousand dollars (\$5,000); and (6) granting such other relief as the Commissioner may deem appropriate.

Service of the amended notice of hearing and complaint was made by certified mail on September 16, 2019 (Exhibit 5). Respondent failed to answer the amended complaint as directed in the amended notice of hearing. Respondent was served with a notice of hearing dated January 14, 2020 advising that a hearing would be held on Thursday, January 30, 2020 at 10:00am (Exhibit 9). As stated in the notice of hearing, an adjudicatory hearing was convened before me at 10:00 a.m. on January 30, 2020. Department staff was represented by Teresa Mucha, Esq., Office of General Counsel, New York State Department of Environmental Conservation, Region

¹ Department staff served a notice of hearing and complaint on September 3, 2019. Pursuant to 6 NYCRR 622.5(a), a pleading may be amended prior to the period for responding expires.

9 office, 270 Michigan Avenue, Buffalo, New York. No one appeared on behalf of respondent. I noted for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing. Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15 and presented proof of the allegations contained in the amended complaint. Department staff presented the sworn testimony of Veronica Kreutzer, DEC Region 9 office of Environmental Remediation, along with eighteen (18) exhibits.

Applicable Regulatory Provisions

Section 613-1.9(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 the transfer.
- (2) The facility owner must submit a registration application using forms or electronic means as provided by the department. Forms are available online at www.dec.ny.gov and at all department offices.
- (3) Each application for an initial registration or transfer of facility ownership must be accompanied by a copy of the current deed for the property at which the facility is located. If the facility is located on multiple properties, deeds for each property must be submitted with the application. If a deed does not exist for a particular property, the application must be accompanied by other evidence of ownership of the property.
- (4) The application must be signed by the facility owner.
- (5) Every registration application must be accompanied by payment of the applicable per-facility registration fee as shown in Table 1 of this section.

Section 613-2.6(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

1. Respondent Les Clark Ministries, Inc. owns the property located at 9114 School Street, Rushford, NY (*see* Exhibit 4, Amended Notice of Hearing and Complaint dated September 13, 2019 [ANOHC] ¶4).
2. Respondent purchased the facility on January 22, 2016 (*see* Exhibit 7). The facility contains an underground petroleum bulk storage system with two active tanks (*see* Exhibit 11).
3. Respondent was required to file an application with the Department to transfer ownership and register the PBS tanks within 30 days of ownership of the facility

pursuant to 6 NYCRR 613-1.9(d).

4. On April 12, 2018, Department staff mailed respondent a cover letter and a PBS application and instructions advising respondent of its responsibility to transfer the facility registration within 30 days of transfer of ownership (*see* Exhibit 17).
5. On July 2, 2018, Department staff mailed respondent a notice of violation (NOV) advising respondent that respondent had failed to transfer ownership of the PBS registration within 30 days after the property was transferred along with a PBS application and instructions for filing the required registration. The NOV advised respondent of the potential penalties for failing to submit the required registration as well as notifying respondent that it could be held criminally liable pursuant to ECL 71-1933. (*See* Exhibit 16.)
6. On September 3, 2019, Department staff mailed a Notice of Hearing and Complaint (NOHC) to respondent by certified mail and respondent received the NOHC on September 6, 2019 (*see* Exhibits 1- 3).
7. On September 16, 2019, Department staff served an Amended Notice of Hearing and Complaint that was received by respondent on September 18, 2019 (*see* Exhibits 4-6).
8. Respondent did not answer the complaint or amended complaint.
9. As shown by the affidavits of service of Pamela Frasier, sworn to September 3, 2019, and September 16, 2019, Department staff served the notice of hearing and complaint and amended notice of hearing and complaint, on respondent by certified mail, pursuant to 6 NYCRR 622.3(a)(3), which were received by respondent on September 6, 2019 and September 18, 2019 respectively (*see* Exhibits 2, 3, 5, 6).
10. Respondent was served with a Notice of Hearing on January 14, 2020 advising that a hearing was scheduled to commence on January 30, 2020 in the Department's Region 9 office at 10:00am (*see* Exhibit 9) and respondent failed to appear at the hearing.

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 (*see* 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.”
(see 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 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 [*Samber*], at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; see also 6 NYCRR 622.15[b][3], CPLR 3215[f]).

The record establishes that: (i) Department staff served the amended notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the amended complaint, as directed in the cover letter and amended notice of hearing served with the amended complaint, and respondent failed to appear for the adjudicatory hearing scheduled on January 30, 2020, as directed in the notice of hearing; (iii) Department staff's papers and the testimony of Department staff Veronica Kreutzer provide proof of the facts sufficient to support the violations alleged and enable me to determine that staff has a viable claim; (iv) Department staff's papers and the testimony of Department staff Veronica Kreutzer include a concise statement of the relief requested (see Exhibit 4); and (v) staff's motion and testimony includes a statement of authority and support for the penalty and relief requested.² 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 timely file a complete and accurate application to register a PBS facility within 30 days of transfer of ownership; and that respondent failed to permanently close an underground storage tank system that was out of service for more than 12 months, in violation of 6 NYCRR 613-1.9(d) and 613-2.6(a)(3) respectively.

² See Hearing transcript (Tr) 8-24.

Staff's complaint requested a total civil penalty of five thousand dollars (\$5,000). Staff's submissions with the amended complaint and exhibits moved into evidence on January 30, 2020 during the testimony of Veronica Kreutzer elaborate on the requested civil penalty, discussing the Department's Civil Penalty Policy, *DEE-1*, and administrative precedent concerning similar violations.³ According to Department staff, the failure to timely submit the registration after transfer of ownership and the failure to permanently close the tanks may result in potential and actual environmental harm.

ECL 71-1929 provides that any person who violates any provision of ECL article 17 or fails to perform any duty imposed by Titles 1 through 11 inclusive as well as Title 19 of Article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto shall be liable for a penalty not to exceed thirty-seven thousand five hundred dollars (\$37,500) per day for each violation as well as injunctive relief. Department staff's proposed civil penalty of five thousand dollars (\$5,000) is consistent with the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990) as well as applicable provisions of ECL article 71 and prior Commissioner orders. Accordingly, I conclude that the penalty of five thousand dollars (\$5,000) requested by Department staff is supported and appropriate.

Conclusion of Law

1. By failing to file an application to register the facility within 30 days of transfer of ownership, respondent violated 6 NYCRR 613-1.9(d).
2. By failing to permanently close the PBS tanks located at the facility that have been out of service for more than twelve (12) months, respondent violated 6 NYCRR 613-2.6(a)(3).

Recommendation

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

1. granting Department staff's motion for default;
2. holding that respondent Les Clark Ministries, Inc. violated 6 NYCRR 613-1.9(d) by failing to file an application to register the facility within 30 days of transfer of ownership;
3. holding that respondent Les Clark Ministries, Inc. violated 6 NYCRR 613-2.6(a)(3) by failing to permanently close the PBS tanks located at the facility that have been out of service for more than twelve (12) months;
4. directing respondent Les Clark Ministries, Inc. to submit a completed registration application within thirty (30) days of the service of the Commissioner's order upon respondent;

³ Tr. 24.

5. directing respondent Les Clark Ministries, Inc. to submit a work plan, for Department review and approval, for the permanent closure of the USTs in accordance with 6 NYCRR 613-2.6(b) within 30 days of service of the Commissioner's order upon respondent, and directing respondent to permanently close the PBS tanks at the facility as required by 6 NYCRR 613-2.6(a)(3) within 60 days of the Department approval of the work plan;
6. directing respondent Les Clark Ministries, Inc. to pay a civil penalty in the amount of five thousand dollars (\$5,000) within thirty days (30) of the service of the Commissioner's order upon respondent; and
7. directing such other and further relief as he may deem just and appropriate.

/s/
Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
September 1, 2021

APPENDIX A

Matter of Les Clark Ministries, Inc.
DEC Case No. R9-20190508-35
Motion for Default Judgment

1. Notice of Hearing and Complaint dated September 3, 2019.
2. Affidavit of Service, Notice of Hearing and Complaint.
3. Green card, USPS for Notice of Hearing and Complaint.
4. Amended Notice of Hearing and Complaint dated September 13, 2019.
5. Affidavit of Service, Amended Notice of Hearing and Complaint.
6. Green Card, USPS for Amended Notice of Hearing and Complaint.
7. Deed for transfer of ownership, 9114 School Street, Rushford, NY and Allegany County Receipt.
8. Division of Corporations certified Application for Authority, Les Clark Ministries, Inc.
9. Hearing Notice dated January 14, 2020.
10. Email from Teresa Mucha, Esq. to Les Clark Ministries dated September 13, 2019.
11. PBS registration, 9114 School Street.
12. PBS application dated October 14, 2016 from Cuba-Rushford School District.
13. Photo of PBS tank
14. Photo of pipe.
15. Photo of tank area.
16. Notice of Violation dated July 2, 2018.
17. DEC letter to respondent dated April 12, 2018.
18. Penalty Calculation prepared by DEC staff.