

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
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CERTIFIED - RETURN RECEIPT REQUESTED
7015 0640 0000 6900 2727

December 14, 2015

Steven Kirkpatrick, Esq.
Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue, 5th Floor
New York, NY 10016

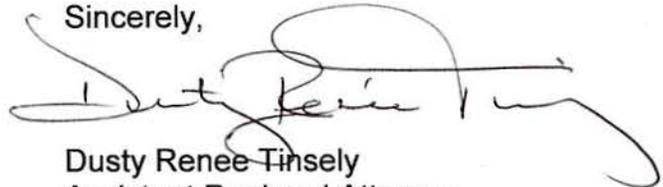
Re: Order of Consent
R4-2015-0625-76
PBS# 4-485020
Lexington Mercantile, LLC

Dear Mr. Kirkpatrick:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$15,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsely
Assistant Regional Attorney
Region 4

Enclosure

ec: D. Pickett
M. McBride



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of
Article 17 of New York State Environmental
Conservation Law

ORDER ON
CONSENT

R4-2015-0625-76
PBS # 4-485020

Owner: Lexington Mercantile, LLC
PO Box 238
Westkill, NY 12492

Respondent.

WHEREAS:

JURISDICTION

1. The Department of Environmental Conservation ("Department") is an agency of the State charged with jurisdiction over the protection of water quality of the State pursuant to Article 17 of the ECL and the rules and regulations promulgated thereto.
2. Respondent, Lexington Mercantile, LLC, owns and/or operates a Petroleum Bulk Storage ("PBS") facility (4-485020) known as Lexington Country Market, located at 4015 State Highway 42, Lexington, NY 12452 (Greene County) ("facility").
3. On July 24, 2012, Department staff inspected the facility and observed the following violations:

6 NYCRR 612.2 (d)	Registration information does/did not reflect current site status
6 NYCRR 612.2 (e)	Registration is/was not posted at the facility
6 NYCRR 613.3 (c) (3) (ii)	AST and/or gauge is/was not properly labeled with design capacity, working capacity and ID number
6 NYCRR 613.3 (b)	Fill Port color coding is missing or incorrect
6 NYCRR 613.5 (b)	Not monitoring leak detection systems
6 NYCRR 613.4 (a) (1)	No daily inventory records
6 NYCRR 613.5 (b)(1) & (2)	Not monitoring cathodic protection system of UST annually
6 NYCRR 613.6 (a)	Monthly inspection of AST not performed
6 NYCRR 613.9 (a) (1)	Tank not properly closed temporarily (must comply with all testing inspect. requirements)

6 NYCRR 614.3 (a)	Improper labeling on post 1986 tank
6 NYCRR 614.5 (b)	Not conducting interstitial monitoring
6 NYCRR 614.7 (d)	As built drawings not maintained on the premises

4. On May 22, 2015, Department staff inspected the facility and observed the following violations:

6 NYCRR 612.2 (d)	Registration information does/did not reflect current site status
6 NYCRR 612.2 (e)	Registration is/was not posted at the facility
6 NYCRR 613.3 (c) (3) (ii)	AST and/or gauge is/was not properly labeled with design capacity, working capacity and ID number
6 NYCRR 613.3 (b)	Fill Port color coding is missing or incorrect (both above and underground tanks)
6 NYCRR 613.3 (d)	Inadequate maintenance of spill prevention equipment (water in sumps, inoperable alarms, sensors, etc)
6 NYCRR 613.4	No daily and/or ten day reconciliation performed (five yrs. worth must be made available)
6 NYCRR 613.5 (b)(2) & (4)	Not monitoring cathodic protection system of UST annually or keeping a record
6 NYCRR 613.6 (a) & (c)	Monthly inspection of AST not performed and no records maintained
6 NYCRR 613.9 (a)	Tank not properly closed temporarily (must comply with all testing inspect. requirements)
6 NYCRR 614.2	UST systems do not meet 614 standards
6 NYCRR 614.3 (a)	Improper labeling on post 1986 tank
6 NYCRR 614.5 (b)	Not monitoring interstitial space of double walled tank weekly
6 NYCRR 614.7 (d)	As built drawings not maintained on the premises
6 NYCRR 614.14	Underground piping systems do not meet 614 standards

5. ECL Section 71-1929 provides for a civil penalty of up to \$37,500 per day for a violation of any provision of Titles 1 thru 11 inclusive and title 19 of Article 17, or the rules, regulations, orders or determinations of the Commissioner promulgated thereto. Injunctive relief is also available.
6. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law, and has consented to the issuing and entering of this Order and it agrees to be bound by the terms, provisions and conditions contained herein.

REMEDIES

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

I. Penalty

With respect to the violations identified in this Order, Respondents are hereby assessed a civil penalty of FORTY THOUSAND DOLLARS (\$40,000) of which \$15,000 (FIFTEEN THOUSAND DOLLARS) shall be payable to the New York State Department of Environmental Conservation by money order or certified check at the time this Order is signed, notarized and returned to the Department. TWENTY FIVE THOUSAND DOLLARS of the civil penalty is suspended conditioned on Respondent's compliance with the Schedule of Compliance. Payment of the suspended civil penalty shall be due within 30 days receipt of notice from the Department setting forth the nature of the violations. The civil penalties shall be paid by check made payable to the Department of Environmental Conservation.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

II. Schedule of Compliance

Respondent shall comply with the Schedule of Compliance and any plans approved thereunder which are incorporated into the Order on Consent and are enforceable thereunder. Any records submitted to the Department shall have the owner's name, facility name and address, contact and phone number and the PBS registration identification number.

III. Force Majeure

Respondent shall not be in default of compliance with this Order if it is unable to comply with any provision of this Order solely because of an action of a national government or court, or an act of nature, war, strike, riot or catastrophe, as to any of which the negligence or willful misconduct of Respondent was not a proximate cause. Respondent shall notify the Department in writing immediately upon obtaining knowledge of any such event. Relief under this clause shall not be available if Respondent fails to timely comply with the notice requirement set out in this paragraph.

IV. Communications

All communications required herein to the Department shall be made to the Department at DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attn: Regional Spill Engineer. All communications required herein to Lexington Mercantile, LLC shall be made to the Respondent at 4021 Rote 42, Lexington, NY 12452 and PO Box 238, Westkill, NY 12492, Attn. Mary Kaplan. All submittals shall have the following information: owner's name, facility name and address, and the PBS Identification number.

V. Access

Respondent shall allow duly authorized representatives of the Department access to the facility referred to in this Order without prior notice, at such times as may

be desirable or necessary in order for the Department to inspect and determine the status of Respondent's compliance with this Order or the ECL and regulations promulgated thereunder.

VI. Summary Abatement

This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VII. Indemnification

Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, and/or damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

VIII. Review of Submittals

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3.a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accepts such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any

modifications it specifies will be reasonable and consistent with customary engineering standards.

IX. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent and its successors (including successors in title) and assigns.

X. Modification

No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

XI. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to Paragraph X of this Order. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

XII. Effective Date

The effective date of this Order shall be the date it is signed by the Regional Director.

XIII. Reservation of Rights

Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, its officers, directors, agents, servants, employees, successors and assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

D. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or

the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

XIV. Full Settlement

Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations of this Order.

This Order settles all violations set forth in the July 29, 2015 Complaint upon payment of the civil penalty and compliance with the Schedule of Compliance. The Notice of Hearing and Complaint in this matter shall be withdrawn as of the effective date of this Order.

DATED: Rotterdam, New York
December 10, 2015

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

SCHEDULE OF COMPLIANCE

1. Within 30 days of the effective date of this Order, Respondent shall submit an updated registration including accurate information regarding the current Site conditions. Copies of the updated registrations completed by Respondent are annexed hereto.

To allow for Department review and processing, all submittals to the Department shall be clearly identified with the owner's name, facility name and address, contact name and telephone number, and the PBS registration identification number.