

**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  
7013 1090 0002 3365 0525

October 14, 2016

Meave M. Toohar, Esq.  
Toohar & Barone, LLP  
Robinson Square  
313 Hamilton Street  
Albany, NY 12210

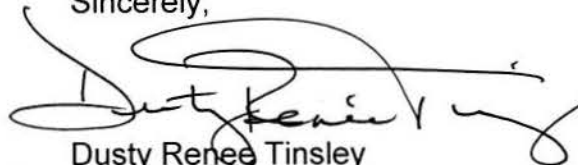
Re: Order on Consent  
R4-2016-411-76  
Old Farm LLC

Dear Ms. Toohar:

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

This will also acknowledge receipt of \$10,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsley  
Assistant Regional Attorney  
Region 4

Enclosure

ec: D. Pickett



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 ("ECL")  
and Part 613 of Title 6 of the New York  
Compilation of Rules and Regulations ("6 NYCRR")

**ORDER ON CONSENT**

-by-

R4-2016-0411-76  
PBS # 4-600015

Old Farm LLC  
36 West 44<sup>th</sup> Street, Suite 630  
New York, New York 10036

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 6 NYCRR Part 613.

**RESPONDENT**

2. 6 NYCRR Part 613-1.3(v) defines "facility" to mean "a single property, or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person or persons, on or in which are located: (1) one or more tank systems having a combined storage capacity of more than 1,100 gallons (including a major facility); or (2) an underground tank system having a storage capacity that is greater than 110 gallons.
3. 6 NYCRR Part 613-1.3(w) defines "facility owner" as "any person who has legal or equitable title to the real property of a facility."
4. 6 NYCRR Part 613-1.3(ao) defines "operator" as "any person who leases, operates, controls, or supervises a facility."
5. Respondent Old Farm LLC is the facility owner and operator of the Petroleum Bulk Storage ("PBS") facility (#4-600015) known as S & A Food Mart located at 6512 Route 23, Durham, New York 12405 (Greene County) ("Facility"). The Facility contains one or more tank systems having a combined storage capacity of more than 1,100 gallons or an underground tank system having a storage capacity that is greater than 110 gallons.

**INSPECTIONS**

6. On March 7, 2013, Department staff inspected the facility and observed the following violations of ECL Article 17 and 6 NYCRR Part 613:

|   |   |
|---|---|
| 6NYCRR 612.2 (b) (now 6 NYCRR 613-1.9(d)(1))      | Owner has/had not transferred facility registration   |
| 6 NYCRR 613.3 (c)(1) (now 6 NYCRR 613-2.2(a)(6))  | Shear Valve on pressurized piping is not secured properly or not operational  |
| 6 NYCRR 613.3 (d) (now 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) (Tank top sumps, Tanks 1, 1A, 2 and 3) |
| 6 NYCRR 613.3 (d) (now 6 NYCRR 613-2.2(a)(6))     | Failure to maintain secondary containment equipment (water in containment) (Fill port catch basins, Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613.4 (now 6 NYCRR 613-2.3(c)(1))         | No daily and/or ten day reconciliation performed (five yrs. worth must be made available)   |
| 6 NYCRR 613.5 (b)(3) (now 6 NYCRR 613-2.3(e))     | No leak detection performed   |
| 6 NYCRR 613.5(b)(4) (now 6 NYCRR 613-2.3(e))      | No cathodic protection records on the premises  |
| 6 NYCRR 614.5 (b) (now 6 NYCRR 613-2.3(c))        | Not monitoring interstitial space of double walled tank weekly  |
| 6 NYCRR 614.7 (d) (now 6NYCRR 613-2.1(b)(4)(iii)) | As built drawings not maintained on the premises  |

7. Department staff sent Respondent a Notice of Violation dated April 1, 2013 setting forth the violations observed during the March 7, 2013 inspection of ECL Article 17 and 6 NYCRR Part 613.

8. On February 24, 2016, Department staff inspected the facility and observed the following violations of ECL Article 17 and 6 NYCRR Part 613:

|                            |  |
|----------------------------|--|
| 6 NYCRR 613-1.9(d)(1)      | Owner has/had not transferred facility registration.   |
| 6 NYCRR 613-2.1(b)(4)(iii) | As built drawings not maintained on the premises. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.2(a)(3)      | Fill Port is/was not properly labeled with design capacity, working capacity and ID number. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.2(a)(4)      | Fill Port color coding is missing or incorrect (both above and underground tanks). (Tanks 1, 1A, 2 and 3)  |
| 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). (Fill Port catch basins were not accessible during |

|                                |  |
|--------------------------------|--|
|                                | the inspection so a determination could not be made regarding their condition. Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.2(a)(6)          | Shear Valve on pressurized piping is not secured properly or not operational. (Shear valves, located in the dispenser sumps, were not accessible during the inspection so a determination could not be made regarding their condition. Tanks 1, 1A, 2 and 3)                           |
| 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). (Dispenser sumps were not accessible during the inspection so a determination could not be made regarding their condition. Tanks 1, 1A, 2 and 3) |
| 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). (Tank top sumps were not accessible during the inspection so a determination could not be made regarding their condition. Tanks 1, 1A, 2 and 3)  |
| 6 NYCRR 613-2.2(b)(2)          | Not monitoring cathodic protection system of UST annually. (Tanks 1, 1A, 2 and 3)  |
| 6 NYCRR 613-2.3(b)(2)(i)(a)(2) | No piping leak detection performed. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.3(c)             | Not monitoring interstitial space of double walled tank weekly. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.3(c)(1)          | No daily and/or ten day reconciliation performed (five yrs. worth must be made available). (Tanks 1, 1A, 2 and 3)  |
| 6 NYCRR 613-2.3(d)(1)          | Piping was not annually tested as required. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.3(d)(1)          | Underground piping systems do not meet standards. (Tank top sumps were not accessible during the inspection so a determination could not be if automatic line leak detectors were present. Tanks 1, 1A, 2 and 3.)  |
| 6 NYCRR 613-2.3(e)             | No leak detection monitoring records on the premises. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.3(e)             | No cathodic protection records on the premises. (Tanks 1, 1A, 2 and 3)   |
| 6 NYCRR 613-2.6(a)(2)          | Tank not properly taken out of service (must comply with all testing inspection requirements).   |

9. Department staff sent Respondent a Notice of Violation dated March 18, 2016 setting forth the violations observed during the February 24, 2016 inspection of ECL Article 17 and 6 NYCRR Part 613.

10. On or about June 30, 2016, Respondent removed the USTs from the Facility. Respondent's Engineering Report states that the removed USTs were intact and showed no signs of failure.
11. Respondent's Engineering Report states that Respondent removed the contaminated soil which is currently being stored on-site, that contamination did not extend off-site, and that testing confirmed the removal of all contaminated soil. The contaminated soil is scheduled to be disposed of at the Colonie Landfill, at 135 tons of soil per month based on the landfill limits.
12. The excavation from which the contaminated soil was removed has been backfilled.

#### **CIVIL PENALTY**

13. 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.

#### **WAIVER OF HEARING**

14. 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.

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

I. **Civil Penalty.** In respect to the Order's violations, a civil penalty for TWENTY THOUSAND DOLLARS (\$20,000) is assessed against the Respondent for the above violations of which TEN THOUSAND DOLLARS (\$10,000) shall be payable to the New York State Department of Environmental Conservation by company or bank check made payable to the at the time this Order is signed, notarized, and returned to the Department. TEN THOUSAND DOLLARS (\$10,000) 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 civil penalty shall not in any way alter Respondent's obligation to complete performance under the terms of the Order.

II. **Schedule of Compliance.** Respondents shall comply with the terms and conditions of this Order including the Schedule of Compliance. The attached Schedule of Compliance and 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.

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

IV. **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.

V. **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.

VI. **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.

VII. **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.

VIII. **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.

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

X. **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.

**XI. 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.

**XII. Communications.** Communications shall be sent to

For Department:

Regional Spills Engineer  
New York State Department of Environmental Conservation - Region 4

1130 N. Westcott Road  
Schenectady, New York 12306

For Respondent:

John Rapp  
Old Farm LLC  
36 West 44<sup>th</sup> Street, Suite 630  
New York, New York 10036

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



DATED: October 14, 2016  
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 Old Farm LLC 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 Farm LLC

Authorized Representative JOHN RAPP

SIGNED: [Signature]

TITLE: MANAGING MEMBER

DATE: \_\_\_\_\_

STATE OF NEW YORK )  
COUNTY OF New York ) ss.:

On the 5th day of October in the year 2016, before me, the undersigned, personally appeared JOHN RAPP (full name) personally known to me who, being duly sworn, did depose and say that he/she/they reside at 22 CRAWFORD ROAD, SCARSDALE, NY 10583 (full mailing address) and that he/she/they is (are) the president (president or other officer or director or attorney in fact duly appointed) of the OLD FARM, LLC (full legal name of corporation) the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by the authority of the board of directors of said corporation.

[Signature]  
Notary Public  
Qualified in the County of:  
My Commission Expires:

**ALEXANDER PALMER KELLY, ESQ.**  
Notary Public, State of New York  
No. 02KE6212902  
Qualified in Kings County  
Commission Expires October 28, 2017

## **SCHEDULE OF COMPLIANCE**

1. Respondent shall dispose of the stockpiled contaminated soil at the Facility to an appropriate disposal facility, as required under all laws, rules, and regulations, no later than December 31, 2016.
2. Within 15 days of disposal of the contaminated soil, Respondent shall submit to Department staff copies of the invoice(s) for the disposal of the contaminated soil.

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.