

**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  
www.dec.ny.gov

**CERTIFIED - RETURN RECEIPT REQUESTED**  
7015 0640 0005 8292 2366

June 8, 2017

Bill Black  
28 Birch Hill Road  
New Lebanon, NY 12195

Re: Order on Consent  
R4-2017-0116-5  
PBS# 4-087416

Dear Mr. Black:

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

This will also acknowledge receipt of \$7,500 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: L. Winterberger

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

-by-

ORDER ON CONSENT  
R4-2017-0116-5  
PBS # 4-087416

Old Elm LLC  
28 Birch Hill Road  
New Lebanon, NY 12195

Respondent  
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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, Old Elm LLC, owns and/or operates a Petroleum Bulk Storage (“PBS”) facility (4-087416) known as Chief’s Repair Lodge, LLC, located at 218 Riverside Drive, Fultonville, NY 12072 (Montgomery County) (“facility”).
3. On July 17, 2016, Department staff inspected the facility and observed the following violations:

6 NYCRR 613-1.4(b)	No records on the premises
6 NYCRR 613-1.9(a)	Facility registration information is not current and accurate
6 NYCRR 613-1.9(d)	Owner has/had not transferred facility registration
6 NYCRR 613-2.1(b)(1)(iv)(a)	Failure to maintain secondary containment (contains debris and liquid)
6 NYCRR 613-2.2(a)(6)	Inadequate maintenance of spill prevention equipment (water in sumps/catch basins, inoperable alarms, sensors, shut-off valves, etc)
6 NYCRR 613-4.1(b)(1)(ii)	Failure to paint AST for corrosion protection
6 NYCRR 613-4.1(b)(4)(ii)	Failure to test newly installed AST
6 NYCRR 613-4.1(b)(3)	AST does/did not have a gauge, high level alarm or overflow prevention valve
6 NYCRR 613-4.3(a)(1)(i); 4.3(b)(1)	Monthly inspection of AST not performed and no records maintained

6 NYCRR 613-2.6(a)(3)	UST systems out of service for greater than 12 months not properly closed permanently (Tanks 14, 15, 16, 17 and 18)
6 NYCRR 613-4.4(d)(1)	Observed an unreported spill in the AST secondary containment area

4. 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.
5. 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, Respondent is hereby assessed a civil penalty of THIRTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$37,500) of which SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) 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.

The balance THIRTY THOUSAND DOLLARS (\$30,000) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

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

In the event that Respondent fails to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

#### II. Schedule of Compliance

The attached Schedule of Compliance and any plans approved thereunder are incorporated into the Order on Consent and 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 DEC 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 shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attn: Regional Spill Engineer. 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 DEC access to the facility referred to in this Order 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 or the ECL.

### 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 DEC, New York State, and their representatives and employees harmless for all claims, suits, 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. 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.

DATED: *June 7* 2017  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:



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Keith Goertz  
Regional Director  
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

Old Elm LLC

Authorized Representative

Howard Commander

SIGNED:

Howard Commander

TITLE:

pres

DATE:

6/6/2017

STATE OF

New York

COUNTY OF

Columbia

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)ss.:  
)

On the 6<sup>th</sup> day of June in the year 2017 before me, the undersigned, a Notary Public in and for the State, personally appeared Howard Commander personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Jennifer L. Golden Wright  
Notary Public  
Qualified in the County of: Rensselaer County  
My Commission Expires: May 15<sup>th</sup> 2019

JENNIFER L. GOLDEN WRIGHT  
Notary Public, State of New York  
Qualified in Rensselaer County  
No. 01GO5011579  
Commission Expires May 15, 2019



## SCHEDULE OF COMPLIANCE

1. By June 19, 2017, Respondent shall submit to the Department, the closure report under required 6 NYCRR 316-2.6(b)(1) for Tanks 14, 15, 16, 17 and 18.
2. Within 30 days of the effective date of this Order, Respondent shall submit documentation stating the date on which Tank 9 was reinstalled and certifying that Tank 9 meet all appropriate PBS installation requirements at the time it was reopened at the facility.

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.