

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4  
1130 North Westcott Road, Schenectady, NY 12306-2014  
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CERTIFIED - RETURN RECEIPT REQUESTED  
7015 0640 0000 2327 0360

November 25, 2015

Ann Cianflone, Esq.  
Mirabito Holdings, Inc.  
49 Court St  
PO Box 5306  
Binghamton, NY 13902

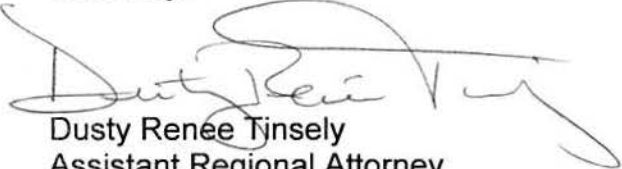
Re: Order of Consent  
R4-2015-0917-106  
PBS# 4-600135

Dear Ms. Cianflone:

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

This will also acknowledge receipt of \$8,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsely  
Assistant Regional Attorney  
Region 4

Enclosure

cc: T. Lane



Department of  
Environmental  
Conservation

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER ON CONSENT

-by-

R4-2015-0917-106  
PBS # 4-600135

Mirabito Holdings, Inc.  
49 Court St  
PO Box 5306  
Binghamton, NY 13902

Respondent.

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WHEREAS:

**JURISDICTION**

1. The New York State 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.

**RESPONDENTS**

2. 6 NYCRR Part 612.1(c)(18) defines "owner" as "any person who has legal or equitable title to a facility."
3. 6 NYCRR Part 612.1(c)(16) defines "operator" as "any person who leases, operates, controls or supervises a facility."
4. Respondent, Mirabito Holdings, Inc., owns a Petroleum Bulk Storage ("PBS") facility (4-600135) known as Mirabito #68, located at 360 State Highway 10, Deposit, NY 13754 (Delaware County) ("Facility").

**INSPECTION**

5. On July 8, 2015, Department staff inspected the facility and observed violations of Environmental Conservation Law ("ECL") Article 17 and regulations promulgated thereunder.
6. Department staff sent Respondent a Notice of Violation dated July 9, 2015 setting forth the violations of ECL Article 17 and the regulations promulgated thereunder.

**FIRST VIOLATION**

7. 6 NYCRR Part 612.2(b) states that "if ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer."

8. During the July 8, 2015 inspection, Departments staff determined that Respondent failed to properly transfer the Facility registration.
9. Respondent's failure to properly transfer the Facility registration is in violation of 6 Part NYCRR 612.2(b).

### **SECOND VIOLATION**

10. 6 NYCRR Part 613.3(d) states that the "owner or operator must keep all gauges, valves and other equipment for spill prevention in good working order."
11. During the July 8, 2015 inspection, Department staff observed that the secondary containment system associated with above ground storage tank ("AST") #6 was not in good working order as there was an accumulation of water over the bottom of the tank and records indicated that the last time the dike had been drained was May 15, 2015.
12. Respondent's failure to keep all gauges, valves and other equipment for spill prevention in good working order is a violation of 6 NYCRR Part 613.3(d).

### **THIRD VIOLATION**

13. 6 NYCRR Part 613.5(b)(3) states that: "(1) The owner or operator of any corrosion-resistant underground tank or pipe which is exempt from tightness testing under subparagraph (a)(2)(iii) of this section, must monitor all cathodic protection and leak detection systems. (2) The adequacy of a cathodic protection system must be monitored at least annually. If at any time the system fails to provide the necessary electrical current to prevent corrosion, the cathodic protection system must be restored within 30 days. Any tank or pipe with a nonworking cathodic protection system will be considered unprotected and must be tested for tightness within one year and retested every five years thereafter until the tank is permanently closed. (3) The owner or operator must monitor for traces of petroleum at least once per week. All monitoring systems must be inspected monthly. Monitoring systems must be kept in proper working order. If at any time the monitoring system fails to function effectively, it must be repaired within 30 days. Any tank or piping system with a nonworking monitoring system must be tested for tightness within one year and retested every five years thereafter until the tank is permanently closed."
14. During the July 8, 2015 inspection, Department staff observed that:
  - Respondent was not conducting leak detection monitoring associated with underground storage tanks ("USTs") 1, 2A, 2B, 3, 4, and 5;
  - Respondent was not conducting interstitial monitoring of the double-walled UST #1;
  - Respondent was not conducting leak detection monitoring associated with the piping for UST # 1, 2A, 2B, 3, and 4 and for AST #6; and

- Respondent was not maintaining annual cathodic protection monitoring reports.
15. Respondent's failure to conduct leak detection monitoring of USTs #1, 2A, 2B, 3, 4, and 5, AST #6 and associated piping, conduct interstitial monitoring, and maintain annual monitoring reports are violations of 6 NYCRR Part 613.5(b)(3).

#### **FOURTH VIOLATION**

16. 6 NYCRR Part 613.9(b) states "(1) Any tank or facility which is permanently out of service must comply with the following: (i) Liquid and sludge must be removed from the tank and connecting lines. Any waste products removed must be disposed of in accordance with all applicable State and Federal requirements. (ii) The tank must be rendered free of petroleum vapors. Provisions must be made for natural breathing of the tank to ensure that the tank remains vapor-free. (iii) All connecting lines must be disconnected and removed or securely capped or plugged. Manways must be securely fastened in place. (iv) Aboveground tanks must be stenciled with the date of permanent closure. (v) Underground tanks must either be filled to capacity with a solid inert material (such as sand or concrete slurry) or removed. If an inert material is used, all voids within the tank must be filled. (vi) Aboveground tanks must be protected from floatation in accordance with good engineering practice. (2) Storage tanks or facilities which have not been closed pursuant to paragraph (1) of this subdivision are subject to all requirements of this Part and Part 612 of this Title, including but not limited to periodic tightness testing, inspection, registration and reporting requirements."
17. During the July 8, 2015 inspection, Department staff observed that Tank #1 was no longer in service but had not been permanently closed.
18. Respondent's failure to permanently close Tank #1 is a violation of 6 NYCRR Part 613.9(b).

#### **FIFTH VIOLATION**

19. 6 NYCRR Part 614.2 states that "(a) . . . Beginning one year from the effective date (December 27, 1985) of these regulations, all new underground storage facilities must meet the following requirements: (1) Tanks must be made of fiberglass reinforced plastic, steel which is cathodically protected or steel which is clad with fiberglass as specified in section 614.3 of this Part. (2) Secondary containment must be installed as specified in section 614.4 of this Part. (3) A leak monitoring system must be installed as specified in section 614.5 of this Part. (4) Underground pipes must be made of fiberglass reinforced plastic or cathodically protected iron or steel as specified in section 614.14 of this Part. (5) Facilities must be installed as specified in section 614.7 of this Part. (b) Substantially modified facilities—summary of requirements. (1) If a new tank is added to a facility or an existing tank is replaced, the new tank must be installed as required for a new facility in subdivision (a) of this section. (2) When an existing tank is reconditioned, it must be reconditioned as required in section 614.6 of this Part. (c) Compliance with Part 613 of this Title. A new facility or a new tank must employ all practices and equipment for handling and storage of petroleum required in Part 613 of this Title before the new facility or tank is placed in service."

20. During the July 8, 2015 inspection, Department staff observed that UST #1 did not have secondary containment.
21. Respondent's failure to have UST #1 meet the requirements of 6 NYCRR Part 614 is a violation of 6 NYCRR Part 614.2.

#### **SIXTH VIOLATION**

22. 6 NYCRR Part 614.14 sets forth the requirements for new underground piping.
23. During the July 8, 2015 inspection, Department staff observed that the underground piping associated with AST #6 did not meet the requirements set forth in 6 NYCRR Part 614.14 as the underground double wall portion of the piping did not have an access port for leak monitoring.
24. Respondent's failure to having underground piping that met the requirements is a violation of 6 NYCRR Part 614.14.

#### **CIVIL PENALTY**

25. 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.

NOW THEREFORE, having considered this matter and having been duly advised, IT IS ORDERED THAT:

I. **Waiver of Hearing.** Respondent has affirmatively waived its right to a hearing as provided by law and has consented to the issuing of this Order and has agreed to be bound by the provisions, terms and conditions of this Order.

II. **Civil Penalty.** In respect to the Order's violations, a civil penalty for TWENTY EIGHT THOUSAND DOLLARS (\$28,000) of which EIGHT THOUSAND DOLLARS (\$8,000) 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 THOUSAND DOLLARS (\$20,000) 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.

III. **Schedule of Compliance.** Respondents shall comply with the terms and conditions of this Order including the Schedule of Compliance. The attached Schedule of Compliance any plans approved thereunder are incorporated into the Order and are

enforceable thereunder. Any records submitted to the Department shall have the owner's name, facility name and address, and contact and phone number.

IV. **Settlement.** This Order settles all violations identified herein as of the effective date of the Order.

V. **Binding Effect.** This Order is binding upon the Respondent, its agents, employees, successors, assigns and to all persons and firms, and corporations acting subordinate thereto.

VI. **Summary Abatement.** This Order shall not be construed to prohibit the Commissioner or his duly authorized representatives 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 the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, 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. **Modification.** 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 the provisions of the 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 obligation to obtain such formal approvals as may be required by this Order.

IX. **Access.** Respondent shall allow duly authorized representatives of the Department access to the facility without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondent's compliance with this Order, Department regulations, and/or the ECL and applicable federal regulations.

X. **Effective Date.** The effective date of this Order shall be the date upon which it is signed on behalf of the Department.

XI. **Scope.** 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 or Department may have against Respondent for any violations not cited in this Order on Consent.

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

C. The Department's right to enforce this Order against Respondent, its officers, directors, servants, and employees in the event that Respondent shall fail to fulfill any of the terms or provisions hereof;

D. 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

E. 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.

**XII. Review of Submitted Documentation.** 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 accept 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.

XIII. **Default.** Respondent shall not be in default of compliance with this Order if they are 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.

XIV. **Multiple Respondents.** If more than one Respondent is a signatory to this Order, use of the term "Respondent" in this Order shall be deemed to refer to each Respondent identified in the Order.

XV. **Communications.** Communications shall be sent to

For Department:

Thomas Lane  
New York State Department of Environmental Conservation - Region 4  
1130 N. Westcott Road  
Schenectady, New York 12306

For Respondent:

Russell Wark  
49 Court St.  
Binghamton, New York 13902

Please include entity name, address, and permit number (if applicable) on all correspondence.



DATED: *November 24* 2015  
Rotterdam, New York

Basil Seggos  
Acting Commissioner  
New York State Department of  
Environmental Conservation

BY:

  
\_\_\_\_\_  
Keith Goertz  
Regional Director  
Region 4



## **SCHEDULE OF COMPLIANCE**

1. Within 15 days of the effective date of this Order, Respondent shall submit to the Department a completed, signed change of ownership application and its associated fee.
2. Within 30 days of the effective date of this order, Respondent shall submit to the Department a plan setting forth how Tank 1 will be closed in accordance with 6 NYCRR Part 613.9(b) of the PBS regulations.
3. Within 30 days of the effective date of this order, Respondent shall submit to the Department the last four weekly monitoring reports for Tanks 2A, 2B, 3, 4, and 5.
4. Within 30 days of the effective date of this order, Respondent shall submit to the Department the most recent cathodic protection annual monitoring report(s) for Tanks 2A, 2B, 3, 4, and 5.
5. Within 30 days of the effective date of this order, Respondent shall submit to the Department the last four weekly monitoring reports for the piping associated with Tanks 2A, 2B, 3, 4, and 6.
6. Within 30 days of the effective date of this order, Respondent shall inspect and submit to the Department the most recent monthly inspection record for Tank 6.
7. Within 30 days of the effective date of this order, Respondent shall repair the Tank 6 secondary containment system and submit to the Department photos and documentation thereof.

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.