

**Summary of Assessment of Public Comment**  
**Part 613 (Petroleum Bulk Storage – PBS)**  
**Subpart 374-2 and section 370.1(e)(2) (Management of Used Oil)**

**Introduction**

This summary reflects the responses of the New York State Department of Environmental Conservation (DEC) to the main comments submitted by the public regarding the newly adopted Part 613 (the petroleum bulk storage (PBS) rule) and revisions to Subpart 374-2 and section 370.1(e)(2) (the used oil regulations). This rule making was proposed on August 6, 2014 and included an extended 90-day comment period that ended on November 4, 2014. A statewide webinar with nearly 500 participants was held on August 26, 2014 to explain the proposed rules and answer questions from the public. Six public information meetings/hearings were held across the state to further explain the proposed rules and receive comments. Approximately 221 comments were received on the PBS regulations and one comment on used oil.

**Main Themes** (where lists of issues are provided, the summary of DEC responses is in brackets)

**Applicability/Definitions (section 613-1.2, 1.3; e.g., comment 4.1.2):** Many comments were received asking for clarifications or interpretations of the various definitions in section 613-1.3. Examples include the definition of “operational tank system” [DEC clarified that lubricating oil system reservoirs are also operational tanks]; the status of trailer-mounted tanks serving emergency generators [non-stationary/mobile tanks are not regulated]; the status of tank systems storing asphaltic emulsions [regulated]; whether tank systems covered with “materials” (e.g., earth, concrete) are underground storage tank (UST) systems [if they cannot be inspected for condition/leaks or are not otherwise explicitly excluded from the definition, they are USTs]; whether airport hydrant systems are UST systems [generally not]; and whether an AST system that has been out of service for more than 12 months must be permanently closed [not if there are other tank systems in-service at the facility].

**Unannounced Inspections (section 613-1.4; e.g., comment 4.1.29):** Several commenters expressed their opinion that all DEC facility compliance inspections should be preannounced so that facility representatives can be prepared and inspections can focus more on compliance assistance rather than strict enforcement. Although the great majority of DEC’s inspections are preannounced, some are unannounced. Concern was raised that the regulatory language is inconsistent with the law. The response explained that the text of Part 613 represents no change in DEC’s inspection authority. In addition, DEC revised the proposed version of Part 613 to more closely conform to the statutory language regarding the provision of reasonable notice of an inspection. Reasonable notice does not necessarily require that an inspection be announced days in advance. Reasonable notice may consist of going to the facility and asking the operator for permission to inspect the facility. There is nothing unreasonable about unannounced inspections. Inspections that are not announced in advance allow the opportunity for inspectors to see how the facility is usually operated and limit the facility’s ability to hide deficiencies in equipment and operations.

**Registration of Facilities (section 613-1.9; e.g., comment 4.1.13):** Several questions were asked about how to interpret the “new” definition of “facility” (changed under the law in 2008 and implemented through Part 613) for the purposes of registering a facility. The owner of the property where the tanks are located (or its authorized representative) is required to register a facility. However, at a single facility there sometimes are multiple property owners, multiple tank owners, and the tank systems may be used for different purposes. Therefore, it is not always clear who should register the

individual tank systems and when it is appropriate to have multiple independent facilities located on a single property. The response explained that DEC recognizes that there are situations involving multiple tank owners who are operationally independent with tank systems that are co-located on a single property. An example is when multiple independent telecommunication companies have emergency power generation systems with fuel tanks on a single property. In certain limited situations, DEC may allow more than one registration for a site. DEC will take into account the property and tank ownership issues, whether the operators are independent from each other, the feasibility of having all tanks listed under one registration, and whether tank systems are being used for a “common purpose” when deciding whether multiple tank systems on a single property should be registered as one or more facilities. When there is a single tank operator with multiple tank owners, the facility registration must include all tanks that are under the control of the tank operator.

**Technical Standards for Tank System Design, Construction, and Installation (section 613-1.10; e.g., comment 4.3.2):** Several commenters requested that additional standards for the design, construction, and installation of tank systems be included in the regulation. DEC explained that the inclusion of additional standards will be considered in the second phase of rulemaking that is to begin after Part 613 is promulgated.

**As-Built Drawings of Tank Systems (section 613-2.1; e.g., comment 4.2.6):** Part 613 requires that when an UST tank system is installed, the owner must keep and provide to DEC upon request a drawing showing the location of the tank(s) and piping and details about the size and various components of the tank system. This information is needed to verify that the facility has the proper equipment and that if a leak occurs, the drawings and details can be used to expedite an investigation and remediation of the problem. Owners of older systems submitted comments expressing concern that the original as-built information was either not provided to the owner or is no longer available and that it will be very expensive to create new documents. DEC responded that an accurate diagram showing the approximate (not surveyed) locations of the tank systems is sufficient.

**Operator Training (section 613-2.5; e.g., comment 4.2.26):** Several commenters requested details about how the operator training program will work. When Part 613 goes into effect, tank system operators will have one year to become trained on topics specified in section 613-2.5 and to pass an exam approved by DEC, or obtain a credential issued by another state with a program acceptable to DEC. Anticipating these comments, DEC released a proposed program policy (DER-40, “Operator Training”) which was made available for public comment at the same time as Part 613 was proposed. In addition, since the release of the proposed regulations and policy, DEC has developed and made available to the public a draft operator training manual (“Tank IQ”) which addresses all of the topics required by Part 613, and has developed an online exam which will be used to determine which operators are competent to be authorized to operate tank systems.

An extensive pilot program to test the online exam was completed in April, 2015. Over 200 volunteers from the regulated community took the pilot exam in 13 proctored locations across the state. The pilot exam included effectively all of the questions that will be used in the live/formal exam (over 300 questions; the live exam will have between 50-85 questions depending upon operator class). With the assistance of an expert in giving competency exams (psychometric expert), the results of the pilot exam were evaluated, adjustments were made, and difficulty ratings were assigned to all questions. The results of a survey regarding the exam and the guidance material provided positive feedback and good suggestions for fine tuning the guidance and exam. DEC believes that the provision of the guidance, the program policy, and the experience from the pilot exam substantially address the issues raised in the

public comments. There was a comment that DEC should provide more than one year for operators to pass the exam but DEC maintains that one year is sufficient.

**Secondary Containment for AST Systems (section 613-4.1; e.g., comment 4.4.6):** Several comments were received expressing concern about a proposed revision that clarifies when smaller ASTs require secondary containment. The existing and proposed regulations require that ASTs with a design capacity of more than 10,000 gallons must have secondary containment and that smaller ASTs require secondary containment if a release from the smaller AST would threaten nearby waters of the state or sensitive resources. The existing regulation required secondary containment for smaller ASTs if a release from the tank “could reasonably be expected to discharge petroleum to the waters of the state.” Since any discharge could theoretically result in an impact to the “waters of the state,” DEC issued guidance in 1990 (TOGS 4.1.10) that limited which ASTs need secondary containment. These limitations were reaffirmed in 2011 when DEC issued DER-25, “Petroleum Bulk Storage (PBS) Inspection Handbook.” Commenters were concerned that incorporating the guidance into Part 613 gives it more weight and that DEC inspectors will be requiring many more tanks to be provided with secondary containment. DEC’s response explained that the approach to AST secondary containment requirements in Part 613 represents no change from how the existing requirements are implemented through the existing regulation and supplemental guidance. Part 613 clarifies that smaller ASTs “in close proximity to sensitive receptors [are] required to either have secondary containment . . . or utilize a design/technology such that a release is not reasonably expected to occur” (section 613-4.1(b)(1)(v)(b)).

**Delivery Prohibition (Subpart 613-5; e.g., comment 4.5.1):** Several comments were submitted expressing concern about the process DEC will use when it is necessary to prohibit the delivery of petroleum to a tank system because the system is either leaking, may be leaking, or the equipment/procedures are not in place to determine if the system is leaking. Most of the concerns relate to the time needed to resolve the issue and remove the delivery prohibition tag on the fill pipe of the tank system. DEC’s response explained that Part 613 includes many features designed to ensure that prohibitions are not indiscriminately applied, an opportunity for a hearing is automatically provided, and that the process is completed expeditiously. There was a comment that utilities should be exempt from the process because a disruption of service would threaten public health and safety. DEC explained that it has the authority to terminate the prohibition on its own initiative. If the situation calls for imposing a delivery prohibition, DEC’s opinion is that it is reasonable for the violator to fix or replace the tank system or equipment within 180 days or to come into compliance with the terms of a consent order that includes an appropriate schedule and any needed remedial measures. If warranted, DEC could seek a summary abatement order, negating the need for a delivery prohibition. The law (ECL section 17-1007(3)) forbids the operation of tank systems that are leaking petroleum. There are no exceptions to this mandate.

## Assessment of Public Comment

### Part 613 (Petroleum Bulk Storage – PBS)

#### Subpart 374-2 and § 370.1(e)(2) (Management of Used Oil)

## 1. General Comments in Support

### 1.1. Changes to Part 613 and Parts 596-599 are welcome.

Comment 1.1.1. [Commenter] supports efforts by the New York State Department of Environmental Conservation (NYSDEC) to improve petroleum and chemical bulk storage regulations and we appreciate the opportunity to provide comments. We provided comments on the preliminary draft last year and were pleased to see that some of our recommendations were considered and incorporated by NYSDEC.

Response 1.1.1. Comment noted.

### 1.2. The unification of state and federal Petroleum Bulk Storage (PBS) regulations is appreciated.

Comment 1.2.1. The Department's intent to modify the Petroleum Bulk Storage regulations to clarify, reorganize, and conform to federal provisions is appreciated.

Response 1.2.1. Comment noted.

Comment 1.2.2. We support DEC's initiative to consolidate the State Petroleum Bulk Storage regulations into a single set of regulations in Part 613 and harmonize the consolidated State regulations with the existing federal tank regulations. We agree with the Department that having these regulations in a single part and in line with existing federal regulations will improve overall compliance.

Response 1.2.2. Comment noted.

Comment 1.2.3. First, we wish to commend the DEC for providing an extended period of stakeholder education and feedback on these proposed regulations. You have demonstrated a genuine commitment to obtaining input from the regulated community. We also acknowledge the role of the Petroleum Bulk Storage Advisory Council in facilitating this expanded review process.

The industry welcomes long-awaited action to bring New York's PBS regulations into conformity with federal EPA regulations. For years, discrepancies between the state and federal rules have caused regulatory heartburn for New York motor fuel retailers. Once this alignment is achieved, the key will be for DEC, going forward, to resist temptation to stray from it by seeking additional unfunded mandates that exceed EPA standards, such as the burdensome vapor monitoring system requirement the Department is on record as intending to pursue.

Response 1.2.3. Comment noted.

Comment 1.2.4. [Commenter] supports the goal of the NYSDEC to make the Part 613 regulations consistent with the federal regulations (40 CFR Part 280) and with recent amendments to New York State law (ECL section 17, Title 10).

Response 1.2.4. Comment noted.

### **1.3. Changes in certain definitions are welcome.**

Comment 1.3.1. The change in the definition of temporary tank system as an aboveground tank system that is installed and intended for use on a property for no more than 180 days during any 12-month period is a marked improvement from the previous 90-day period.

Response 1.3.1. Comment noted.

### **1.4. The unification of state and federal Used Oil (UO) regulations is appreciated.**

Comment 1.4.1. We also support the harmonization of the State's Used Oil Program in 374-2 with existing federal regulations in 40 CFR 279. In particular, we support the proposed change of definition of used oil mixed with less than 50 parts per million PCBs as used oil when recycled rather than as a hazardous waste or as a 40 CFR 761 regulated material. The federal used oil program was amended in 2003 to address this issue and we support the Department adopting this change with this proposed rule update.

Response 1.4.1. Comment noted.

## **2. General Comments in Opposition**

### **2.1. Changes to Part 613 are too expensive/stringent.**

Comment 2.1.1. We are concerned that there was little consideration of the financial and operational burdens that will be placed on tank owners in complying with the new additional requirements. The Department should reconsider several of the modifications to weigh the environmental benefits, if any, against the cost and impacts upon businesses across New York State.

Response 2.1.1. See Response 2.1.3.

Comment 2.1.2. On behalf of crude oil producers in New York State I am writing to express my strong opposition of the proposed revisions to the Petroleum Bulk Storage regulations. Our industry cannot survive an additional layer of regulations that are costly to implement and provide virtually no increased level of protection for the environment. The assertion that these revisions cause "no substantive changes" in the regulations is simply not true. Please consider the effects that these revisions will have on the businesses and families who make their living producing crude oil in New York State.

Response 2.1.2. The commenter's complaint is with the legislature, not DEC. ECL section 17-1009(4) provides, "Owners who become newly subject to registration requirements of this section must, within one year of becoming subject to this section, register the facility and complete any modifications to tanks at the facility to be in compliance with the regulations promulgated pursuant to this title." Agency action in response to direct statutory mandate does not require a cost analysis.

Comment 2.1.3. Despite the Department's claim that the Proposed Part 613 does not include any substantive change to existing requirements, it imposes an extreme cost burden on smaller bulk storage businesses operating in its jurisdiction. The Rules should be revised to better reflect those Standards and Recommended Practices published by the American Petroleum Institute; many of which are otherwise referenced throughout the proposal. API is an international association and unequivocally recognized as the industry leader in the development of petroleum equipment and operating standards. Because its Standards and RPs are developed by experienced professionals; they are efficient, achievable, and current.

If applied today, a significant number of tank storage facilities would find themselves in breach of these Rules. Although businesses would strive to modify its equipment in a judicious manner, the enormous construction, labor, and capital outlays necessary for full compliance are nearly impractical in the short-term. Many tank systems, and by some estimates a majority, could cease operations; a proposition detrimental to stakeholders, individual employees, local commerce, and the overall economic well-being of the State of New York. The most reasonable alternative is for the proposed PBS Regulations to include a compliance schedule or grace period giving businesses the opportunity to budget, plan, and achieve compliance accordingly.

Response 2.1.3. While this comment refers to "an extreme cost burden" and "enormous construction, labor, and capital outlays," there is nothing contained in it or the rest of the commenter's submission which provides any detail as to the specific types of costs, the amounts of the costs, or the reasons why the costs arise. All of the facilities referred to by the commenter should already be in compliance with the requirements of the final version of Part 613.

### **3. General Comments on Part 613**

#### **3.1. PBS facilities in Native American territories (in New York) should also comply with Part 613/DER-40.**

Comment 3.1.1. We again note that there is no provision for enforcing compliance by Native American tribes that operate underground petroleum storage tanks at gas stations in New York State. Unequal enforcement undermines the credibility of the enforcing agency. Will tribal stores be subject to the same unannounced inspections, red-tagging procedures, and recordkeeping requirements that our members are?

Excuses relating to jurisdiction are hollow. New York's groundwater knows no territorial boundaries. In our view, all petroleum bulk storage facilities in New York State should abide by 6 NYCRR Part 613 and DER-40/Operator Training once duly adopted.

Moreover, these regulations should contain a statement of DEC's intent that enforcement be consistent and uniform across all regions of New York State. Our members are all too familiar with uneven interpretations and intensity on the part of DEC field personnel from one DEC region to the next on the basis, often rationalized by claims of regional differences in environmental sensitivity.

There should be one set of standards for everybody, uniformly applied.

Response 3.1.1. DEC does not exercise regulatory jurisdiction on Indian Nation territories or reservations of any of the nine recognized tribes.

The rule treats all similarly situated facilities in the same manner. It is not necessary to include a general provision that essentially states that the regulation must be enforced as it is written. It is always the Department's intent to treat similarly situated persons in the same manner.

### **3.2. DEC should provide cross-references between versions of the PBS regulations (Parts 612-614/Part 613).**

Comment 3.2.1. Changes to these rules will require revision of compliance documents for many regulated entities. It would be helpful if the NYSDEC would publish a cross reference between versions of the regulations once they are finalized. A cross-reference in an editable form (e.g. MS Word) would facilitate revision of affected written plans, programs, etc.

Response 3.2.1. DEC has created cross-references between former Parts 612-614, the Federal regulations, and Part 613. Copies are posted on the DEC website.

### **3.3. Subtitles should be placed beside section references in Part 613.**

Comment 3.3.1. The regulations would be easier to follow and understand if references to section numbers also referenced the subtitles. For instance, in [613-4.1(b)(1)(iv)] states that: Any tank which does not adhere to one of the standards listed in subparagraph (i) of this paragraph may not be used for the storage of petroleum unless approved under section 1.8 [Variances] of this Part.

Response 3.3.1. DEC understands that Part 613 is complicated and requires careful reading. However, DEC declines to insert unnecessary wording into the regulation that does not follow standard rulemaking practice. Furthermore, since every provision does not have a separate subtitle, the absence of subtitles from some cross-references could be confusing to some readers.

### **3.4. The effective date of Part 613 should not be until after pertinent guidance documents are finalized/adopted.**

Comment 3.4.1. As we noted in our previous written comments, the Department is harmonizing federal and state petroleum bulk storage statutes, codifying recent changes to both federal and state law, and detailing practices and procedures for the storage of petroleum in the state. [Commenter]'s initial concern is that the regulations as set forth are complex and could be confusing to the regulated community. Therefore, [commenter] believes that the Department's guidance documents will be essential to explain whether and to what extent specific rules apply

to particular facilities. Clarification and simplification of the requirements would be welcomed so that regulated entities can fully understand their compliance obligations. This is especially so with regard to the new provisions included in the rules.

The timing of DEC's guidance will be equally important. The Department has explained that the proposed regulations are intended to harmonize existing State requirements (citations omitted) with overlapping federal requirements (SAPA Notice N.Y.S. Register 8/6/14). The recodification of existing requirements combined with substantial additional obligations under a new regulatory scheme is going to be difficult for regulated entities to initially comprehend.

Therefore, [commenter] recommends that the effective date of the regulations should be deferred until all guidance documents are finalized and adopted.

Response 3.4.1. DEC cannot issue final guidance documents until the applicable regulations have been promulgated. However, DEC is working to finalize the guidance documents so they are available as soon as possible after the regulations are adopted.

### **3.5. Notices of Violation (NOVs) should be issued after a specific timeframe after a facility inspections.**

Comment 3.5.1. [Commenter] requests that DEC add language to the regulations that specifies that DEC must issue any Notices of Violation ("NOVs") within a specified timeframe (i.e., 72 hours) after a facility inspection. City agencies often struggle to respond to NOVs issued months or even years after facility inspections.

Response 3.5.1. DEC intends to issue notices of violation as promptly as possible. The suggested additional text implies that if DEC fails to act within the specified timeframe, then DEC would be stopped from enforcing against a violator of the provisions of Part 613 and the ECL. Not every inspection leads to rapid enforcement action because further investigation may be necessary or the facility may be uncooperative and impede an adequate investigation. Although DEC intends to act as quickly as possible following an inspection, DEC will not create an obstacle that will hamper its ability to enforce the law. Since January 1, 2015, DEC has placed increased emphasis on issuing compliance determinations after inspections expeditiously. Between January and June 2015, over 99% of these determinations have been made in less than 30 days.

## **4. Specific Comments on Part 613**

### **4.1. Comments on Subpart 613-1: General Provisions.**

Comment 4.1.1. The Department's existing CBS regulations and proposed revisions of the CBS regulations apply to or will apply to some petroleum fuel additive tanks (additive tanks) in petroleum bulk storage terminals. These regulations have and will continue to present an additional and unnecessary burden on petroleum bulk storage terminals. Before the CBS regulations became effective, terminals managed all additive tanks under the PBS regulations. This included providing secondary containment, spill prevention measures, management procedures, etc. Once the CBS regulations went into effect, due to the additives hazardous chemical constituents, some additive tanks were required to be licensed under the CBS program.



The constituent chemical content that causes these additives to be characterized as hazardous chemicals are also for the most part are also found in the petroleum products regulated under the PBS regulations. As a result, terminals are required to manage some additives with the same hazardous chemical constituents as the petroleum products handled/stored at the facilities as a hazardous chemical. Additionally, when additive formulations change, which is fairly often, the applicability for non-hazardous additives and hazardous chemical additives changes. The alternating applicability causes the terminals to change the PBS/CBS registrations, make equipment changes, make operational procedure changes and implement different recordkeeping requirements. [Commenter] does not believe that this flip-flopping of additive tanks between the PBS and CBS programs serves any environmentally beneficial purpose. In either the case of both programs, the terminals managing additive tanks provide adequate measures that are protective of the environment. [Commenter] strongly believes that the Department should consider a provision that classifies all petroleum fuel additive tanks as PBS regulated tanks. If a terminal in fact handles a hazardous substance that is used for a purpose other than being a fuel additive, then that tank should be considered a CBS tank. Revision of the proposed regulation to exclude petroleum additives from the CBS requirements would eliminate an unnecessary burden for both the regulated terminals and the Department by way of consolidating terminal tanks, for the most part, into the PBS program.

Response 4.1.1. The determination of whether a substance is either petroleum or a hazardous substance depends on the characteristics or constituents of the substance. These substances are mutually exclusive; a substance cannot be classified as petroleum and a hazardous substance. The way the substance is used is irrelevant to the determination. This approach is consistent with the underlying definitions found at ECL sections 17-1003(5) and 40-0105(4).

Comment 4.1.2. The definition of operational tanks includes a stipulation that the petroleum contained in the system is not used for combustion in any context. Does the Department intend to regulate lubricant systems associated with stationary combustion engines (e.g., generator crankcases, combustion turbines) given that low volumes of the lube oil (used to enable operation of the equipment) is combusted during its operation?

Response 4.1.2. DEC opted to not regulate operational tank systems because they contain small amounts of petroleum used for operational purposes. A loss of petroleum in such a system is accompanied by faulty operation of the equipment or machinery such that the loss is readily apparent. DEC believes that lubricating oil system reservoirs also meet these criteria and may be exempt from regulation. The definition of ‘*operational tank system*’ has been modified to read that “petroleum ... is not consumed in any context ....” In addition, lubricating oil system reservoirs have been added as an example of an operational tank system.

Comment 4.1.3. We recommend that language on operational equipment and the exemption of capacitors and transformers be consistent throughout the proposed regulations. Under the draft CBS regulations capacitors and transformers are listed as exempt and we recommend that language be included/added to the sections on PBS and MOSF. The CBS draft regulations do not include exemptions for operational equipment. [Commenter] recommends that both the PBS and CBS rules have consistent exemptions for all operational equipment.

Response 4.1.3. DEC has reviewed the language regarding this issue and has determined that capacitors and transformers currently meet the definition of ‘*operational tank system*.’ Due to

the differences between the enabling statutes, it is not possible for both the PBS and CBS regulations to have consistent exemptions for all operational equipment. ECL section 40-0105(11) explicitly excludes capacitors and transformers from the CBS regulations; therefore, this exemption is included in the CBS regulations. ECL Article 17 Title 10 does not have an explicit exclusion for capacitors and transformers. But in reviewing this issue, DEC has determined that it is appropriate to exempt operational tank systems such as capacitors and transformers from PBS because: (1) it would be difficult to apply standard tank requirements to those systems, and (2) any leaks from operational tank systems would be readily detected because the systems would cease to function properly if there is a leak. Operational tank systems at major facilities will be addressed in a future rulemaking.

Comment 4.1.4.1. Some members utilize trailer-mounted mobile emergency generators (Mobile Emergency Generators or MEGs) for emergency network load reduction, emergency response and other means to ensure reliability for customers. The MEGs are portable trailers that generally contain an electrical generator powered by a diesel engine, a double walled diesel tank, lubrication system, switchgear and a three-phase voltage generator. The fuel tanks store ultra-low sulfur diesel fuel oil and range in capacity depending on the generator output.

The proposed PBS regulatory changes to incorporate the definition of temporary tank system may regulate the above described MEGs because the units can be stored for greater than 180 consecutive days during any 12 month period; depending on the frequency and duration of emergency scenarios. Previously, the MEGs storage tanks did not meet the definition of an aboveground storage tank due to the fact the overall tank system was not stationary in nature or confined to one facility. We request clarification from the department regarding whether MEG tanks are intended to be regulated under PBS or not.

Comment 4.1.4.2. [Commenter] uses mobile emergency generators ("MEGs") for emergency load reduction, emergency response, and to ensure reliable customer service during emergencies. The MEGs are portable trailers that generally contain an electric generator powered by a diesel engine, a double-walled diesel fuel tank, a lubrication system, and electrical switchgear. The fuel tanks store ultralow sulfur diesel fuel, and range in capacity depending on generator output.

The proposed PBS "temporary tank system" definition will make MEGs subject to PBS requirements if the MEGs are utilized for greater than 180 consecutive days during any 12-month period. This will make the permitting process very difficult to administer as they are designed for emergency response and will be used across the entire [commenter] service territory at various locations rather than remain at one facility.

[Commenter] requests that a definition for "mobile emergency generator" be added to the definitions section of 613-1.3 and that the "facility" definition be revised, as set forth below, to include an exemption for these mobile emergency generators.

Add to 613-1.3 (Definitions):

[Mobile Emergency Generator means a non-stationary standby electric generating system powered by an internal combustion engine (including a turbine), where such system is designed to supply temporary electric service only when service from the normal or primary - electric source is disrupted.]

Revision to 613-1.3(v)(3) Facility Definition Exemptions:

[(ix) mobile emergency generators.]

Response 4.1.4. The examples provided in the comments are not considered stationary devices. Therefore, they do not meet the definition of 'tank system' and are not subject to Part 613. As such, no additional exemption is necessary.

Comment 4.1.5. In a PBS Enforcement Discretion Directive dated July 8, 2009 signed by Bureau Chief Benjamin A. Conlon, the issue of PBS regulations applying to tanks storing asphaltic emulsions was addressed. This document specifically stated that the Department would exercise its discretion and not assess owners of these tanks a violation of the PBS regulations until the promulgation of updated regulations at which time the operational compliance concerns would be addressed during the Department's rulemaking process. This issue has not been addressed in the proposed regulations (see 613-1.3(at & au)).

Response 4.1.5. 613-1.3(v)(3)(vi) states that a "tank system used to store or contain asphaltic emulsions is included" in the definition of 'facility.' The mentioned PBS Enforcement Discretion Directive is now superseded by the new Part 613.

Comment 4.1.6. The NYSDEC published a PBS enforcement directive in 2009 to address tanks storing liquid asphalt and asphaltic emulsions. The document specifically stated that the Department would exercise its discretion and not assess owners of these tanks a violation of the PBS regulations for tanks storing asphalt and asphalt emulsions. This issue has not been addressed in the proposed regulations. Liquid asphalt and asphalt emulsions should be explicitly exempted from the definition of petroleum under Part 613-1.3(at) and (au) [(as) and (at) in the final Express Terms] due to their physical and chemical properties which differ from petroleum fuels.

Response 4.1.6. See Response 4.1.5.

Comment 4.1.7. Under the federal regulations, 40 CFR 280.12, "*Underground storage tank*" is defined as "any one or combination of tanks . . . the volume of which . . . is 10 percent or more beneath the surface of the ground." "Beneath the surface of the ground" is defined as "beneath the ground surface or otherwise covered with earthen materials." (Emphasis added). This definition would seemingly not encompass tank systems installed above the ground surface that are encased in concrete vaults, since such vaults are not "earthen materials."

Yet under DEC's new proposed regulations, a tank system with ten percent or more of its volume covered by just "materials" (not "earthen materials") is classified as an underground storage tank. DEC has clarified, on the first page of its "Summary of the Assessment of Public Comments on Draft for Consideration of the PBS Regulations 6 NYCRR Part 613," that "a tank that is not able to be physically inspected is considered an underground tank," even if such tank is installed with weep holes, as required by the NYC building codes, which allow for detection of tank leaks.

[Commenter] respectfully submits that DEC's new definition of "underground storage tank" is inconsistent with the federal regulations and will wrongly encompass a very large number of tanks within New York City that had previously been appropriately regulated as aboveground storage tanks.

Response 4.1.7. To be considered an aboveground tank, the tank needs to be accessible for inspection. Tanks in concrete vaults that are not accessible for inspection are considered underground tanks. If a tank is in a vault and is not accessible for inspection (i.e., an underground tank), but the vault has weep holes that can be monitored weekly for leaks, then tightness testing is not required for that tank.

Comment 4.1.8.1. Many mounded tanks located in NYC are located with all the volume completely above the surface of the surrounding ground. Many of these mounded tanks do not have their external steel surfaces on the sides and roof exposed to the atmosphere. Materials is not defined in this document. The regulation should clearly make a distinction as to whether these tanks are to be regulated as underground storage tanks or above ground storage tanks. Their design and construction have nothing in common with a typical cylindrical underground storage tank found through the state, other than both being constructed in steel. Many of the underground storage tank regulations proposed are intended to address the majority of underground tanks found in service stations and these provisions are not practical to apply to mounded tanks of this design. These tanks were primarily built prior to 1986.

Comment 4.1.8.2. The proposed Regulation should clearly establish whether mounded tanks are considered aboveground or underground tank systems. Most Mounded or Semi-mounded tanks are situated such that all of the storage volume is above the surrounding ground surface. The exterior surfaces and roof, however, is covered and protected from the atmosphere. Specifically, the Regulation should define materials. The design and construction of mounded and semi-mounded tanks is altogether distinct from the majority of the underground tank systems intended by this Part. Therefore, the application of this Rule to all mounded or semi-mounded tanks is not feasible.

Response 4.1.8. As described by the commenter, mounded tanks are UST systems. DEC has modified the definition of '*Underground storage tank system or UST system*' to clarify what is meant by "covered by materials." DEC has confirmed with EPA that Part 613 is consistent with 40 CFR Part 280 in regulating mounded tanks as UST systems.

Comment 4.1.9. During the informational sessions in 2013, there was discussion whether an aboveground storage tank with more than 10% of its piping below ground would be reclassified as an underground storage tank and subject to those regulations. This interpretation is not consistent with the definition of an underground storage tank system. A tank should only be considered underground if 10% or more of the volume of the tank system (i.e., tank plus piping) is below ground and a tank should not be defined as underground solely based on the amount of piping that is below ground. This interpretation would unfairly impose additional requirements on tanks that should be only subject to the aboveground requirements.

Response 4.1.9. A tank system is considered an underground tank system if 10% or more of its volume (tank and piping, not just the piping alone) is beneath the surface of the ground or covered by materials. Subpart 4 of Part 613 sets standards for aboveground tank systems, including setting standards for any connected underground piping.

Comment 4.1.10. Most importantly, the [commenter] currently operates a hydrant fuel distribution system at JFK Airport under a Major Oil Storage Facility (MOSF) license. The current federal

regulations, 40 CFR Part 280, acknowledge that airport hydrant systems do not fit the traditional UST paradigm in terms of system size, complexity, and function, and therefore includes the exemption for airport hydrant fuel distribution systems (40 CFR 280.10 (c)(4) Airport hydrant fuel distribution systems). USEPA began an effort to update 40 CFR Part 280 in 2011 however, EPA has not moved forward with finalizing the update to the UST regulations and has not resolved the regulatory approach to airport hydrant fuel distribution systems. Given the current state of uncertainty regarding the proposed federal regulatory changes (40 CFR Part 280) with respect to airport hydrant fuel distribution systems, the [commenter] strongly urges NYSDEC to include an exemption for airport hydrant fuel distribution systems in Section 613-1.3(v)(3) in the proposed 6 NYCRR Part 613 – Petroleum Bulk Storage regulations.

Maintaining the existing federal exemption aligns with DEC's Regulatory Impact Statement published in connection with this proposed Petroleum Bulk Storage regulatory change: One of the main goals of this rule making is to reduce duplication. The proposed rule represents a harmonization of existing State PBS and federal UST program requirements. The existing State PBS and federal UST programs regulate the same tank systems in somewhat different ways and are not completely consistent with respect to the terminology used. Those differences would be reduced with the promulgation of the new Part 613. New requirements that result from the pending federal rule making will be incorporated, as appropriate, into Part 613 in a subsequent rule making.

Under the current MOSF permit, the [commenter] operates the hydrant fuel distribution system at JFK in accordance with numerous regulatory requirements. Our current leak detention practices include the following:

- Nightly Pressure Testing – Satellite Fuel Farm (SFF) - 27 lines - distribution pumps to hydrant valves, 5 lb/hr pressure. If pressure is not held, investigate with tracer.
- Hydrant pits visually inspected by Allied personnel when fueling aircraft
- Inventory control – daily gauging
- 5-year leak detection testing of the hydrant system

Extending the requirements of the proposed NYSDEC regulations to hydrant fueling systems would require substantial changes to the 75 miles of underground hydrant fueling lines at JFK. Economic and operational impacts on airport hydrant fuel distribution systems are not adequately addressed under the proposed changes to Petroleum Bulk Storage regulations. These issues would be best addressed subsequent to resolution at the federal level.

Response 4.1.10. DEC considers airport hydrant fuel distribution systems to be part of aboveground tank systems regulated under Subpart 4. DEC will address in a future rule making the changes that USEPA has made to Part 280.

Comment 4.1.11.1. Language (in 613-1.3(v)(3)(iii)) should state that this regulation does not apply to tank systems that are regulated under DOT PHMSA Part 195 as a break-out tank and that the federal regulation of the tank construction and maintenance processes are pre-empted by the federal requirements.

Comment 4.1.11.2. The Rule (613-1.3(v)(3)(iii)) should state that it does not apply to breakout tanks as defined by DOT PHMSA. A breakout tank is a tank used to relieve surges in a

hazardous liquid pipeline system or receive and store hazardous liquids transported by a pipeline for reinjection and continued transportation by pipeline. 49 C.F.R. 195.2. Furthermore, it should include language stating that the Federal regulation of tank construction and maintenance processes are preempted by the state requirements.

Response 4.1.11. DEC agrees that breakout tanks subject to 49 CFR Part 195 are not subject to Part 613. Under 49 USC Section 60104(c), states are preempted from imposing pipeline safety standards on breakout tanks subject to federal Pipeline Safety Act (49 USC Section 60101 et seq.). It is not necessary to revise Part 613 to reflect this principle.

Comment 4.1.12. The definitions of 'Facility' in 6 NYCRR 613-1.3(v) and 'Used for a common purpose' in 6 NYCRR 613-1.3(bs) raise some questions. A facility as defined can either be (1) a single property; or, (2) contiguous or adjacent properties used for a common purpose. Please clarify whether a single property which is used for separate purposes must be a single "facility" under the proposed regulations. Specifically, could a single property choose to be treated as separate facilities, so long as each part follows the regulations? This is similar to Comment 112 addressed in the "Summary of the Assessment of Public Comments on Draft for Consideration of PBS Regulations 6 NYCRR Part 613", issued on August 6, 2014.

For example, on one property there are two operators, each with different NAICS codes. Operator one controls a portion of the facility that is used for research and development (R&D) activities. As such, the operator for this portion has registered petroleum bulk storage tanks used for facility heating, to supply vehicles/equipment with gasoline or diesel fuel and for storage tanks associated with emergency generators. Operator two, whose job function is temporary (say 3 years), is performing environmental remediation at a distinct part of the facility, separated by a fence. A small stationary heating oil tank is present. If this tank were on a separate parcel, it would not require registration since the total petroleum product stored in stationary tanks is <1,100 gallons.

In the example, is operator two required to register its small tank solely because the first operator exceeds the 1, 100 tank registration threshold on the same property? If registration is required for both operators, must the registration be on the same form as operator one or could two separate registrations be issued to each operator?

Response 4.1.12. DEC recognizes that there are situations where multiple companies that are operationally independent of each other are co-located on a single property. In all cases, the property owner must either register the facility or authorize another party to complete the process on their behalf. If there is one tank operator but multiple tank owners at a property, the facility registration must include all tanks that are under the control of the tank operator. In certain limited situations, evaluated on a case-by-case basis, DEC may allow more than one registration for a site. When determining whether more than one registration would be allowed for a single property, DEC will consider the following factors:

1. who owns the property;
2. who owns the tanks;
3. who operates the tanks and if there are multiple operators, whether they are independent of each other;
4. the feasibility of having all the tanks on the site listed under one registration; and
5. whether the tanks are being used for a common purpose.

Comment 4.1.13. ECL 17-1003 defines a "Facility" as "a single property or contiguous or adjacent properties used for a common purpose which are owned and operated by the same person on or in which are located one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum and any tank whose capacity is greater than one hundred ten gallons that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground."

The interpretation of the regulatory definitions for 'Facility' (at 613-1.3(v)) and 'Used for a common purpose' (at 613-1.3(bt)) should allow for logical and reasonable designation of facilities for effective management of the properties owned by [commenter]. The [commenter] consists of contiguous properties located on Interstates 87, 90, 190, 95 & 287 Right of Ways (ROWs). The [commenter] consists of lands along the Erie, Seneca, Oswego & Champlain Canal systems. Various properties owned by [commenter] have significantly different functions/purposes as well as operational entities. Operational functions include, but are not limited to maintenance, repair, construction, toll collection, traveler services, police barracks and communication. The regulations should allow for separate facility registrations with differing functions/purposes located on contiguous property owned by the same organization.

Larger property owners, such as the [commenter], have various organizational units, tenants and permittees under contracts who best manage their separate facilities. Although numerous facilities may be located on [commenter] contiguously owned land, many times there are different functions and purposes for each facility. Facility examples with differing functions and/or common purposes include:

- Service Plazas with vendor operated fueling station and restaurant services for travelers.
- Maintenance Facilities for support of activities needed for maintenance of the highway and bridges within designated sections including storage of materials for surface deicing, vehicle fueling, bridge repair and maintenance, pavement repair, and fleet maintenance.
- Toll Facilities at highway tolling locations for revenue collection. Locks at canal locations for use by the public.
- [Commenter] owned facilities operated by other entities by contract (examples included but are not limited to fueling stations, fiber regeneration facilities and communication systems).
- Lessee owned structures/equipment totally operated by other entities under contractual agreements with the [commenter]. An example include cellular towers/communication structures where [commenter] only owns the land, but does not own the equipment, nor have operational responsibilities, regular access or expertise in the operator's function/purpose. Another Canal example would be a municipality or private marina that offers fuel services to boaters, wholly outside of [commenter] operational control.

In conclusion, although facilities may be physically adjacent on the same property, as shown above, they do not have common purposes. To best manage these differing purposes/functions, facility designation and PBS registrations need to be separate.

While we are not requesting changes in the proposed regulations, we do request that the proposed regulatory definitions for 'Facility' and 'Used for a common purpose' be interpreted to ensure that separate facilities, under the same ownership, that do not have a common function or

purpose can be designated as separate facilities for PBS registration purposes. Each situation should be carefully considered as there are unique conditions and situations which would be found not only at the [commenter], but at possibly other facilities around the state.

Response 4.1.13. Comment noted. See Response 4.1.12.

Comment 4.1.14. One goal of the proposal is to bring the regulatory definition of 'Facility' into conformance with the new statutory definition. The current regulation defines a facility as: "one or more stationary tanks, including any associated intra-facility pipelines, fixtures or other equipment, which have a combined storage capacity of over 1,100 gallons of petroleum at the same site."

The criteria for whether two unrelated tanks are "at the same site" is not explicitly defined. Under the statutory definition:

- 'Facility' means a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located one or more [regulated tanks]."

The proposed rule appropriately adopts this definition verbatim.

In the statute, what constitutes "common purpose" is not further defined. The proposal purports to bring clarity by adding a definition of "used for a common purpose". [Commenter] believes the proposed definition actually adds confusion and expands the scope of the definition beyond the statutory language. It goes well beyond mere consistency with the law and adds costly administrative burdens.

The proposed definition begins:

- 'Used for a common purpose' means that the primary activity at the properties is the same.

[Commenter] notes that "purpose" and "type of activity" are two very different things. Our member companies have facilities with very different activities. For example, one may provide telephone customer support. Another may perform data or voice switching. Yet another may perform service on maintenance vehicles. But they all serve the common purpose of providing that company's telecommunication service.

Having changed the statutory term "common purpose" to "primary activity is the same", the proposal goes on to specify that two activities having the same NAICS code definitively establishes them as a single facility. We believe that such use of NAICS codes will create irrational, arbitrary, unintended and unnecessary results.

NAICS codes are designed for the purpose of macroeconomic statistics. While occasionally useful in defining types of commercial activity, they are not intended to indicate commonality of purpose. (See <http://www.census.gov/eos/www/naics/>.) Under NAICS, different portions of a facility owned and operated by the same company are often classed differently. Competitive businesses that may be located next to one another on a property would have the same classification. For example:

- At an automobile dealership, the new car lot (NAICS 44111 0) could be a separate facility from the used car lot (NAICS 441120); and



- Two hotels (NAICS 72111 0), say Marriott and Hilton, built on adjacent land leased from an airport or industrial park would be a single facility. However, the Marriott Restaurant (NAICS 722511) and the hotel bar (NAICS 72241 0) could each be a separate facility.

This would create a particular burden to the wireless telecommunications business. Wireless carriers typically share towers for cellular antennas. We lease adjacent parcels of land from one another or from a joint landlord. To support communication during power outages, we each install a small emergency generator, typically with a small diesel fuel tank comparable in size to a home heating oil tank. Carriers can have hundreds of such sites to manage across the state of New York and potentially a comparable number of different landlords.

If you aggregated the tank capacities of all the carriers on a given site, a very few of these properties might require registration. However, there is no physical, operational or other connection between these tanks. They do not support "a common purpose." In fact, they support competitive purposes and as such specific storage capacities of tanks are generally considered trade secret by their respective owners.

As competitive companies with regularly changing operations, we would need to establish some sort of intercompany system to track and manage aggregate tank capacity per site. One tenant installing a tank at a property could cause the site to exceed 1,100 gallons aggregate and trigger a registration obligation and compliance requirements for all tenants, very likely without the knowledge of those other tenants. While actually exceeding this threshold quantity would be infrequent, the industry would need to perform complex tracking at all of the thousands of these remote facilities to identify the few that might be large enough to trigger applicability.

[Commenter] believes that definition of '*Used for a common purpose*' should be stricken from the proposed rule. If the Department believes it necessary to define '*Used for a common purpose*,' we suggest that common purpose be defined in terms of common operational control. Where a property owner or landlord exercises operational control over a property, it is reasonable to hold the owner responsible for those operations. Where two operations are separate and distinct, and especially where they are run by competitive companies, it is unreasonable to consider them to serve a common purpose and to require them to be managed as one facility. This also includes additional costs associated with complying with the amended regulations that were not considered in the impact statements.

Additionally, [commenter] suggests that the definitions should:

- Clearly state the conditions in which someone other than the property owner may register tank systems. In your public outreach meeting on September 10, 2013 the first slide stated that "if unrelated businesses [are located] on the same property, then each business may register tanks separately;" and
- 613-1.3(bn) [(bm) in the final Express Terms]: Define a '*Temporary tank [system]*' as one that can be in service without registration for 365 days rather than 180, since large tank replacement construction jobs can take much longer than 180 days, especially in urban areas.
- 613-1.3(ap) [(ao) in the final Express Terms] defines an '*Operator*' as "any person who leases, operates, controls, or supervises a facility. This definition is inconsistent with the use and definition of '*Facility*' as stated in section 613-1.3(v) of the proposed regulation. [Commenter] suggests that "Facility Operator" and "Tank Operator" are clearly defined and their respective responsibilities are clearly delineated throughout the proposed regulation.

Response 4.1.14. The term “used for a common purpose” is drawn from ECL section 17-1003(1). It will not be stricken. As the commenter notes, the term is not defined in the statute. DEC needs to interpret the term as part of implementing the law. The definition found at section 613-1.3(bs) is DEC’s interpretation.

It is unclear what exact circumstance the commenter is trying to expost. The term “used for a common purpose” only applies in situations where there are contiguous or adjacent properties that have common ownership. In the example of the typical cell tower, the tower is likely on a single property. With regard to conditions that may warrant more than one registration on a single property, see Response 4.1.12.

Assuming the telecommunications site consists of separately deeded properties, then DEC needs a readily verifiable method by which to determine whether the properties are used for a common purpose. There is no practical way for DEC to verify any particular person’s claim regarding how a property is used. There are innumerable ways that a person could subjectively classify the use of a property. This is why DEC has selected the NAICS designation as one factor in determining the use of the property.

The ECL provision does not account for competitive differences. The aim of the phrase is to identify which facilities are subject to regulation. DEC believes that it does not have to account for any new costs that might arise from implementation of the new Part 613 to various small tanks at a cell tower location because the regulatory framework is mandated by the statute and is not a discretionary act of DEC.

The term “operator” is taken from ECL section 17-1003(3). The definition of this term is not inconsistent with the definition of “facility.” Facility operators are operators within the meaning of ECL section 17-1003(3). If a facility has, for its own purposes, separately designated tank system operators, they are all considered to be operators within the meaning of ECL section 17-1003(3) and section 613-1.3(ao).

The commenter’s claim about how “the industry would need to perform complex tracking at all of the thousands of these remote facilities to identify the few that might be large enough to trigger applicability” is unsupported. The owner of the property or properties that form a facility would need to add up the capacities of the tanks at the location and, if the threshold is crossed, contact DEC if there is a question on the need to file a registration application and pay a fee. DEC is not required to inquire about what contractual arrangements the telecommunications companies and the landowners may have concerning the use of the property; those parties may work out all leasehold arrangements in private.

Comment 4.1.15. This proposed regulation defines ‘*Out-of-service*’ as any tank system no longer receiving or dispensing petroleum (613-1.3(aq) [(ap) in the final Express Terms]). By comparison, the existing definition in 612.1(c)(17) defines ‘*Out-of-service*’ as a facility or portion thereof no longer in use. Facilities or tanks which are used for seasonal storage, for surcharge storage, or for standby storage, are not considered out-of-service. The proposed regulation could be mistakenly interpreted as excluding empty or static tanks from being considered in service, subjecting them to the requirements for Temporary and potentially Permanent Closure.

The Department has indicated at public meetings that the change is necessary to make the PBS regulations consistent with the New York State Fire Code. However, the Fire Code makes clear

that the rules governing closure apply only to tanks that are, in fact, truly closed, i.e., no longer in use. First, the relevant section of the Fire Code is titled Abandonment and status of tanks, indicating that the closure provisions are intended to address abandoned tanks, not those tanks that are not currently in use because of short-term changes in market conditions. Second, although the Fire Code does require the permanent closure of aboveground tanks that have been out of service for a period of one year, the code provides an exception for tanks within operating facilities (See Fire Code of New York Section 3404.2.13.2.3).

There are a variety of reasons including market conditions or contractual obligations that may dictate a tank to be in service but be empty and held in standby service, or contain product for extended periods of time without adding or removing product. The proposed regulation does not address actual operational needs of affected industries and businesses.

Recommendation: The definition in 613-1.3(aq) [(ap) in the final Express Terms] should be replaced with the existing definition under 612.1(c)(17) allowing tanks which are used for seasonal storage, for surcharge storage, or for standby storage to not be considered Out of Service.

Response 4.1.15. DEC has modified the language in section 613-4.5(a)(3) to allow the continued operation of out-of-service AST systems that are located at facilities where one or more other tank systems are not out-of-service.

Comment 4.1.16. An *'Aboveground storage tank system'* is defined as any tank system that is not an underground storage tank system. Further in this section, definitions distinguish the tank systems into categories based on the installation date. It is not clear from the language that the installation date cited in the definitions (613-1.3(e), (f), (g)) refers to the date of tank construction. Since a system consists of many components in addition to the tank itself, the date needs to be clearly established in order to properly apply any applicable standard. Most aboveground storage tanks in major facilities were constructed prior to 1986. The API standards governing the tank construction are based on the construction date of the tank. Installation is not defined in the document.

Response 4.1.16. *'Installation'* is defined at section 613-1.3(ae), which reads as follows: *Install or installation* means the emplacement of a tank system, or any part thereof, in, on, or above the ground. The movement of a tank from one location for use in a different location constitutes the installation of the tank system.

A tank system is determined to be either a Category 1, 2, or 3 tank system based on the date that the tank was installed. See sections 613-1.3(e), (f), and (g).

Comment 4.1.17. NACE has several different certifications for corrosion professionals. This definition (*'Corrosion expert'* – 613-1.3(o)) does not specify which accreditation or certification is required for the respective tasks. Also, there is also no alternate equivalent credential system aside from NACE.

Response 4.1.17. DEC has modified section 613-1.3(o) to clarify that the NACE certifications of corrosion specialist and cathodic protection specialist are always acceptable.

Comment 4.1.18. The definition of '*Install or installation*' under 613-1.3(af) [(ae) in the final Express Terms] is too broad. In many operations, such as mining operations, tanks will be moved from one location to another within the same site as the mine progresses. This should not be considered a new installation.

Response 4.1.18. If the device is mobile, then it is not considered a stationary device and thus is not considered a tank system. If the tank system referenced by the commenter is considered a stationary device, then movement of the tank system to a new location would be considered a new installation.

Comment 4.1.19. We reiterate that the proposed definition of '*Leak, spill, or spillage*' on Page 7 of Part 613 inappropriately goes beyond existing regulations by positing that any escape of petroleum that enters containment (for example, a catch basin) is a spill. The essence of the term containment is that it captures, contains, or otherwise prevents petroleum from contaminating the environment. Such an escape does not warrant activation of the reporting, clean-up, and other prescribed responses accorded a true spill.

Response 4.1.19. The definition of '*Leak, spill, or spillage*' in Part 613 is consistent with the definition found at former section 612.1(c)(24). Petroleum is not meant to be stored in secondary containment; secondary containment is but a measure to keep petroleum from entering the environment. As such, the presence of petroleum in secondary containment is a spill, which increases the likelihood of a release, and therefore requires action.

Comment 4.1.20. It may be beneficial to include a code key for column 2 of Section B of the PBS application to include codes for manifolded and compartmented tanks. I understand the instructions cover manifolded and compartmented tanks. However, so many facilities inadvertently use numbering protocol that should be reserved for manifolded or compartmented tanks. For instance when replacing a tank that had a Registration ID of Tank 1 many facilities register the replacement tank as Tank 1A or 1B. A code key on the application form may help to curb this practice and avoid confusion.

Additionally, including the term "manifolded" within the definitions of 613-1.3 would be useful for explaining registration requirements to facilities.

Response 4.1.20. DEC will consider issuing guidance to address registration issues in the future. DEC will not include the definition of 'manifolded' as this term is not used within the regulation.

Comment 4.1.21. The definition of a '*Stationary device*' is a device that is not mobile. Examples of stationary devices include tank systems that are fixed or permanently in place on foundations, racks, cradles, or stilts (6 NYCRR 613-1.3(be) [(bd) in the final Express Terms])." Also, a '*Temporary tank (system)*' is defined as an aboveground tank system that is installed and intended for use on a property for no more than 180 consecutive days during any 12 month period (6NYCRR613-1.3(bn) [(bm) in the final Express Terms]).

Can a mobile or non-stationary tank (skid-mounted) become stationary if it is used for longer than 180 days in one location? Another way of saying this is can a mobile or non-stationary tank become a stationary tank in practice versus design? This is similar to Comment 50 addressed in

the "Summary of the Assessment of Public Comments on Draft for Consideration of PBS Regulations 6 NYCRR Part 613", issued on August 6, 2014.

For example, if a skid-mounted tank is installed and used in one location for greater than 180 days, does the tank become stationary in practice and needs to be registered (if the facility AST capacity already exceeds 1, 100 gallons)?

Response 4.1.21. If a skid-mounted tank is not mobile, such as being fixed or permanently in place, then it is considered a stationary device. If such a tank is intended to be used for more than 180 days, then it is required to be included on a facility registration at the time of installation. If such a tank was not intended to be used for more than 180 days but nevertheless is not removed within 180 days, then the tank must be included on a facility registration within 180 days of installation. As long as a mobile tank is still able to be moved (not fixed in place such as being hooked to piping or conduit, or connected to another structure), then it is not considered a stationary tank regardless of whether it is moved within 180 days after placement.

Comment 4.1.22. Under the definition for ‘*Operational tank (system)*’ (item ao) [613-1.3(an) in the final Express Terms] you give what appears to be examples but if the scope is larger you should consider including the words "but not limited to." I should think reservoirs on lube systems integral to equipment would qualify as operational tanks, correct?

Response 4.1.22. See Response 4.1.2. DEC has clarified the definition of ‘*operational tank system.*’

Comment 4.1.23. The definitions of an ‘*Operational tank system*’ (ao) [(an) in the final Express Terms] and a ‘*Tank system*’ (bl) [(bk) in the final Express Terms] provide for some specific examples. Are the definitions limited to those specific examples? If those definitions are not limited to those examples then the words but not limited to should be included in the definition. For instance, could lube oil reservoirs and hydrogen seal oil reservoirs qualify as an operational tank? We would like to see this clarified, and recommend that they remain excluded. Likewise, under (bl) [(bk) in the final Express Terms] an oil-water separator should not qualify as a tank system as it is not designed to store petroleum.

In addition, among the definitions in 613-1.3, we would like to see further clarity and expansion of the definition of a ‘*Liquid trap.*’ We ask that gas condensate vessels associated with natural gas fired turbines be added to the list of exempt liquid traps.

Response 4.1.23. See Response 4.1.2 in addition to the following.

DEC has excluded wastewater treatment tank systems (oil-water separator) by revising the definition of ‘*facility*’ and adding a definition for ‘*wastewater treatment tank system.*’ DEC anticipates this exclusion to become more limited after a future rulemaking, in which DEC intends to conform to the applicability for wastewater treatment tank systems under the revised 40 CFR Part 280.

The definition of ‘*liquid trap*’ is consistent with 40 CFR Part 280 and will not be revised to include additional situations. The exclusion for liquid traps applies only in the context of oil and gas production and gathering activities. It is not an exclusion for any type of tank system associated with natural fired turbines which may be used in many other contexts.

The examples provided in the referenced definitions are illustrative and not exhaustive.

Comment 4.1.24. The present definition of ‘*Rural and remote area*’ at 613-1.3(bb) [(ba) in the final Express Terms] means, "an area where one retail motor fuel facility is more than 20 miles from the nearest other retail motor fuel facility." This phrase is used in the delivery prohibition provisions of the proposed regulations at 613-5.1(c) to permit the Department to withhold the imposition of a delivery prohibition for a Tier 1 or 2 condition under certain circumstances so as not to jeopardize public access to motor fuel. The Association commented on the preliminary draft that this discretion should be available to DEC for heating fuels as well. The Department has added language to 613-5.1(c) to permit the withholding of delivery prohibition where it would, jeopardize public health or safety or the availability of, or access to, fuel in a rural and remote area. We are unsure whether this gives DEC discretion over heating fuels since the definition of rural and remote area still refers to retail motor fuel facilities.

In certain areas of the state, distributors draw product (heating oil, kerosene etc.) from remotely located terminals. The imposition of a delivery prohibition during the winter could have local supply implications for residential and commercial customers. Therefore, [commenter] believes that giving the Department discretion to defer a delivery prohibition would allow for the supply of needed heating fuels to homes and businesses as provided under 613-5.1(c). The Association requests that the Department reconsider adding this discretion in order to protect the health and welfare of heating consumers.

Response 4.1.24. DEC considers that the phrase “jeopardize public health or safety” refers to all seriously adverse consequences that might arise from the imposition of a delivery prohibition. Therefore, no change was made to the rule.

Comment 4.1.25. As currently written, the definition of ‘*Tank system*’ lists certain devices not included in the definition of a tank system. Since oil-water separators (excluding the tank holding the removed oil) are not intended to store oil, should they also be listed as not included in the definition of a tank system?

Response 4.1.25. The definition of ‘*facility*’ has been revised to exclude oil-water separators. See Response 4.1.23.

Comment 4.1.26. The Registration section, 6NYCRR 613-1.9, does not clearly state what tanks or tank systems need to be registered or not.

Words similar to the current 6NYCRR 612.2(a) should be added. As a minimum, the following should be added to 6NYCRR 613-1.9, “The owner of any petroleum storage facility as defined in 613-1.3(v) must register tank systems as defined in 613-1.3 (bl) [(bk) in the final Express Terms].” A further clarification could be added to state, "Operational tank systems as defined in 613-1.3(ao) [(an) in the final Express Terms] are not included as part of the registration."

An example using an emergency generator tank would also be helpful. State that the tank associated with an emergency generator would not be considered as an operational tank. The oil contained within the emergency generator tank would be combusted to run the generator and thereby must be included in the facility registration.

Response 4.1.26. All tank systems at a facility must be included on the registration unless those tank systems are excluded from the definitions of ‘*facility*’ or ‘*tank system*.’ For example, operational tank systems are excluded from the definition of ‘*facility*’ and therefore would not be included on the registration.

Comment 4.1.27. The definition section, 6 NYCRR 613-1.3, does not provide a definition of "underground pipe." In “AST systems: design, construction and installation” (613-4.1(b)(2)), it says that piping "in contact with the ground" must be properly designed, constructed and protected etc., and in a number of locations within 613-4.1(b)(2)[(i)](a) and (b), it refers to the term "underground piping," but does define what "underground" means.

Would a pipe located in a pipe chase embedded within a concrete floor be considered to be underground piping since the pipe cannot be easily seen? Would a pipe in an in-floor trench with a grated cover where most of the pipe could be seen be considered to be above ground? Is the key to above ground versus underground the capability of performing a monthly visual inspection?

An illustrative definition for an "underground pipe" should be added to the definitions section in 6 NYCRR 613-1.3.

Response 4.1.27. DEC has added a definition for ‘*underground piping*.’ Piping in a chase embedded in a concrete floor would be considered underground piping. Piping in an in-floor trench with a grated cover would be considered aboveground if its exterior can be physically inspected.

Comment 4.1.28.1. Section 613-4.3(a)(2) states that inspection and leak detection requirements are required for underground piping that routinely contains petroleum. Does that mean always contains petroleum or sees petroleum on some minimum frequency. That should be defined somewhere to avoid varied interpretations.

Comment 4.1.28.2. As noted in previous comments, the phrase "routinely contains petroleum" (found in 613-4.3(a)(2)) is not defined. The [commenter] appreciates DEC's responses to Comments 8, 127, and 158 in its "Assessment of Public Comments on Draft for Consideration of PBS Regulations 6 NYCRR Part 613," but would still appreciate further guidance. Does this term apply to piping that conveys product for short durations of time, but on a routine basis, as during transfers?

Response 4.1.28. As listed in EPA’s UST Technical Compendium – Category 3, Question 6 (<http://epa.gov/oust/compend/rd.htm>) – piping that “routinely contains product” refers to piping that is part of a tank system but is neither a remote fill pipe nor a vent pipe. The phrase “routinely contains petroleum” is based on the preceding and will not be defined in the PBS regulations.

Comment 4.1.29. Absent evidence of a leak, DEC inspections should be carried out only with proper advance notice to the owner/operator. The deliberate shift to gotcha-style enforcement proposed in Part 613 is as anti-business as it is unnecessary. The Department’s insistence on giving itself the authority to conduct unannounced inspections without cause threatens to damage the constructive relationship between DEC and the regulated community statewide.

Response 4.1.29. DEC considers the text of section 613-1.4(b) to represent no change in DEC's inspection authority. However, to reduce any confusion as to the provisions applicable to the conduct of inspections by DEC, DEC has decided to revise the language to more closely track the text of ECL section 17-1011. The statute provides that upon reasonable notice and at reasonable times, DEC may enter and inspect a facility and examine its records.

Reasonable notice does not necessarily require that an inspection must be announced days in advance. Reasonable notice may consist of going to the facility and asking the operator for permission to inspect the facility. There is nothing unreasonable about unannounced inspections. Inspections that are not announced in advance allow the opportunity for inspectors to see how the facility is usually operated and limit the facility's ability to hide deficiencies in equipment and operations.

At the time that a DEC inspector seeks to inspect a facility, the facility operator can always refuse entry and, in that case, DEC staff or representatives must depart. In those cases, DEC will exercise its authority under the ECL and regulations as appropriate to gain access to complete the inspection. DEC's policy concerning access to private property is covered in Office of General Counsel Program Policy, OGC-7: Staff Access to Property or Premises. OGC-7 may be found at <http://www.dec.ny.gov/regulations/2381.html>. The facility operator is free to train the facility staff in any way it chooses as to how to respond when a government regulatory agency, including DEC, seeks to inspect the facility or its records.

Absent an emergency situation, DEC staff does not intend to seek entry to a facility outside of normal business hours.

Comment 4.1.30. It should be noted (in 613-1.4(b)) that if the State does not provide notice of an inspection that the appropriate personnel may not be onsite to assist with the inspection. For example, if the employee on duty is not physically able to remove the tank sump lid then it should not be held against the station that the inspection could not be completed.

Response 4.1.30. See Response 4.1.29. Additionally, if facility staff needed to provide access to equipment are not available during an unannounced inspection, DEC will arrange a future day/time with the owner/operator for them to provide access to the equipment.

Comment 4.1.31. The proposed regulations in Section 613-1.4(b) provide that DEC may enter and inspect a facility for purposes of assuring compliance. This proposed regulation does not incorporate any limitation on DEC's ability to inspect a facility. It implies that unannounced inspections are permissible. It also implies that such unannounced inspections may be made at any time of day or night. The approach taken in the proposed regulation is not consistent with the language of the statute, Environmental Conservation Law 17-1011, which governs inspections of facilities. This is not a case of failure to reflect legislative intent. The proposed regulation does not reflect the clear statutory mandate.

Environmental Conservation Law 17-1011 specifically addresses the issue of access to records and facilities. It provides as follows:

1. Every owner or operator shall, upon reasonable notice of the commissioner or his designee, permit a duly designated officer or employee of the department at all reasonable times to



have access to and to copy all books, papers, documents and records relating to the daily measurement and inventory of petroleum stored at a facility.

2. Any duly designated officer or employee of the department may, at reasonable times and upon reasonable notice of the commissioner or a designee, enter and inspect any facility, provided that such officer or employee shall be accompanied by the owner or operator or their designee.

The current statute provides for reasonable notice at reasonable times to the owner or operator of the bulk storage system. The proposed regulation is devoid of any such qualification. The current regulation, at 6 NYCRR Part 613.1(e) specifically requires DEC to provide the owner or operator with reasonable notice at reasonable times. The current regulation reflects the requirements of Environmental Conservation Law 17-1011.

The statutory mandate for DEC to provide reasonable notice at reasonable times to owners and operators is grounded in common sense. Service stations are often manned only by a retail clerk who is charged with processing retail transactions. The appropriate personnel to make records available for inspection or to remove the sump covers and pump skirts may not be at a retail location to accommodate DEC personnel if an unannounced inspection is undertaken.

Both the current statute and common sense dictate that the owner or operator be provided with reasonable notice at reasonable times to undertake an inspection. Staffing at a service station is dependent on volume of sales. Recognizing this fact and the nature of the business, it would benefit both DEC and the owners and operators to have appropriate personnel on site to permit the inspection to proceed without any delay. The current regulation works effectively and reflects the statutory requirements.

This proposed regulation is not only vague but also is not consistent with the statute. There is no basis not to make the regulation consistent with the statute by requiring reasonable notice at reasonable times.

Response 4.1.31. See Response 4.1.29.

Comment 4.1.32. I'm here today because I wanted to speak on a section in the proposed regulations, 613-1-4, access to records and facilities. I want to refer back to the original regulations, Part 614, section F, access to records and facilities.

I wanted to quote from that because there is a stark contrast between that and the proposed regulations. In the original document, the existing ones, quotes, "upon reasonable notice of the commissioner or his designee, the owner or operator must allow any designated officer or employee of the department at all reasonable times to review and to copy any books, papers, documents and records relating to recordkeeping requirements in compliance with this part".

It goes on further to say, "Any designated officer or employee of the department may, at reasonable times and upon reasonable notice, enter to inspect the facility for compliance with this part, provided that the office or employee is accompanied by an owner, operator or their designee".

Referring to the proposed regulations, "The operator, facility owner, or tank system owner of the facility must allow any designated employee or agent of the department to review and copy any books, papers, documents and records relating to compliance with this part".

In stark contrast, we are missing some key words that are in the existing regulations, namely the words "upon reasonable notice" and "accompanied by an owner, operator or their designee".

I am a small business owner, and if I were still running the stations, this would be of grave concern to me because we may have one cashier running the station, and an inspector may come in and say, I am here to do an inspection.

Now, this is quite a bit different than other unannounced inspections that the gasoline and convenient store industry is used to. For instance, Department of Health may come in and do an inspection of are you mopping the floor right, are the sinks okay, things like that. Taxation and Finance may come in and want to inspect all the cigarettes to make sure you have your tax stamps.

But in comparison, this inspection is a lot bigger than that. There are big manholes, there are bottom-up tanks, bottoms of dispensers that need to come out. There is safety for the public at the site.

So, just from a coordination standpoint, it wouldn't be reasonable to come into a station unannounced and do this inspection, unlike the Department of Health or Sales Tax and Finance which only take four or five minutes.

So not only is it I think unreasonable, but from my standpoint don't think it's productive, because I have done all the inspections at my stations over the years, I've done probably a couple dozen of them, and I have cherished the opportunity, believe it or not, to get with a representative from DEC to make sure I am doing the right thing for me, and more importantly why we are here, for the environment.

If an inspector comes in and I am not there to go over stuff with them, I may miss the opportunity to get a point on something, and not to mention, not being able to do the inspection itself.

You know, you can put lipstick on a pig but it's still a pig. So, a couple days' notice, which is what we have always had, I think is still reasonable and you can't hide grave deficiencies. What I would urge the department to do is to go back and incorporate some of the original words, but also put something else in there.

Certainly, if there is a suspected leak for any reason, an inspection should be able to be done immediately to protect the environment, but if the station has been in compliance, and there's no suspected leak, I don't think there should be unannounced inspections.

Response 4.1.32. See Response 4.1.29.

Comment 4.1.33. Although raised in the previous comments on the preliminary draft regulations, the [commenter] would like to reiterate that DEC's practice of conducting unannounced inspections as a matter of right is anti-productive. The [commenter] respectfully requests that DEC reconsider this determination and provide 72-hour advance notice for inspections, in proposed sections 569.1(e) and 613-1.4, to allow the appropriate staff to be on hand to assist in providing access to tank systems with minimal disruption to business operations. With respect to PBS inspections, the [commenter] notes that NY ECL 17-1011 permits DEC officers or employees to access facilities and regulatory records only "upon reasonable notice"; this limitation should at least be included in the proposed section 613-1.4.

Alternatively, the [commenter] requests that if DEC is unwilling to include any such restriction in the regulations, DEC clarify in its regulatory guidance that 72-hour advance notice will be provided except in emergency cases.

Response 4.1.33. See Response 4.1.29.

Comment 4.1.34.1. Table 1: Required Records, found under Part 613-1.5(a), indicates that Financial Responsibility is discussed under Part 613-2.7(f). However, Part 613-2.7 is not included within the PBS Proposed Regulations text.

Comment 4.1.34.2. Table 1 has a reference to Section 613-2.7(p) for records regarding financial responsibility but Section 613-2.7(f) does not exist in the draft regulations. This reference should be removed from Table 1.

Response 4.1.34. DEC has removed Table 1.

Comment 4.1.35. Section 613-1.5(b)(1) [613-1.5(a) in the final Express Terms] states that "(e)very facility must maintain all records ... and make them available to the Department within three business days following the Departments request..." The recommendation is that this is changed to specify "...following the Department's request made to the UST owner point of contact listed on the facility registration." This is no additional effort to the inspector and would eliminate the potential of the facility on-duty clerk not properly communicating the request or content of the request to the UST owner.

Response 4.1.35. Certain records must be on-site, and any that are not will be requested by the inspector by contacting the appropriate person (usually the Class A or B Operator).

Comment 4.1.36. [Commenter] believes that allowing electronic records to be centralized has its benefits. Keeping records in a centralized location greatly reduces the possibility of accidental disturbance of records kept in a local office where many employees may pass. Even more importantly, by centralizing the records it becomes far easier for a business to perform audits and assure that the records are, in fact, being properly maintained. Therefore, [commenter] recommends that:

- With regard to the Recordkeeping Timeframes listed in 613-1.5(a) Table 1:
  - 1.9(a): [Commenter] recommends that Registration Certificates should be listed as Current Certificate rather than 5 years.
  - 2.3(e): The proposed regulation would require leak detection records be maintained for three years. This requirement for additional document storage creates an undue burden, when one year is sufficient to determine compliance and trends associated with a tank system. [Commenter] recommends sustaining the current requirement for maintaining leak detection records for one-year.
  - 2.7(p): Financial Responsibility requirement should be the Current Instrument for the current year in the life of the tank. As proposed, life of tank would imply that a 20-year-old tank would have to have 20 years of financial responsibility documents.

- 613-1.5(b)(1): leak detection monitoring records may be collected and maintained electronically at a central location, rather than at the facility, as long as they can be retrieved within a reasonable time during an inspection.
- The proposed regulation contains a requirement for documented weekly leak detection records, when the current regulation requires a Monthly Inspection of the leak detection monitoring equipment (current 613.5 (b)(3)). To be consistent with the current regulation, as well as the current and proposed Federal UST regulations, [commenter] recommends that the timeframe for leak detection recordkeeping remains on a monthly basis.

Response 4.1.36. DEC requires certain records to be kept for given timeframes to create a historical context for each facility; shortening the timeframes shortens that history. The requirement for weekly leak detection is an existing one. Regarding centralized records, the regulations do not explicitly prohibit centralized records, but do specify that certain records must be kept on-site. The last 30 days of electronic leak detection records may be centralized but must be retrievable at the time of request.

Comment 4.1.37. DEC states "The Department maintains its jurisdiction over every facility in any city or county having an approved local program." [Commenter] suggests clarifying in (613-1.7) that:

- the DEC will not enforce if the city/county is adequately enforcing; and
- if the DEC enforces, it will only enforce those provisions consistent with the DEC regulations and not the more stringent local law.

Response 4.1.37. DEC has modified section 613-1.7 to read, "To the extent that the provisions of this Part are not inconsistent with the provisions of the approved local law or ordinance, the Department maintains its jurisdiction over every facility in any city or county having an approved local program." DEC does not intend to enforce local requirements that are more stringent than the state requirements.

Comment 4.1.38. At Subpart 613-1.7(f), the proposed regulations require every county or city administering an approved local program to re-apply to the Department for approval of its local law or ordinance within 180 days of the effective date of the regulations. In its comments on the preliminary draft, [commenter] raised a question about those areas of the state that presently currently operating under locally approved programs. Specifically, the [commenter] asked what law would be applicable (local or state) and whether the state or the local government had regulatory oversight during the period of time starting from the effective date of the regulations to the approval date of the local program. The Department responded that state regulations will be effective in all parts of the State when they are finalized and that local programs will be effective after approval by DEC.

We believe DEC's explanation to mean that upon the effective date of these regulations, all local authority ceases including any delegation of power to local governments to administer the new regulations. If this is incorrect, we welcome the Departments clarification. However, if it is DEC's plan to undertake administrative oversight in these localities, then the regulated community in those jurisdictions would no longer be interacting with their accustomed local officials which could cause some confusion.

Therefore, [commenter] requests that those entities presently operating under locally approved programs be given notice of the change. The notice should explain that all regulatory oversight of the new rules will be performed by the Department until the new local program is approved and should also provide appropriate DEC contact information.

Response 4.1.38. DEC has added language to section 613-1.7 to clarify that existing approvals will remain in effect until they are rescinded.

Comment 4.1.39. Definition of '*Facility owner*' is also problematic in the new proposed regulations, particularly for the Oil and Gas operator. Under proposed 613-1.3(w), the term '*Facility owner*' is defined as "any person who has legal or equitable title to the real property of a facility" and under (ap) [(ao) in the final Express Terms], "*Operator* means any person who leases, operates, controls, or supervises a facility."

It would be my assertion that the overwhelming majority of existing and currently registered facilities are owned and operated by the same entity. This is NOT the case in most, if not all cases dealing with facilities of Oil and Gas operators and yet another reason why these regulations should not apply to Oil and Gas operators and that there should be a continuing exception for unrefined petroleum. Oil and Gas operators overwhelmingly get the rights to build and manage and operate their facilities solely through rights obtained from Oil and Gas Leases. The general, standard and uniform language of most Oil and Gas Leases, which is relied upon universally in this business for the construction and operation of such facilities is language which is or is similar to the following: "Lessor, hereby grants, leases and lets exclusively unto Lessee for the purpose of exploring, drilling, and operating for and producing oil, casing head gas, liquid hydrocarbons, all gases, and the respective constituents thereof, injecting gas, waters, other fluids and air into subsurface strata, injecting, storing, and withdrawing stored gas regardless of source, laying pipelines, storing oil, building roads, tanks, power stations, telephone lines and other structures and things thereon as necessary, useful, or convenient to produce, save, take care of, treat, process, store and transport said oil, liquid hydrocarbons, all gases and other products manufactured there from, the following described land." There are generally no other contracts or agreements as between the parties which govern the construction and operation of these facilities and furthermore, this agreement lease is between the mineral owner (Lessor), who may not even have title to the surface estate because of the possibility of severed minerals, and the Oil and Gas operator (Lessee).

Under the proposed regulations, it is up to the '*Facility owner*' as that term is defined under the proposed regulations is required among other things to:

- (i) obtain registration from the Department, ensure that such information remains accurate and current (613-1.9(a)),
- (ii) renew registrations(613-1.9(c)),
- (iii) apply for registrations of new facilities(613-1.9(d)) which also includes various additional requirements of the '*Facility owner*', including, without limitation the requirement that the application be executed by the '*Facility owner*,'
- (iv) submit information corrections(613-1.9(e)),
- (v) notify the Department of permanent closure, and
- (vi) notify Department of a tank system and pay the applicable fees (613-1.9(h)).

The ‘*Operator*’ (as currently defined in the proposed regulations) in the case of an Oil and Gas operation has no ability either contractually or otherwise to force the ‘*Facility Operator*’ to comply with any of the afore stated requirements or for that matter any other that are proposed in the regulations. The ‘*Facility Operators,*’ in the case of an Oil and Gas operation, do not have the knowledge, ability, expertise or inclination to do so, nor do they have any ownership in nor control over the facility. In some cases, the ‘*Facility Operator*’ in this scenario, may not even have knowledge of the existence of the Oil and Gas operators’ facility. Under the proposed regulations, all of the responsibility of compliance falls upon ‘*Facility Owner*’ and the ‘*Operator*’ of the facility, in this case the Oil and Gas operators, have no ability to effect such compliance without the full complete and unfettered cooperation of the ‘*Facility Owner.*’ This proposed language creates an obvious dilemma for all Oil and Gas operators with facilities which will certainly lead to failure to comply with the proposed regulations. Once again, these Regulations do not take into account the daily operations of an Oil and Gas operator. This issue must be addressed in order to permit the Oil and Gas Operator to build and operate its facility in a prudent business manner consistent with the Regulations of this Department.

Under the ECL 23-0101. Definitions. “As used in this article, unless the context otherwise requires:

11. ‘Owner’ means the person who has the right to drill into and produce from a pool or a salt deposit and to appropriate the oil, gas or salt he produces either for himself or others, or for himself and others.”

A compatible definition of ‘*Facility Owner*’ is warranted in this application whereby the Owner or, in this case as it relates to Oil and Gas operations the Operator must register, pay for and comply with the proposed Regulations without the burden of having to involve the ‘*Facility Owner*’ as that term is currently defined in the proposed Regulations and without attempting to obtain in each case a variance under proposed 613-1.8.

Response 4.1.39. Title 10 does not provide for an exemption for unrefined petroleum. In fact, the 2008 changes to the statute clearly brought all unrefined petroleum within the definition of ‘*petroleum,*’ the storage of which is subject to the requirements of Title 10.

Title 10 provides for no exceptions or special treatment for facilities that may have entered into contracts involving the extraction of oil or gas. Facility owners that are party to such contracts will have to arrange their contractual affairs as they see fit in order to achieve compliance with the registration requirement of Part 613.

If a facility fails to register, then the facility will be in violation and may be forced to close. This eventuality would seem to provide an incentive for a facility operator to assist the owner with the registration of the facility. The parties to that contract are free to negotiate a new arrangement that accomplishes whatever their individual goals are within the context of compliance with Part 613. It is possible for the owner to authorize another person to register the facility; this other person can be the facility operator.

The definition of ‘owner’ found at ECL section 23-0101 is inapplicable to the provisions of Title 10. The applicable definition of ‘owner’ is found at ECL section 17-1003(4).

Comment 4.1.40.1. We realize the definition and use of the term ‘*Facility*’ and ‘*Facility Owner*’ now reflects ownership of the real property based on 2008 legislation. However, the definition does not reflect many of our business operations since owner and/or operator of the tanks or tank

system is often not the landowner. We believe the entity responsible for the day-to-day operation of the tank system should be the registrant (cf. 613-1.9[a]). [Commenter] recommends additional dialogue to sort out the responsibilities of "authorized representatives," '*Facility owners*' and '*Operators*.'

Comment 4.1.40.2. While the definition of '*Facility*,' '*Facility owner*,' and '*Operator*' have been updated per the 2008 amendments to Article 17 Title 10 of the ECL, Section 613-1.9 (Registration) should make it the primary responsibility of the facility operator to obtain the PBS registration since many sites are leased by the land owner who has no control over the operations of the facility and no hands-on knowledge of the tanks present on site. In the alternative, the last sentence can be revised to state that the facility owner may register the tanks to satisfy any obligation imposed on the operator of this section. This better reflects the realities of business operations.

Response 4.1.40. The owner is free to make whatever arrangements the owner finds necessary in order to authorize another person to register the facility.

Comment 4.1.41. Part 613-1.9 (Registration) states that the '*Facility owner*' must obtain an initial or revised registration certificate. The regulations should allow for individual businesses with separate federal identification numbers that are co-located on the same property, to register their own tanks. Property owners are typically not involved in the daily operations of a business that they do not own, nor do they have authority over the employees of a business they do not own. It is not practical to expect property owners to register, maintain, and inspect tanks that they do not own nor control. Many lease agreements explicitly state that the lessee is responsible for obtaining and maintaining any environmental permits and registrations. Thus, each individual business should be responsible for the registration of its own tanks regardless of who owns the property.

Requiring the property owner to register all tanks at a site and, as such, be responsible for their compliance, inspections, etc., will have major implications with respect to existing lease agreements. In certain instances, lease agreements could be terminated which would negatively impact businesses. Companies might be forced to move off of properties that they lease if the property owner does not want to be responsible for their tanks. This would have a ripple effect, and require the lessee to find another site to lease and relocate their business, or force them to purchase a property, and then spend thousands moving their business to another location. Some companies may choose to go out of business altogether.

Response 4.1.41. See Response 4.1.12.

Comment 4.1.42. Under current rules (613-1.9), the owner of a facility must register the facility. That was appropriate when the "facility" was defined as the tank itself. Under the draft proposal, the '*Facility*' is the property on which the tank is located. Property owners may have no direct involvement with the tank itself and may not even be present at the site. This leads to a number of costly administrative burdens that may well keep property owners from agreeing to allow valuable and necessary public services, such as telephone switching sites, on their property because of the liability that they could incur with respect to a tank. It also places unexpected liability on landlords who have already agreed to allow a tenant to lease a property without restrictions about tanks or, if a landlord refuses to execute a registration, cause a lessor to be

without the ability to receive the benefit of a lease because a landlord refuses to take primary responsibility to the government for tanks owned and operated by the tenant. Further, it could trigger a need to re-register a tank every time a property is transferred. This will cause unnecessary and burdensome costs and activities with no related environmental benefit. If the DEC determines that it is necessary to cause this disruption to the arrangements between tenants and landlords, then at a minimum we recommend that at least the following changes be made.

The perceived statutory requirement for the real property owner to register all tanks on his or her property is ambiguous at best. Text of the law states:

All owners shall register the facility with the department. In cases where there are multiple tank owners at a facility, the owners of the tanks may designate one of the tank owners to be an authorized representative to register the tanks.

Clearly this text envisions the "owner" include the person with ownership of the tanks, not necessarily the person with ownership of the property.

[Commenter] recommends simplifying the registration process by allowing the registration process to be managed by the tank owner, and not the property owner. However, we also suggest the following changes:

- 613-1.9(a)-(e): Registration applications can be submitted by an authorized representative of the property owner rather than the owner since the DEC already allows an owner's representative to sign the applications.
- 613-1.9(a)-(e): An authorized representative of the property owner should be defined to include anyone who is responsible for compliance, permits, fees, and financial assurances, etc., per a contract agreement between a tenant and landlord.
- PBS / CBS Application form: Since some facility owners are small businesses or individuals who either do not have an employer ID number (EIN) or use their Social Security number as an EIN, this sensitive information should be omitted from the application form. [Commenter] notes that if an individual has leased a property, that individual will now be forced to disclose its social security number unnecessarily (which may also cause the landlord to refuse to sign a registration).
- 613-1.9(e)(2) [613-1.9(d)(3) in the final Express Terms]: Registrants should not be required to file a copy of the deed with the registration application, since obtaining and submitting copies of deeds is extremely difficult for tenants of facilities, especially when dealing with absentee landlords, Trustee and Estate landlords, and large corporate landlords. This requirement would add considerably administrative cost and delay without any environmental benefit.
- 613-1.9(g): A statement be included in this section to clarify that the 30-day requirement for notifying the department prior to installing a tank system is not applicable when a temporary tank is going to remain in service beyond the allowable time period, as defined in section 613-1.3(bn).

Response 4.1.42. See Response 4.1.12.

Comment 4.1.43. Section 613-1.9(d) should set out a clear and more easily followed transfer procedure, particularly when the facility is being transferred without transfer of the real estate.



As written, the section conceivably requires the current registrant to close the facility and the new facility owner must submit an application to initially register the facility.

Response 4.1.43. For purposes of section 613-1.9(d), there is no transfer of the facility without a transfer of the real property. Without a transfer of the real property ownership, there is no new facility owner and thus no requirement for a new registration. However, if the other information on the current registration changes, such as the identity of the tank system owner, the facility owner is required to submit information corrections. See section 613-1.9(e).

Comment 4.1.44. I know your response to comments is that 613-1.9(d)(3) is not a new regulation but it is unduly burdensome and will lead to delays getting sites registered, and may impact the future landscape of retail fueling locations. I still haven't seen or heard one shred of evidence on how this better protects the environment.

Response 4.1.44. Since the DEC is obligated, under ECL sections 17-1009(2) and 17-1003(4), to require the owner of the property to register the facility, it is necessary for DEC to know the identity of the property owner. The current real property deed is the best and most conclusive evidence of property ownership. It is reasonable to expect the owner of real property to have possession of, or access to, this evidence of the ownership interest.

Comment 4.1.45. Add "or his / her designee" (in 613-1.9(d)(4)). This is spelled out in the response to comments and must be included.

Response 4.1.45. Section 613-1.9(a) allows an owner to designate an authorized representative in order to satisfy any obligation imposed on the owner.

Comment 4.1.46. 6NYCRR613-1.9(a) says: "The facility owner may rely on an authorized representative to satisfy any obligation imposed on the owner by the provisions of this section." Therefore, the signature authority can be delegated.

6NYCRR613-1.9(d)(4) says, "The application must be signed by the facility owner". Also, 613-1.9(e)(2) says, "The registration application must be signed by the facility owner".

These sections, 613-1.9(d)(4) and (e)(2), should be revised to add "or authorized representative."

Response 4.1.46. See Response 4.1.45.

Comment 4.1.47.1. Part 613-1.9(e)(3)(ii) indicates that an information correction will include changes to the Class A or Class B operators, thus implying that the Class A and Class B operators shall be added to the registration. The facility owner or their authorized representative should be the only name listed on the registration because they are ultimately responsible for the registration and the compliance of the tanks. The owner will be required to maintain the list of Operators per Part 613-2.5 f(2) , so in the event of a problem with the tank, the owner should be notified first then he/she will contact the appropriate operators to respond. The operators should not be added to the registrations. Additionally, the definition of facility within facility owner should be stated to prevent misinterpretation. For example, leaseholds within an airport are

facilities thereby allowing airport tenants (such as airlines) to be the owners and operators of their tanks.

Comment 4.1.47.2. Requiring a registration change / information correction for Class A or Class B Operator (in 613-1.9(e)(3)(ii)) is unduly burdensome, especially since you are also requiring this information to be maintained onsite in 613-2.5(f) (Documentation).

Response 4.1.47. The tank system owner must designate Class A and Class B Operators. If upon inspection, DEC determines that an UST system is in significant non-compliance, the relevant Class A or Class B Operators may be subject to the requirement for retraining.

Comment 4.1.48. Subpart 613-1.9(f) [613-1.9(g) in the final Express Terms] states that upon submission of a completed application and registration fee, a registration certificate shall be issued. [Commenter] repeats its request that a timeframe for processing a completed and fully paid application should be inserted so as to prevent any unnecessary delay.

Response 4.1.48. DEC intends to process all applications expeditiously.

Comment 4.1.49. Subpart 613-1.9(g) [613-1.9(h) in the final Express Terms] requires a 30-day advance notice to the Department prior to the installation of a tank. In instances where a tank installation is needed to return a facility to operational status, the 30-day period could be burdensome. In our comments on the preliminary draft, we suggested that a shorter time period should be allowed in certain circumstances. For example, an abbreviated period would be fitting where the Department is actively involved with the site, a corrective action plan is being performed, or for other circumstances where a time period less than 30 days would be appropriate. While DEC responded that it would consider doing so in its discretion, language permitting the Department to do so should be included in this provision.

Response 4.1.49. DEC believes that a 30-day advance notice is generally appropriate for the installation of a tank. Where there is a need for the installation of an AST with fewer than 30 days' advance notification required by 613-1.9(h), the installation of a temporary tank system would be allowed.

Comment 4.1.50.1. The extensive list of references contained in section 613-1.10 which contain the technical standards that must be complied with should be available electronically to the regulated community. Having these documents available for inspection and copying in Albany is not feasible or practicable for the multitude of regulated entities not in the Capital District.

Comment 4.1.50.2. We recommend the extensive list of references contained in section 613-1.10, containing technical compliance standards, should be available electronically to the regulated community.

Response 4.1.50. The technical standards referenced in Part 613 are covered by license agreements DEC made with the organizations that wrote them. DEC may provide links to some of the standards allowed for public viewing, but can neither provide nor guarantee free online access to every standard. The public may visit any of the main Regional Offices (or the Albany office) to view the standards.

Comment 4.1.51. Member company facilities may have tanks that are used to provide for additional containment volume typically at transfer station pads or where space constraints may limit the size of containment dikes for aboveground tank systems. Will PBS apply to underground spill collection tanks that are normally empty and are emptied expeditiously if a spill event occurs? They are exempt from Federal regulation.

Response 4.1.51. DEC has modified the definition of ‘*tank system*’ to exclude any tank used for emergency spill or overflow containment that is expeditiously emptied after use.

Comment 4.1.52. The proposed Regulation (613-1.3(a), (e), (f), (g)) should expressly define the term ‘installed.’ In its attempt to categorize tank systems by installation date, the Rule fails to provide the definition of an installed tank. Specifically, it is unclear as to the date on which a tank shell is considered to be installed. The plain and ordinary meaning of the word allows for ambiguity. A fully constructed and useable tank relies upon a variety of components, not limited to the piping and ancillary equipment. Therefore, the applicable installation date could be interpreted as either the date on which the tank had the capability to become fully operational, or the date on which the tank itself was constructed.

Response 4.1.52. The term ‘*install or installation*’ (613-1.3(ae)) is defined as the “emplacement of a tank system, or any part thereof, in, on, or above the ground.” By extension, the installation date is the date on which a tank system (or any component) is placed in, on, or above the ground. In the case of shop-built tanks, the date of installation would be the date on which the tank was put into place. In the case of a field-constructed AST, the installation date would be the date upon which the construction of the tank was completed.

Comment 4.1.53. 6 NYCRR 613-4.1(b)(1)(i)(a)(I) requires the tank to be UL 142 (or other standards also listed there). 6 NYCRR 613-4.1(b)(1)(iv) says that if the tank does not meet 613-4.1(b)(1)(i), the tank cannot be used unless approved under 613-1.8 Variances.

In the UL-142 Standard, a storage tank is defined as follows in the definition's section:

3.11 STORAGE TANK (TANK) – A vessel having a liquid capacity that exceeds 60 gal (230 L), is intended for stationary installation, and is not used for processing. Therefore, an emergency generator with a tank smaller than or equal to 60 gallons is not required to meet the UL-142 standard.

Can this small tank still be registered if it is not UL-142 certified? If yes, must a "Variance" as listed in 6 NYCRR 613-1.8 be sought?

Alternately, should greater than 60 gallons be minimum size for tank registration, and consequently any tank of 60 gallons or less would not require registration?

Response 4.1.53. The tank described in the comment is regulated and must be included on a registration for a facility. DEC has reviewed the standards incorporated by reference and determined that they are applicable only to tanks that have a design capacity of 60 gallons or more. DEC is not aware of additional standards for use in constructing tanks of smaller size. In recognition of this, DEC has modified the requirement such that only tanks with a design capacity of 60 gallons or more must be designed in accordance with one of the reference standards. DEC will consider in a future rulemaking setting a lower threshold that would exempt these tanks from being considered part of a facility.

Comment 4.1.54. Add *UL 2085 – Protected Aboveground Tanks for Flammable and Combustible Liquids* to the list of referenced standards under 613-1.10(h). A large number of aboveground storage tanks installed in New York must comply with this standard.

Response 4.1.54. UL 2085 refers to UL 142 for tank construction standards, which Part 613 incorporates by reference. DEC will consider explicitly including UL 2085 in a future rulemaking.

#### **4.2. Comments on Subpart 613-2: UST Systems Subject on Both Subtitle I and Title 10.**

Comment 4.2.1. At the 9/9 meeting in Brooklyn, the time period for removing from service any TOS tanks, especially ASTs, was questioned. Due to various reasons, facilities did not want to have to remove the tanks due to the possibility of reutilizing the tanks at a future date. (The cost to remove and re-install for the large tanks was a burden.) I suggested the tanks be assigned as unregulated, in which case the tanks would need to be cleaned and documentation kept on-site. If ASTs were to be reutilized perhaps the State would require a "ten-year" test prior to refilling. Since USTs would require a site assessment at time of decommissioning, perhaps a test of the interstitial would suffice. Furthermore, perhaps the tanks would still be registered but as "former PBS-unregulated or inactive".

Response 4.2.1. Classifying tanks as unregulated (after being out-of-service for 12 months) encourages improper closing of tanks because PBS regulations do not apply to unregulated tanks. DEC will not make this revision.

Comment 4.2.2. To ensure that petroleum is not accidentally delivered to an out-of-service or permanently closed tank, the Department has properly included language requiring the facility owner/operator to assure that deliveries are terminated. However, the regulations do not specify the method of doing so and [commenter] previously recommended that specific language and the requirements be included in several more provisions as follows:

To avoid any uncertainty, [commenter] suggests adding a new paragraph (iii) to 613-2.6(b)(2) to read as follows:

(iii) Must assure that all scheduled deliveries to the tank system are terminated and that all appropriate carriers are notified.

Identical paragraphs labeled (iii) should also be added to 613-3.5(a)(2) and 613-4.5(a)(2). At 613-2.6(b)(2)(ii) the following language should be used:

The facility must assure that all scheduled deliveries to the tank system are terminated and that all appropriate carriers are notified.

Identical amendments should be made to 613-3.5(b)(2)(ii).

At 613-4.5 (b) the following provisions should be added:

(5) Cap and secure all other piping, ancillary equipment, and

(6) The facility must assure that all scheduled deliveries to the tank system are terminated and that all appropriate carriers are notified.

The Department responded that these suggestions may be considered as part of Phase 2 of this rulemaking. [Commenter] suggests that these changes are relevant and necessary now to assure that out-of-service tanks systems are safe from accidental deliveries.

Response 4.2.2. Notifying carriers of the termination of deliveries to out-of-service or permanently closed tanks is the responsibility of the facility operator/owner. Further, out-of-service and permanently closed tanks must be “securely capped.” Accidental deliveries should not occur when proper procedures are followed for out-of-service/permanently closed tanks.

Comment 4.2.3. 613-2.1(b)(3)(i) and (ii) require compliance to codes that were after the date of installation for Category 2 tanks. It is suggested that language be inserted to grandfather piping that is older than the codes of practice listed.

Response 4.2.3. DEC believes the commenter meant to refer to section 613-2.1(b)(2)(i) and (ii), and has modified the regulatory language to specify that the listed codes of practice only apply to piping installed after the effective date of Part 613.

Comment 4.2.4. It is stated in your Summary of Changes webpage and during your public outreach meeting on September 4, 2014 in Albany, NY, that these regulations would not have additional fiscal impacts. Additionally, the Regulatory Flexibility Analysis for Small Business and Local Governments stated, "No new or additional professional services are likely to be needed by facilities owned by small businesses or local governments to comply with the proposed rules." However, as proposed parts of this section would require capital expenditures that would include:

- Engineering analysis to determine compliance with Standards that appear to be applied retrospectively;
- Tank system upgrades and replacements that would be needed to comply with increased standards, applied after installation;
- Legal fees for small businesses and private landowners (that are not aware or familiar with the regulation);
- Costs associated with registration amendments and as-built record preparations;
- Legal fees for Landlords to get copies of Deeds from municipal offices; and
- Legal fees for lease contract amendments, relative to the proposed requirements and delegation of authority (where delegation is permitted).

To be consistent with the DEC's intent for section 613-2.1(b), [commenter] recommends that only standards applicable at the time of installation be required for Category 2 Tank Systems. Many of these systems were installed prior to the development of the reference codes and standards identified in 613-1.10 of this Part, and would therefore require the replacement of tanks and piping systems.

Response 4.2.4. Regarding standards applicable at the time of installation, refer to Response 4.2.3. The bullet points in the comment are addressed in order as follows:

1 and 2. It is not clear what specific provisions these points refers to. However, DEC has revised the relevant terms of Part 613 to eliminate the imposition of later issued standards to pre-existing tank systems or equipment. Any upgrades undertaken by a facility will be the result of a business decision by the facility.

3. The rule does not impose any requirement for legal services and activity that would naturally require the use of legal services. The likelihood of the extent of reliance, if any, by any facility on legal services due to efforts to understand or comply with the terms of Part 613 is unknowable and will vary greatly from facility to facility. The Department has not attempted any such analysis.

4. There have been no changes to DEC's positions or practices with respect to: (1) when a facility registration may need to be corrected or renewed, and (2) what may be considered a proper as-built drawing (see Response 4.2.6.) As such, no facility in compliance with the relevant former requirements should experience an increase in the costs of compliance with Part 613.

5. One need not engage any legal services to acquire a deed to a property. Any person may acquire a deed to any property. It is reasonable for DEC to expect that a facility owner will have evidence of its ownership. This evidence is most commonly in the form of a deed to the real property. The State Legislature defined "facility" to consist of the real property on which the tank systems are found. In order for DEC to be assured that the correct person is registering a facility, it is necessary for DEC view the common legal document that would confirm that person's ownership interest in the property. If the owner of the facility lacks a copy of the deed to its property, the deed may be obtained for what would ordinarily be considered a nominal fee. DEC has been requiring deeds for new facilities and change of ownership cases for many years.

6. Part 613 will not require anyone to change lease arrangements. A decision to change any lease agreement that involves a facility subject to Part 613 is a decision that will be made by the parties to the lease. DEC does not anticipate that the act of delegating an owner's registration responsibility to someone else requires obtaining legal services.

Comment 4.2.5. Section 613-2.1(b)(3)(i)(b): Is it required to have item 1 (automatic shut off at 95%) in addition to either item 2 or 3 or was there supposed to be an OR after item 1?

Response 4.2.5. Only one of the three options (under section 613-2.1(b)(3)(i)(b)) is needed to satisfy the requirement for overfill prevention equipment.

Comment 4.2.6. As-built information and drawings was an issue raised and addressed in DEC responses to comments made to the Preliminary Draft Regulations for Consideration. DEC references the Inspection Guidance Document (former DER-25) as having content that would have already required tank owners to have detailed as-built information that exceeded current requirements stated in 614.7(d).

The development of detailed as-built information is an unnecessary burden for owners of existing tank systems. Much of the information required is not available after an underground infrastructure is back-filled, nor would installer certifications be available for tank systems installed by entities no longer in business, or beyond normally accepted record-retention times.

[Commenter] recommends that the proposed as-built information requirement (in 613-2.1(b)(4)) only applies to tank systems installed after promulgation of the proposed regulation.

Response 4.2.6. The requirements in section 613-2.1(b)(4) with respect to as-built information are intended to clarify what DEC currently requires under former section 614.7(d). As such, DEC does not believe that this imposes an unnecessary burden on owners of Category 2 tank systems. To operate in compliance, facilities must know what equipment they are operating and where the equipment is located. For equipment location, DEC guidance (former DER-25) made it clear that for previously installed equipment, original as-built drawings are not required and that an accurate diagram showing approximate location of equipment is sufficient.

Comment 4.2.7. The enhanced as-built plan requirements (in 613-2.1(b)(4)) are required for Category 2 and 3 tanks; however, Category 2 tanks should either be grandfathered in or excluded, as these requirements may not have been required at their time of installation. The cost to "create" an as-built after the fact may be as much as \$2,500 per site, which could quickly add up to tens of thousands of dollars. Additionally, it unduly burdens the "qualified person" to sign a statement related to a tank system that was not installed under their watch. There is concern that the qualified person may be held liable for someone drilling or cutting into a product line because they used the approximate location marked on the map and the person's guesstimate of where the piping was located was incorrect.

Response 4.2.7. See Response 4.2.6.

There is no "undue burden" on a consultant that may be hired to create as-built records which a Category 2 tank system may currently fail to have (and thus in violation of former section 614.7(d)). This is the responsibility of the facility. DEC will not hold a consultant liable for inaccurate as-built records.

Comment 4.2.8. There are two sections of the proposed regulations which contain provisions relative to as-built plans for the underground storage tank system.

Section 613-1.5 on Recordkeeping in Table 1 lists the required records which must be maintained, including -2.1(b)(4) which references installation records (as-built diagrams, manufacturer checklists). These records are to be retained for the life of the tank system.

In subpart 613-2 of the proposed regulations, in 613-2.1 which deals with underground storage tank system design, construction and installation, provides in (4)(ii) [(4)(iii) in the final Express Terms] that the facility is required to maintain:

(a) an accurate diagram showing:

(1) the location of:

- (i) each UST and its associated piping, including registration identification number;
- (ii) dispensers or loading equipment;
- (iii) check valves;
- (iv) transition sumps (if any); and
- (v) monitoring or recovery wells (if any).

- (2) the following tank system attributes:
  - (i) physical dimensions of each tank (approximation if not known); and
  - (ii) installation date for each portion of piping that was installed at a different time (approximation if not known).
- (3) at least one visible reference point (for example, facility structure), a frame of reference (for example, north arrow), and scale of the drawing.
- (b) for each newly installed component of a tank system, a signed statement by the installer certifying that the tank system component was installed in compliance with subparagraph (i) of this paragraph; and
- (c) for each newly installed component of a tank system, the completed manufacturer's installation checklist showing that the tank system component was installed in accordance with the manufacturer's instructions or that the tank system component installation has been inspected and certified by a registered professional engineer with education and experience in UST system installation.

There are no requirements comparable to these in the current regulatory scheme. These regulations do not make it clear that these requirements for as-built information along with installer certification and the manufacturer's installation checklist are applicable prospectively only and not retroactively.

An inspection by DEC under the proposed regulations at a facility will result in noncompliance and fines levied because current facilities, in most cases, will not be able to produce the as-built information with the detail required and the manufacturer's installation checklist. These documents were not required when the underground storage tanks were installed, so there is little likelihood, for example, that the manufacturer's installation check list is retained by the facility, if it was ever provided.

There should be clear language added to the proposed regulations to make it prospective as to retention of this documentation. To obtain this documentation retroactively would require an engineer to prepare new as-builts and dig up the current underground storage tanks. There is no necessity for the expense of such an undertaking. It does not have a materials impact on the occurrence of leaks and the protection of groundwater. The only reasons to undertake such expense to obtain such records would be to avoid the imposition of fines by the DEC during inspection.

The proposed regulations unfairly target facilities which have installed tanks under prior regulations, when no requirement existed to obtain the newly-required documentation such as the manufacturer's installation checklist. To apply the proposed regulations retroactively is both arbitrary and capricious since there is no objective purpose which makes this a reasonable requirement for existing underground storage tanks. Under current regulation, 6 NYCRR Part 614.7(d) "[t]he owner must maintain an accurate drawing or as-built plans which show the size and location..." This is significantly less specific than the proposed regulations. There is nothing to suggest that the current regulation isn't sufficient for underground storage tanks already installed. If applied only to newly-installed underground storage tanks, there would be no objection to the new requirements.

Response 4.2.8. See Response 4.2.6. DEC has revised section 613-2.1(b)(4)(iii)(b) and (c) so that the requirements for a signed statement by the installer and maintaining the manufacturer's



installation checklist only apply to components of a tank system where the component is installed after the effective date of this rule.

Comment 4.2.9. We appreciate the DEC's initiative to clarify the oft-debated requirements regarding as-built diagrams. However, the new regulations as presented would toss hundreds of facilities into non-compliance for lacking documentation their as-built plans previously didn't have to display.

Existing regulations require the owner to maintain an accurate drawing or as-built plans which show the size and location of any new underground tank and piping system, including a statement by the installer that the system was installed in accordance with New York State standards.

However, the new regulations would require the as-built diagram to show much more information – the location of each UST and its associated piping, including registration identification number; dispensers or loading equipment; check valves; transition sumps if any; monitoring or recovery wells if any; physical dimensions of each tank; and installation date for each portion of piping that was installed at a different time.

We recommend this provision be removed in favor of the language in the existing regulations. Otherwise, the Department will knowingly, automatically expose to penalties those facilities that may lack one of the new documentation items on their previously compliant as-built diagram. That would be unjust.

Response 4.2.9. See Response 4.2.6.

Comment 4.2.10. After the new regulations are promulgated, how long will tank operators have to comply with the new requirements (613-2.1(c)(1)) for Category 1 USTs or close these tanks?

Response 4.2.10. There are no new requirements for Category 1 USTs. The current equipment standards for Category 1 USTs are listed in sections 613-2.1(c)(2) through (5). Tanks that do not meet those standards or equipment standards for Category 2 or 3 USTs must have been permanently closed on December 22, 1998 in accordance with the requirements of 40 CFR Part 280.

Comment 4.2.11. Section 613-2.1(b)(1)(iii)(c): Storage tank fabricators employ a corrosion protection systems that are approved under UL 1746, January 2007 but are not listed under F961, "ACT-100U: Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks," revised January 2013.

Response 4.2.11. DEC will consider further revising standards in a future rulemaking.

Comment 4.2.12. Section 613-2.2(b)(2)(i) states that all cathodic protection systems must be tested within six months of installation and at yearly intervals thereafter. Both the current and proposed EPA rules require testing within 6 months of installation and at least every 3 years thereafter. [Commenter] recommends that DEC use EPA as a guide and adopt the 3-year interval verses annual.

Response 4.2.12. Annual cathodic protection monitoring reflects an existing requirement and will remain as is.

Comment 4.2.13. I don't believe that the language "unless the monitoring equipment is found to be defective" in 613-2.3(a)(2) covers false alarms adequately.

Response 4.2.13. DEC believes the language does adequately address false alarms because we are not aware of false alarms that are not caused by defective equipment. No change will be made to this provision. The language being referenced is consistent with 40 CFR 280.50(c)(1).

Comment 4.2.14. [Commenter] suggests allowing 24/7 remote monitoring of the interstitial space of USTs with electronic leak detection systems, in place of on-site leak detection, at unmanned facilities. This continuous monitoring is far more effective than a monthly monitor system inspection (current regulation 613.4(b)(3)) in detecting anomalies in the tank system.

[Commenter] suggests amending this section by adding:

613-2.3(b)(3) Specific requirements for USTs at unmanned facilities.

(i) Continuous remote monitoring of the secondary containment of USTs and underground piping systems at unmanned sites can be conducted in lieu of a visual monthly monitor system inspection when applied in conjunction with a quarterly visual inspection of the remote monitoring system inspection.

Response 4.2.14. The purpose of the operability inspection required in section 613-2.3(b)(1)(iii) is to verify that the leak monitoring system would detect a leak if one existed. This operability inspection may be able to be conducted remotely. The inspection for operability is an assessment of an active leak detection monitoring system, including a monitoring system that is operating continuously but may be malfunctioning. Thus, the existence of an operating continuous monitoring system by itself does not assure that the system's results are valid.

Comment 4.2.15. 613-2.3(b)(1)(iii) and (2)(iii) require that all tank monitoring systems be inspected for operability at monthly intervals. Please confirm that if the station is on electronic polling (multiple times per day) that would suffice for the monthly operability inspection.

Response 4.2.15. See Response 4.2.14.

Comment 4.2.16. DEC stated that the current regulations are being revised to more closely mirror the United States Environmental Protection Agency's (USEPA) Petroleum Storage Regulations. To meet that intent [commenter] recommends that:

- Monthly leak detection monitoring rather than weekly be required (under 613-2.3), since in existing regulation (40 CFR 280), and in their document, *Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training* (76 Fed. Reg. 71708 (November 18, 2011)), the USEPA has proposed continuing Monthly Leak Detection, as their studies have shown that this has proven sufficient in providing adequate leak detection and protection to the environment.

Response 4.2.16. Weekly leak monitoring reflects an existing requirement and will remain as is.

Comment 4.2.17.1. Car rental customers are required to return a car with a full tank of gas and have the ability to go to any establishment that sells gasoline to the public to do so. When a customer returns a car with less than a full tank of gas, rental car companies offer a refueling service and are not engaged in the retail sale of gasoline or diesel. Because gasoline and diesel are not sold, dispensers at rental car facilities are not subject to the New York Weights & Measures regulations that, by contrast, are applicable to retail sellers of gasoline and diesel fuels in New York. Thus, rental car companies' dispensers are not sealed and calibrated by Weights & Measures agencies. Since the dispensers are not sealed for accuracy, the 10-day inventory reconciliation will not be an accurate leak detection method for rental car companies who fuel fleets. The proposed rules, specifically Subparts 613-2.3(b)(1)(i) and (ii) state, "... any tank system which stores any amount of motor oil or kerosene that will be sold must meet the ten-day inventory monitoring requirements in section 2.3(c)(1) of this Part."

Please clarify that rental car companies will not be required to perform 10-day inventory reconciliation.

Comment 4.2.17.2. Will rental cars be exempt from the 10 day inventory control requirement?

Response 4.2.17. DEC has determined that a refueling service for returned rental cars is not a resale of petroleum and therefore underground motor fuel storage tank systems operated by rental car companies are not subject to 10-day inventory monitoring.

Comment 4.2.18. I was surprised to hear that the proposal to eliminate the ten-day inventory monitoring requirement (ten-day reconciliation) would not apply to underground tanks that contain motor fuel that is SOLD. Using the scenario of a school selling fuel to a municipal DPW, Emergency Services, etc. This requirement would affect several school districts that offer fuel purchase as a shared service to their local municipalities as a cost-saving measure. It would seem that districts that participate in shared services with other local public agencies, resulting cost savings and fewer tanks in the ground, should not be subjected to additional recordkeeping requirements.

Response 4.2.18. DEC has determined that the above scenario of refueling for municipal services is not a resale of petroleum and that underground motor fuel storage tank systems operated by school districts in this manner are not subject to 10-day inventory monitoring.

Comment 4.2.19. What type of recordkeeping requirements will PBS Facilities that previously had to have a 10-day reconciliation that are not required to anymore (e.g. fleets) (previously 3 years)?

Response 4.2.19. If the facility is no longer required to perform 10-day reconciliation under Part 613, they will not be required to keep records for inventory monitoring.

Comment 4.2.20. UST Systems: Reporting, Investigation, and Confirmation (613-2.4)

Several of the timeframes for conducting investigations and repairs under 613-2.7 are unrealistic and burdensome. However; to be consistent with other sections of this proposal (i.e. 613-6.3(a)(6)), [commenter] recommends "as soon as practicable" be used in place of "immediate".

- 613-2.4(a)(1)(iii): The word "immediately" should be omitted from this proposed requirement which includes " ... unless system equipment is found to be defective but not leaking, and is [immediately] repaired or replaced as soon as practicable."

It is not realistic to assume that a tank maintenance contractor will have all parts necessary for all repairs or replacement of monitoring devices. It may take several days for a tank operator's maintenance contractor to supply and install replacement parts or obtain all materials necessary to perform a repair.

- 613-2.4(a)(1)(iii): Some release detection alarms will respond solely to the presence of water when no leak has occurred. The section on Reporting Suspected Leaks (from alarms) (613-2.4(a)(1)(iii)) should be revised to state, "unless the monitoring device is found to be defective and is [immediately] repaired, recalibrated or replaced as soon as practicable; or if within 48 hours, it is determined that a cause other than product release triggered the leak detection alarm, and additional monitoring does not confirm a release of product."

Two-hour reporting is not practicable, nor is this sufficient time to permit a tank operator to determine if an interstitial leak alarm from a tank or piping system (including piping sumps) is from an actual leak of product, or is condensation or water intrusion. This will also place an undue burden on regional DEC offices, with fielding and closing out unnecessary 'suspected leak' reports.

Response 4.2.20. The requirement is to report suspected leaks within two hours after discovery. The exception to that requirement comes if the monitoring system is found to be defective and is immediately repaired. If the monitoring system cannot be immediately repaired, then a report must be made.

Comment 4.2.21. Some of our member companies' unmanned sites are located in remote areas and it is not practicable to be able to commit/guarantee that a spill will be cleaned up within two hours. In some instances, it will take longer than two hours for a contractor to schedule and mobilize to a site, let alone complete the clean-up activities within two hours. As mentioned previously, DEC's desire for consistency with EPA requirements is not reflected in the following proposed requirements:

613-2.4(d)(1)(i) (Reporting, investigation and confirmation) states that one of the conditions to qualify for an exception from the spill reporting requirement is that the spill be less than five gallons. Note that EPA 40 CFR 280.53 does not require the reporting of spills less than 25 gallons if cleaned up within 24 hours.

[Commenter] recommends the following revision:

613-2.4(d) Response to spills and overfills.

- (1) A facility must report every spill to the Department's Spill Hotline (518-457-7362) within two hours, contain the spill, and begin corrective action in accordance with the requirements of Subpart 613.6 of this Part except if the spill meets the following conditions:

- (i) It is known to be less than **twenty-five** gallons in total volume
- (ii) It is contained and under the control of the spiller;
- (iii) It has not reached and will not reach the land or waters of the State; and,
- (iv) It is cleaned up in accordance with the requirements of Subpart 613.6 of this Part within two hours of discovery; **or if not practicable, emergency response actions have been initiated (e.g. a contractor has been contacted and begun coordinating emergency response actions) within two hours.**

Response 4.2.21. The two hour notification requirement is drawn from Navigation Law section 175. The five-gallon rule exception is consistent with longstanding DEC practice which is set forth in section 1.1 of DEC's Spill Guidance Manual, which may be found at [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/1x1.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/1x1.pdf).

Comment 4.2.22. Spills of more than 5 gallons to a secondary containment system, including a fill-port catch basin, should not be reportable if cleaned up within 2 hours. There is no environmental impact in such an instance, and there is no environmental benefit of the added reporting burden (in 613-2.4(d)).

Response 4.2.22. See Response 4.2.21.

Comment 4.2.23. The term "suspected releases" (in 613-2.4(a)) needs to be better defined, especially as it related to Delivery Prohibition.

Response 4.2.23. The term used in section 613-2.4(a) is "suspected leak," which is different from "suspected release." Neither term is used in regard to delivery prohibition.

Comment 4.2.24. 613-2.4(d)(2) says, "a facility must ... discontinue operation of any leaking UST system and take the UST system temporarily out of service..." This should say "UST system component" where it says "UST system." For example, if a gasoline UST has two lines to different dispensers and one of the lines leaks, the UST system should be allowed to take the leaking line out of service and continuing using the other components of that UST system. As written, the entire system is taken out of service.

Response 4.2.24. According to ECL 17-1007(3), it is "unlawful to continue operation of any leaking tank or associated equipment of a facility." Therefore, no change will be made to the regulatory language.

Comment 4.2.25. The fact that "the DEC is already delayed in implementing this requirement" is not an adequate reason to cram this arbitrary timeline (in 613-2.5(a)) down the tank owner's and operator's throats. The Grant Guidelines were clear that States had 2 years to promulgate the rules; and owners / operators had 3 years to implement them. I am once again asking for a common sense approach that will allow multi-site owners / operators an adequate timeline to implement.

Response 4.2.25. DEC has provided an operator training manual (“TankIQ”) and has made the exam available online so that operators can take the exam at their convenience. Experience from other states has shown that many exam takers wait until the end of an implementation period to fulfill the exam requirement. DEC believes that a one-year implementation is sufficient to comply with this requirement.

Comment 4.2.26. The proposed regulations for operator training are set forth in section 613-2.5. These regulations are sparse on details. DEC issued DER-40/Operator Training to provide guidance on the requirements for training of operators. In essence, the regulations and the program policy portray a system where DEC administers tests on-line and at specified DEC facilities for Class A and Class B Operators. DEC takes no action to approve courses for training. In fact, on page 4 in DER-40, under the heading of "Exam Preparation":

Candidates desiring to be authorized as Class A and/or Class B Operators may prepare for the exam however they see fit (emphasis added). DEC will provide relevant training materials. DEC will not review third-party training materials, nor will it require third-party trainers to be certified or otherwise approved.

The regulations raise concerns based on their lack of detail, and failure to address issues critical to implementation of a successful training program. One concern which should be addressed is the requirement that training and testing must be available in multiple languages. The retail service station business has a great deal of diversity which needs to be reflected in all classes and training. To be effective, the testing and training must both be available in multiple languages. The language barrier which exists for many applicants would be an important reason for DEC to approve third-party courses. This action would protect such applicants from paying and enrolling in courses which were not appropriately designed to permit them to pass the DEC exam. Without some approval mechanism, applicants with language barriers would be potential victims of third parties offering inadequate courses with a substantial cost attached to such courses.

Testing requirements should be specifically detailed in the regulations. The regulations should specifically provide that the exam be provided on-line, in multiple languages, and offered at convenient locations at regular intervals by DEC. In addition, any cost or other exam charges should be specifically spelled out in the regulations.

The Environmental Protection Agency (EPA) requires that testing requirements be developed in conjunction with tank operators and owners. The EPA also requires that training programs implemented by owners and operators be taken into consideration. None of these predicates required by the EPA have taken place. Trade associations representing owners and operators have not been consulted on training programs. Trade associations would advocate for approved training programs to ensure that that appropriate training options are available versus DEC's apparent every man for themselves approach. Retail facility owners want to ensure that their employees are receiving appropriate training which gives them the best chance to pass the DEC exam. The owner's objective is to properly train and maintain their workforce. Owners do not want to dismiss employees because they have failed the examination. A training course which prepares owners, operators and employees to not only pass the test but to meet their responsibilities is the common objective.

Further detail should be set forth in the regulations as to the Class C Operator. Although it is clear a Class A or Class B Operator can provide training, it is not clear whether they can administer a test or if a DEC-administered test is required. There are a number of successful

training programs for retail clerks in service station facilities involving alcohol and cigarette sales which have been effective. DEC needs to provide more specifics to enable the industry to effectively provide training. Again, the industry has the same objectives as DEC and there should be a cooperative approach. The failure to consult with the service station industry, taken together with the lack of specifics in the proposed regulations, raises questions about the program.

Response 4.2.26. DEC believes that the amount of detail provided by the revised regulations and DER-40 is sufficient and appropriate. As experience is gained, DEC may revise the regulations or guidance, but at this time no further change appears necessary for the regulated community to understand and comply with the operator training requirements. With respect to Class C Operators, Class A and/or B Operators are required to ensure that they are adequately trained to respond to emergencies and alarms caused by spills or releases. How this is done is up to the Class A and/or B Operators, but there must be documentation of that assessment. Class C Operators are not required to take a DEC exam.

Since the regulations were proposed, DEC has developed and made available to the public a draft operator training manual (“TankIQ”) which addresses all of the topics required by the regulations and has developed an online examination which will be used to determine which operators are competent to be authorized to operate tank systems. With respect to the issue of multiple languages, DEC has reviewed Executive Order #26 and has determined that the agency is not required to provide TankIQ or exam in multiple languages. That determination notwithstanding, DEC investigated the possibility of providing TankIQ and the exam in multiple languages and discovered that: 1) it is unclear which languages would best represent the regulated community, and 2) it would be cost-prohibitive to translate the materials into multiple languages.

An extensive pilot program to test the online examination was completed in April 2015. Over 200 volunteers from the regulated community took the pilot exam in 13 proctored locations across the state which included effectively all of the questions that will be used in the live/formal exam (over 300 questions). With the assistance of an expert in giving competency exams (psychometrics), the results of the pilot exam were evaluated, adjustments were made, and difficulty ratings were assigned to all questions. The results of a survey regarding the exam and the guidance material provided positive feedback and good suggestions for fine tuning the guidance and exam. DEC expects that the live/formal exam will be available for use when the regulations become effective. DEC believes that the provision of the guidance, the program policy, and the experience from the pilot exam substantially address the issues raised in the public comments regarding operator training.

Comment 4.2.27. The EPA directed the states in 2007 to develop state-specific training requirements consistent with EPA's operator training guidelines. By August 2012, all states were supposed to require all operators to be trained. Most states met the deadline; New York did not. Two years later, New York is still in the process of promulgating regulations.

DEC now proposes to give system operators one year from the effective date of these regulations to identify, train, test and register their Class A, B and C operators. In our view, it's unfair for DEC to take the slow road in enacting these regulations but to then tell the regulated community to hurry up and comply. Twelve months is inadequate time for retailers to achieve compliance.

Otherwise, the Operator Training regulations and program policy are well thought out, providing clarity, flexibility and convenience for those needing to be certified.

Response 4.2.27. See Response 4.2.25.

Comment 4.2.28. Can you take the operator test WITHOUT taking the training?

Response 4.2.28. There is no mandated training. There is only a required demonstration of competency.

#### **4.3. Comments on Subpart 613-3: UST Systems Subject Only to Title 10.**

Comment 4.3.1. To be consistent with the DEC's intent, [commenter] recommends that:

- 613-3.1(b)(4)(ii): Category 1 and 2 Tank Systems should not be required to be in compliance with more than what is required in the existing 6 NYCRR 614.7(d), which states, "The owner must maintain an accurate drawing or as-built plans which show the size and location of any new underground tank and piping system. These plans must include a statement by the installer that the system has been installed in a compliance with the New York State Standards for New and Substantially Modified Petroleum Bulk Storage Facilities, 6 NYCRR Part 614." [December 27, 1985]. Also, "Installer Certification" should be defined, if this is to remain a proposed requirement;
- 613-3.3(b)(1)(ii) & (iii): monthly leak detection monitoring rather than weekly be required for Category 3 and double-walled Category 2 Tank Systems, which also meet the leak detection requirements for Category 3 Tank Systems, since in existing regulation (40 CFR 280), and in their document, Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training. (76 Fed. Reg. 71708 (November 18, 2011), the USEPA has proposed continuing Monthly Leak Detection, as their studies have shown that this has proven sufficient in providing adequate leak detection and protection to the environment; and

Several of the timeframes for conducting investigations and repairs under this section are unrealistic and burdensome. However; to be consistent with other sections of this proposal (i.e. 613-6.3(a)(6), [commenter recommends "as soon as practicable" be used in place of "immediate."

- 613-3.4(a)(2): The word "immediately" should be omitted from this proposed requirement for repairs which includes " ... unless system equipment is found to be defective but not leaking, and is [immediately] repaired or replaced as soon as practicable." Since it is not realistic to assume that a tank maintenance contractor will have all parts necessary for all repairs or replacement of monitoring devices. It may take several days for a tank operator's maintenance contractor to supply and install replacement parts or obtain all materials necessary to perform a repair.
- 613-3.4(a)(3): Some release detection alarms will respond solely to the presence of water when no leak has occurred. The section on Reporting Suspected Leaks (from alarms) should be revised to state, " ... unless the monitoring device is found to be defective and is [immediately] repaired, recalibrated or replaced as soon as practicable; or if within 48 hours, it is determined that a cause other than product release triggered the leak detection alarm, and additional monitoring does not confirm a release of product." Two-hour



reporting is not practicable, nor is this sufficient time to permit a tank operator to determine if an interstitial leak alarm from a tank or piping system (including piping sumps) is from an actual leak of product, or is condensation or water intrusion. This will also place an undue burden on regional DEC offices, with fielding and closing out unnecessary 'suspected leak' reports.

Response 4.3.1. Category 1 UST systems are not required to have as-built diagrams. The requirement for Category 2 UST systems is consistent with policy in former DER-25. The remainder of this comment is addressed in Response 4.2.20.

Comment 4.3.2. UST Systems Subject Only to Title 10

Storage tank fabricators employ a corrosion protection systems that are approved under UL 1746, January 2007 but are not listed under F961, "ACT-100U: Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks," revised January 2013. Therefore, it is recommended to add the following paragraph under 613-3.1(b)(1)(iii)(c):

(5) The tank must have an exterior high-solids polyurethane resin coating of 75 mils thickness permanently bonded to the steel. The coating shall comply with UL 1746, Part IV and be chemically compatible with petroleum products and product additives. The polymer coating must have a high crosslink density with high impact properties and tensile strength and requires absolutely no artificial reinforcement. The finished tank is quality checked by a 15,000-volt spark test to ensure coating integrity and effective corrosion protection.

Response 4.3.2. DEC will consider this modification to language in future rulemakings.

Comment 4.3.3. Due to the latest developments in UST upgrade technology, [commenter] would like the DEC to please consider incorporating the UL 1856 Standard into the new rules. The UL 1856 Standard covers UST Linings, Co-Structural Double Wall Upgrades and Self Structural Double Wall Upgrades.

These tank replacement alternatives are being utilized in numerous States as well as New York and implementing the UL 1856 Standard for these upgrade methods would provide a clear path forward for the future of UST upgrade technology in the State of NY.

Response 4.3.3. DEC will consider this modification to language in future rulemakings.

Comment 4.3.4. The proposed regulations categorize the tanks based on the installation date. Category 1 tanks would require annual tightness testing. Will double-wall tanks installed previous to 12/27/86 be exempt from such requirements?

Response 4.3.4. In accordance with section 613-3.3(b)(1)(i)(b), if a double-walled Category 1 UST system was installed in accordance with Category 2 requirements, it would not be subject to tightness testing if interstitial monitoring is conducted.

#### 4.4. Comments on Subpart 613-4: AST Systems.

Comment 4.4.1. Previous guidance given by DEC on buried piping associated with an AST was that the buried portion of pipe would only be subject to underground requirements if 10% or more of the volume of the "tank system" was buried or covered. During the webinar I asked the same question regarding piping requirements in the revised regulations and I understood the answer to be any length of buried or covered piping would be subject to underground requirements. If that is correct it might be helpful to make such a statement in part 613.4 AST requirements to eliminate any doubt. If the 10% criteria is still valid then that should be spelled out.

Response 4.4.1. The 10% criterion is relevant only with respect to the definition of an UST system. The criterion is irrelevant to the application of requirements that apply to the underground portions of an AST system. There are also requirements that apply to piping that is in contact with the ground but isn't necessarily underground.

Comment 4.4.2. What are the definitions of Class I, Class II, and Class IIIB petroleum (in 613-4.1(a)(1)(iv)(a))?

Response 4.4.2. The proper citation is section 613-4.1(b)(1)(iv), which has been modified to refer to NFPA 30, which contains explanations of the different classes of petroleum.

Comment 4.4.3. The proposed regulation (613-4.1(b)(4)(ii)) will require every AST system to be tested for tightness before being placed into service. This requirement is unnecessary for an AST since any leak would be visible (unlike a UST). Additionally, the proposed regulations specify design standards for ASTs which already include a tightness test upon manufacture. Requiring a tightness test for ASTs before being placed into service will cause unnecessary operational delays and financial burden upon the tank owner. This requirement should be deleted as it is redundant and unnecessary for ASTs, and offers no additional protection of the environment (unlike for a UST).

Furthermore, if a tightness test is required prior to placing a tank in-service, will a tightness test again be required if an in-service tank is relocated to another facility? This too would place undue financial burden upon tank owners and cause unnecessary operational delays.

Will a tightness test be required of a double-walled tank or a tank within secondary containment? If so, what is the environmental benefit of this since a leak would be contained?

The DEC did not consider the financial hardship and cost of requiring tightness tests for ASTs in its Regulatory Impact Statement. The DEC should analyze the cost-benefit of requiring tightness tests for all ASTs upon installation.

Response 4.4.3. Testing an AST for tightness prior to being placed in service is an existing requirement found in the former section 614.13(d). The phrase "before being placed into service" was revised to read "prior to first receipt of petroleum."

Comment 4.4.4. Part 613-4.1(c)(1)(iv) states that soil may be an allowed form of secondary containment for Category 1 AST systems if it is of such character that any spill onto the soil will

be readily recoverable and will result in a minimal amount of soil contamination. Why is soil not an acceptable secondary containment option for Category 2 and Category 3 AST systems?

What does the DEC consider to be a minimal amount of soil contamination? Is a tank located on a bedrock surface considered to have adequate secondary containment since a spill would be readily recoverable and there would be minimal soil contamination?

This regulation leaves too much to interpretation by DEC inspectors and the tank owners as to when soil is or is not an acceptable form of secondary containment, and is in direct contradiction to the definition of a release, as well as the proposed changes to Part 613-4.1(b)(1)(v) Secondary Containment.

Response 4.4.4. DEC has modified the language in sections 613-4.1(b)(1)(v) and (c)(1)(iv) to allow for soil to be used as part of a secondary containment system and to clarify that the soil must be of such character that any spill into secondary containment would be readily recoverable. The main purpose of secondary containment is to: (1) be able to contain petroleum leaked until it is detected and removed, and (2) to prevent petroleum from reaching the environment outside of the secondary containment system. DEC recognizes that many secondary containment systems will have a soil cover on top of a liner system to provide protection to the liner (from vehicles that may enter the secondary containment or from ultraviolet radiation that could degrade the liner) or to minimize dehydration of clay (geosynthetic clay liners or bentonite liner systems) that may be part of the liner system. DEC understands that when there is a leak of petroleum, the soil cover on top of a liner will be contaminated but the spill will still be readily recoverable.

Comment 4.4.5. 6 NYCRR 613-4.1(f) requires the following: "Stormwater which collects within the secondary containment system must be controlled by a manually operated pump or siphon, or a gravity drain pipe which has two manually controlled dike valves, one on each side of the dike."

In the DEC Spill Prevention Operations Technology Series (SPOTS) Memo #10, Secondary Containment Systems for Aboveground Storage Tanks, dated September 28, 1994, it says the following: "It has been brought to the attention of the Division of Water that a valve on the inside of the dike cannot be safely opened to drain a product engulfed in fire within the impoundment. In fact, NFPA 30 Section 2-2.3.3(h) states "drainage shall be accessible under fire conditions from outside of the dike. In recognition of the need for access by fire fighters and the inconsistency between the PBS regulations and NFPA 30, the Division will not require a second valve on the inside of the dike. Revisions to the PBS regulations are currently underway to remove this requirement. "

To protect emergency response personnel and comply with NFPA standards, the requirement for the two manually controlled dike valves should be removed. Only one manually controlled dike valve on the outside of the dike should be required in 6 NYCRR 613-4.1(f).

Response 4.4.5. DEC has modified section 613-4.2(f) to correct this oversight.

Comment 4.4.6. I believe that the department has overstepped its authority on some issues, and has actually changed the current regulation, rather than wait for phase two of the regulation changes, which occur at a later date.

I would like to give an example of that, and the example I would like to give is in the current regulation in regard to secondary containment of aboveground storage tanks.

Reading from the current regulation, "Secondary containment system for aboveground tanks." This is taken from the current regulation document. "A secondary containment system must be installed around all aboveground petroleum storage tanks which, A, could reasonably be expected to discharge petroleum to the waters of the state; or B, which has a capacity of 10,000 gallons or more."

The new regulation that's being proposed is not the same, and I would like to read it and I would like to make sure that people understand it. Under secondary containment on the new proposal it states, "Any tank system with a tank that has a design capacity of 10,000 gallons or more must have secondary containment that meets the following requirements: One, be able to contain petroleum leaked from any portion of the tank until it is detected and removed; and two, be able to prevent release of petroleum".

The new wording that's now going to happen is: "Any tank system with a tank that has a design capacity of less than 10,000 gallons". This is not referenced in the original document. I go on, and it says, "is in close proximity to sensitive receptors is required to either have secondary containment as described in A subparagraph, or utilized a design technology such as that a release is not reasonably expected.

Two, as we go down and it references "tanks within 500 horizontal feet of the following resources are considered to be in close proximity to sensitive receptors. One, a perennial or intermittent stream; two, a public or private well; three, a primary or principal aquifer as defined by US Coast Guard Water Resource Investigation Report, series of numbers; four, a wetland is defined in Part 644 of this title; five, a lake, pond, estuary or other similar water surface; and six, a storm drain".

This wording is not in the current document; however, this wording does come from a guidance document that was written by the department in 1994. It's called SPOTS Memo #10.

At numerous times during the development, we have asked that this not be included. We specifically have said that this is not part of the current regulation. This is a guidance document. And during phase one, we were under the understanding that guidance documents should not be included to change the current regulation.

We have also brought this to the attention of the governor's office. Apparently it's fallen on deaf ears. Let me give you an example of how this could affect if this change goes through.

The problem with this addition to the current regulation is that tanks, small tanks under 10,000 gallons, or even small heating oil tanks, that are currently at a petroleum bulk storage registered facility, are monitored monthly for visual inspections and are in compliance will now be considered to be out of compliance and will need to have secondary containment installed.

A 275-gallon heating oil tank for a convenient store will now have to have secondary containment installed. At the same time, Mrs. Smith, who may now live next store, has a 40-year-old heating oil tank in her basement, has no secondary containment, has no idea if it meets any of the same standards of the PBS registered facility and the adjoining property, and hasn't been in the basement to see the condition of the tank, or if it has or has not been leaking in years.

This is not a question of the department protecting the environment. This is a situation of the department overregulating the business community, creating unnecessary additional expenses,

and finding new ways to write violations and collect money from those violations from monetary penalties. I appreciate your time, I appreciate you letting me speak today, but this is just one blatant example of the department overstepping its bounds and adding to the current regulations when it's not needed nor is it supposed to be in there.

Response 4.4.6. Section 613-4.1(b)(1)(v) is a clarifying provision, not a change in the interpretation or application of former section 613.3(c)(6). The existing rule is broad in its applicability. Since any discharge could theoretically result in an impact to the “waters of the state,” the result of the guidance was to limit which ASTs need secondary containment. DEC narrowed its interpretation of the rule in 1990 (TOGS 4.1.10) and subsequently reissued the guidance in 1994 (SPOTS Memo #10). That interpretation and guidance were also included in former DER-25. The revised rule seeks to reflect DEC’s position on this issue as it has existed for at least 21 years. With respect to home heating oil tanks, the NYS Legislature created an exemption for them. DEC is acting within the bounds authorized by the Legislature and is not imposing a new requirement.

Comment 4.4.7. The current PBS regulations provide that secondary containment must be installed around any AST, with certain exceptions as found in Section 613.3(c)(6). By comparison, the modified language in 613-4.1(c)(1)(i)(a) requires that secondary containment capture “petroleum leaked from any portion of the tank until it is detected and removed.” This change could be mistakenly interpreted to require secondary containment beneath as well as around the tank. As there is no implementation schedule in the proposal, this could render a large number of Category 1 tanks out of compliance upon the effective date of these regulation because they do not currently have an impermeable barrier under the tank, a release prevention barrier or a double bottom.

In the public comment sessions and in the response to comments on the preliminary draft regulations published on DEC’s website, the Department has indicated that there was no intention to modify the secondary containment requirements relative to the modified regulations. However, we feel that the proposed language needs to be modified to prevent misunderstanding of the Department’s intent.

Recommendation: The existing language in 613.3(c)(6) – requiring secondary containment to be installed around any AST – should remain in the regulation for Category 1 ASTs.

Response 4.4.7. There is no language requiring secondary containment beneath a Category 1 AST. This requirement only exists for Category 2 and 3 ASTs. Refer to section 613-4.1(b)(1)(v)(c) and the absence of that requirement in section 613-4.1(c)(1).

Comment 4.4.8. Section 613 – 4.1(c)(1)(i) requires, “(a)ny tank system with a tank that has a design capacity of 10,000 gallons or more must have secondary containment that meets the following requirements:

- (a) be able to contain petroleum leaked from any portion of the tank until it is detected and removed; and...

This revised requirement seems to imply that all existing tanks will be required to have secondary containment under the tank floor. This requirement contradicts the current regulation 6 NYCRR 613.3(c)(6)(i), which states that “(a) secondary containment system must be installed

around any aboveground petroleum storage tank...” [Commenter] respectfully requests that the Department include the language from the existing regulation for clarity. Otherwise, without the clarification, the proposed regulation may be construed to mean that any remaining single bottom tanks or tanks without an underlying barrier will be required to be upgraded. The current regulation allows for tanks to be upgraded when a tank’s floor needs to be replaced. Terminals have been upgrading tank bottoms as required by the existing regulation, when the existing single bottoms reach the end of their service life. Continuing the replacement of single tank bottoms with secondary containment (double bottoms or a underlying liner) as tanks with single bottoms reach the end of their service life will ultimately lead to all tanks in the State having secondary containment for all portions of the tank. [Commenter] requests the revised regulations be modified to include the flexibility of phasing in secondary containment for existing single bottom tanks, as is the case with the existing regulations.

Response 4.4.8. See Response 4.4.7.

Comment 4.4.9.1. The proposed language regarding secondary containment excludes the existing PBS wording must be installed around any AST, as found in 613.3(c)(6). The modified language in 613-4.1(c)(1)(i)(a) requires that secondary containment capture "petroleum leaked from any portion of the tank – which would logically seem to include from beneath – until it is detected and removed.” As there is no implementation schedule in the proposal, this could render a majority of the Category 1 tanks that I am familiar with out of compliance upon the effective date of these regulation because they do not currently have an impermeable barrier under the tank, a Release Prevention Barrier or a double bottom. Is that the intention of the Department?

Recommended Action: We recommend that the existing language in 613.3 (c)(6) – “must be installed around any AST” – remain in the regulation for Category 1 ASTs.

Comment 4.4.9.2. The proposed language regarding secondary containment excludes the existing PBS wording must be installed around any AST, as found in 613.3(c)(6). The modified language in 613-4.1(c)(1)(i) (a) requires that secondary containment capture "petroleum leaked from any portion of the tank" – which would logically seem to include from beneath – "until it is detected and removed." As there is no implementation schedule in the proposal, this could potentially render some Category 1 tanks out of compliance upon the effective date of these regulation because they do not currently have an impermeable barrier under the tank, a Release Prevention Barrier or a double bottom. Does the Department intend to provide a compliance schedule in the final?

Recommended Action: We recommend that the existing language in 613.3 (c)(6) ("must be installed around any AST") remain in the regulation for Category 1 ASTs. If the intent is to provide an impermeable barrier under the tank then since NY has a 10-year, out-of-service inspection interval the schedule for implementing this requirement shall be at the next required out of service inspection date. An under-bottom liner the next time the bottom is replaced or for new tank construction would be the preferred means of compliance with this requirement.

Response 4.4.9. See Response 4.4.7.

Comment 4.4.10. The enlargement of the requirement for secondary containment is both unnecessary and concerning. First, even very small tanks (250-500 gallon) will be subject to the secondary containment requirement if located within 500 feet of a sensitive receptor, even if

there is no potential for contamination to reach the sensitive receptor or leave the facility property. This costly and potentially prohibitive requirement needs to be reexamined. Second, the list of sensitive receptors should be more clearly defined and limited. As currently written, it could be presumed that a vast majority of sites with tanks less than 10,000 gallons in capacity with no potential for a release to reach waters of the State would become subject to costly and onerous secondary containment requirements for no valid reason. This overly broad regulation should be reexamined.

Response 4.4.10. This is not an enlargement in how DEC has interpreted the present regulations. It is more specific and clarifies existing practice. Because it is less vague than the current rule, the regulated community should find it easier to understand.

Comment 4.4.11. The proposed regulations (in 613-4.1(b)) state that a tank with a design capacity of less than 10,000 gallons that is in close proximity to sensitive receptors must have secondary containment or utilize a technology such that a release is not reasonably expected to occur. The proposed regulation goes on to specify the meaning of in close proximity and lists the types of sensitive receptors within 500 horizontal feet that are applicable.

With respect to the above, small indoor tanks such as a 275-500 gallon heating oil or lube oil tank, located on an impervious surface (e.g. concrete slab), should not be required to have secondary containment even if the building in which they are located is within 500 feet of one of the ground/surface waters listed in the proposed regulations (613-4.1(b)). A typical spill from a small indoor tank located on an impervious surface would not cause a release to be reasonably expected to occur. The regulations, as proposed, leave too much to interpretation by DEC inspectors and the tank owners as to which tank requires secondary containment and what is reasonably expected to occur. This will place an undue hardship and financial burden on tank owners by forcing them to install secondary containment systems at any tank system due to the ambiguity of the regulation. Additional specificity should be provided in the regulation to exempt certain indoor tanks from the secondary containment regulation.

The DEC did not consider the financial hardship and cost of installing secondary containment systems around thousands of tank systems throughout the State in its Regulatory Impact Statement. DEC should analyze the cost-benefit of essentially requiring all ASTs to have secondary containment.

Response 4.4.11. Since DEC is not changing existing requirements or practices, there are no new costs associated with the promulgation of this provision. Thus, no analysis of cost is necessary.

Comment 4.4.12. The regulations are drafted in such a way as to require owners/operators of underground petroleum tank systems that also have an existing, small, above-ground heating-oil tank to invest in constructing secondary containment for that above-ground tank if there is a storm drain or other sensitive receptor nearby.

This is excessive, particularly in light of the fact that a private residence next door, with the same size aboveground heating-oil tank, is exempt from any such secondary containment requirement, even though it poses precisely the same risk to the same storm drains and other sensitive receptors. This costly, unfair requirement should be withdrawn.

Response 4.4.12. Since DEC is not changing existing requirements or practices, there are no new costs associated with the promulgation of this provision. See also Response 4.4.6.

Comment 4.4.13. 613-4.1(b)(1)(v) requires secondary containment for aboveground tanks (ASTs) under 10,000 gallons within 500 feet of a sensitive receptor. Technically, this requirement was discussed in the SPOTS Memo #10 in 1994; however, there is some concern that the regulated community may see a rise in violations based on the wording change in the regulations. Additionally, the Department should accept a double-walled tank as a method of secondary containment on smaller ASTs as it may not be feasible to install a dike for small heating oil or used oil tanks.

Response 4.4.13. See Response 4.4.6. Additionally, DEC currently accepts (and will continue to accept) modified double-walled ASTs that capture overfills as meeting the secondary containment requirement.

Comment 4.4.14. Similar to UST regulations that allow exemption from overfill protection on tanks filled with 25-gallons or less, [commenter] suggests that this section (613-4.1(b)(3)) be changed to mirror that of section 613-2.1(b)(3)(ii) of the proposed regulation.

Response 4.4.14. This is an existing requirement that has not changed.

Comment 4.4.15. It is stated in your Summary of Changes webpage and during your public outreach meeting on September 10, 2013 in Albany, NY, that these regulations would not have additional fiscal impacts. As proposed, implementation of parts of this section would require capital expenditures. To be consistent with the NYSDEC's intent, [commenter] recommends that:

- 613-4.1(b): Only standards applicable at the time of installation are required for Category 2 Tank Systems, since many of these systems were installed in compliance with 6 NYCRR 613-614 (December 27, 1985), prior to the proposed standard. Many existing tank systems that are in compliance with the current regulations will not be able to meet this proposed requirement without upgrade or replacement.

Response 4.4.15. The language has been modified to clarify standards that apply to Category 2 versus Category 3 AST systems.

Comment 4.4.16. Add *UL 2085 (Protected Aboveground Tanks for Flammable and Combustible Liquids)* to 613-4.1(b)(1)(i)(a) and (b). A large number of aboveground storage tanks installed in New York must comply with this standard.

Response 4.4.16. DEC will consider this modification to language in a future rulemaking.

Comment 4.4.17.1. The proposal includes onerous new compliance requirements for cathodic protection requiring strict adherence to either API RP 651 or NACE RP 193-2001. These carry with them significantly increased uncertainty and costs for tank operators. While alternative



methods to determine corrosion prevention currently exist, they are seemingly disallowed. Is the Department inclined to include other alternative methods?

Recommended Action: We strongly encourage an alternate means be proposed such as allowing for tank floor corrosion rates much like API 653 allows.

Comment 4.4.17.2. The proposal includes onerous new compliance requirements for cathodic protection requiring strict adherence to either API RP 651 or NACE RP 193-2001. These requirements carry with them significantly increased uncertainty and costs for tank operators. While alternative methods to determine corrosion prevention currently exist, they are seemingly disallowed. Is the Department excluding the use of other alternative methods?

Recommended Action: Accept alternate industry used means of demonstrating cathodic protection such as allowing for tank floor corrosion rates much like API 653 allows.

Response 4.4.17. DEC has modified section 613-4.2(b) to only apply to Category 2 and 3 AST systems. The provision to monitor corrosion protection is not considered onerous, as it is derived from former section 614.9(b), which requires facilities to have the ability to monitor cathodic protection for tank bottoms.

Comment 4.4.18. Tanks that have double bottoms may have the lower bottom in contact with the soil, but this part of the tank may or may not be part of the containment, depending on the design. Secondary containment systems may interfere with effective operation of a cathodic protection system by virtue of their design. The regulation (613-4.1(b)(1)(iii)) does not define the extent of protection required. The regulation does not cite the applicable edition of API 651 that would apply and requirements in cases where secondary containment systems may cause cathodic interference.

Response 4.4.18. DEC has modified section 613-4.1(b)(1)(iii) to cite the specific edition of API 651 that applies to this provision. The requirement in this provision is for tank bottoms in contact with the ground to be protected from corrosion.

Comment 4.4.19. 613-4.1(b)(1)(iii) should define the extent of the protection required and provide comment on current methods for cathodic and leak protection. For example, many dual bottom systems across the State use leak detection ports, with the metal to concrete contact acting as a corrosion prohibitive. Furthermore, the Rule should distinguish the requirements in circumstances involving a secondary containment system causing cathodic interference. Depending upon the design of a dual bottom tank, the lower bottom in contact with the soil may be part of the secondary containment. According to API Standard 651 cited by this Rule, secondary containment systems such as dual bottom tanks may interfere with a cathodic protection system and in some cases may cause accelerated corrosion of the tank bottom. (API 651 5.4.3.1).

Response 4.4.19. See Response 4.4.18.

Comment 4.4.20. Section 613-4.2(b)(2)(ii)(a): The current applicable standard API RP 651 Fourth Edition was published September 2014.

Response 4.4.20. DEC will consider referencing the fourth edition in a future rulemaking.

Comment 4.4.21. The last sentence (in 613-4.2(a)(4)) talks about marking fill ports on stations with remote fills. I believe the intention is to mark the remote fill port; however, it is written as needing to mark the tank fill port.

Response 4.4.21. DEC has modified section 613-4.2(a)(4) to clarify this requirement.

Comment 4.4.22. Subdivision 613-4.2(a)(4) requires tank system fill ports to be color coded, and if the fill port is remote from the tank, the fill port must be marked to identify the petroleum in the tank system. Implementing this requirement at a tank farm, where there is one fill port for multiple tanks containing various materials, will not be possible.

Response 4.4.22. DEC has modified the requirement for fill ports to be color coded to address the circumstance where a single fill port is connected to multiple tanks storing different types of petroleum.

Comment 4.4.23. Subdivision 613-4.2(a)(7) specifies that the carrier determines the tank has available working capacity to receive the volume of petroleum to be delivered. Carriers arriving at our tank farms may not be able to make this determination. Please provide alternatives such that an area operator can make this determination to facilitate a safe transfer of materials into a tank.

Response 4.4.23. The carrier is responsible for ensuring that the tank system to which a delivery is being made has available working capacity to receive the volume of petroleum to be delivered. The carrier may decide to rely on an assurance from the operator that the tank system has sufficient available working capacity.

Comment 4.4.24. Section 613-4.2(d)(3)(i): Isophthalic polyester based resins represents older technology containing styrene which is a recognized hazardous air pollutant (on the federal HAPS list). They are not compatible with ethanol and have been replaced by much newer and better technology. These resins should not be considered for application in a regulation for health, safety and environmental reasons.

Response 4.4.24. DEC has modified the rule to eliminate isophthalic polyester-based resins as an option for tank linings.

Comment 4.4.25. 613-4.2 (d) (Repairs) states:

(3) Coating (lining) specifications

- (ii) The coating must be applied as soon as possible, but not later than eight hours after sandblasting and cleaning of the internal surface. Visible rust, moisture or foreign matter must not be present.

The eight hours specified is arbitrary. The abrasive blast may or may not meet the required standard of cleanliness before the time has transpired. Depending on the site logistics and the size and configuration of the tank, environmental controls such as dehumidification equipment

and holding agents are often used which negate any time requirement to coat, provided the surface cleanliness has not been compromised. The emphasis should be on the quality of the surface preparation only. This regulation may actually discourage the use of environmental controls. This option should be available to applicators.

Also, this regulation does not make a distinction between a completely new installation and repair of an existing lining where abrasive blasting may be substituted due to limited work scope. Alternate surface preparation methods are available for lining repairs based on the coating manufacturers' recommendations.

Response 4.4.25. DEC has modified the requirement to remove section 613-4.2(d)(3)(ii) and will rely on the requirement that "the lining must be applied and cured in strict accord with manufacturer's specifications" (613-4.2(d)(3)(v)).

Comment 4.4.26. 613-4.2(d) (Repairs) states:

(3) Coating (lining) specifications

(iii) The coating must be of sufficient thickness, density, and strength to form a hard impermeable shell which will not crack, soften, or separate from the interior surface of the tank. The coating when applied to properly prepared steel must maintain a permanent bond to the tank.

While a selected coating is intended to maintain a permanent bond to the tank, only after the next out-of-service inspection can the determination be made whether the coating is still bonded. Many factors affect the longevity of the lining including operational parameters. The regulation as written describes the intent of a good lining system. There is no definition of "permanent" in the regulation.

Response 4.4.26. DEC has modified the requirement to remove the sentence, "The lining when applied to properly prepared steel must maintain a permanent bond to the tank." DEC believes reliance upon the manufacturer's guarantee under section 613-4.2(d)(5) provides sufficient assurance that the lining will be adequately protective.

Comment 4.4.27.1. Coating the interior of tanks is not required; however, top-side corrosion protection on tank bottoms is used by many terminal operators as a best management practice to mitigate top side corrosion. While liners are not required, the proposed regulations designate lining specifications, application methods, inspection techniques and a manufacturer's guarantee.

The inspection methods required by the proposed regulations at 613-4.2(d)(4) may not allow a holiday test to be performed on an existing liner that has been in service as allowed under *API 652 – Lining of Aboveground Petroleum Storage Tank Bottoms*.

As proposed in 613-4.2(d)(5) (Manufacturers guarantee), "The manufacturer or representative must guarantee to the owner in writing that the coating will not leak the product specified in storage and the lining will not deteriorate in any way for a period of 10 years."

The purpose of the lining is to prevent top side corrosion, not to prevent leaks. In addition, requiring a guarantee that the coating will not deteriorate in any way for a period of 10 years is an unachievable goal given that that some degree of degradation is expected to occur under normal conditions.

The implementation of such onerous requirements related to coatings will make it difficult for operators to utilize this best management practice and could be detrimental to spill prevention efforts in New York.

Recommendation: We recommend that the coating (lining) specifications in 613-4.2(d)(3) be replaced with the language in the CBS regulations 6 NYCRR Part 598.9(d)(2) which states that tanks may be lined “in accordance with API 652, NLPA 631 or in accordance with an equivalent consensus code, standard or practice developed by a nationally recognized association or independent testing laboratory.”

Comment 4.4.27.2. While liners are not required, the proposed regulations have gone so far as to designate lining specifications, application methods, inspection techniques and a manufacturer’s guarantee.

The inspection methods required by the proposed regulations 613-4.2(d)(4) may not allow a holiday test to be performed on an existing liner that has been in service. The most widely accepted methods are found in *API 652 – Lining of Aboveground Petroleum Storage Tank Bottoms*.

The purpose of the lining is to prevent top side corrosion of the tank floor not to prevent leakage. The Departments requirement in 613-4.2(d)(5) mandating a 10 year guarantee from suppliers for any tank liners, identifies a standard which today is not commercially available. Inclusion of this requirement may discourage the use of floor linings. As a point of information both NACE and API have come to an agreement on identical language governing corrosion protection. There are three different definitions that serve the industry: 1) a lining refers to the protective coating that is applied to the product side of a tank bottom to prevent active corrosion, 2) a liner is a flexible membrane that is installed under a tank bottom or within an emergency containment dike to prevent undesired permeation, and 3) a coating is a protective material that is applied to the surface of an object such as a tank, piping, structural support, building etc., to prevent active corrosion.

As a point of reference, the CBS regulations states in 6 NYCRR Part 598.9(b)(2) that tanks may be lined “in accordance with API 652, NLPA631 or in accordance with an equivalent consensus code, standard or practice developed by a nationally recognized association or independent testing laboratory.”

Recommended Action: We recommend that the Coating (lining) specifications in 613-4.2(d)(3) be replaced with the language in the CBS regulations 6 NYCRR Part 598.9(b)(2) which states that tanks may be lined “in accordance with API 652, NLPA631 or in accordance with an equivalent consensus code, standard or practice developed by a nationally recognized association or independent testing laboratory.”

Comment 4.4.27.3. The proposed Regulation (613-4.2(d)(5)) is beyond any standard of reasonableness in requiring a manufacturer’s guarantee that the lining will not deteriorate in any way for a period of ten years. The deterioration rate of the lining material is dependent upon a number of external and internal factors outside the manufacturers’ control, including the laws of mother-nature. Furthermore, the language seems to imply that coatings may be used to prevent the product from leaking. Internal coatings and linings are never intended to prevent leaking, but rather to deter steel corrosion and maintain product quality.

Response 4.4.27. These requirements are existing requirements found in former section 614.12. In addition, facilities may request a variance to the above requirements in order to use other industry standards. This issue will be given consideration in a future rulemaking.

Comment 4.4.28. 613-4.2(d) (Lining of Underground [Aboveground] Tanks) states:

(1) Permanent Repairs

- (i) All repairs must be permanent in nature and equal to or better than the standards of original construction. Such repairs must consist of:
  - (a) Steel welds or steel patches which are welded in place in accordance with accepted practices; OR
  - (b) Practices set forth for lining of underground tanks, as described in section 3.2(d) of this Part.

The proposed Regulation states that repairs must be PERMANENT and the same or better than the standards of original construction. Repairs must also consist of either steel welds or patches, OR practices set forth for lining USTs in Section 3.2(d) therein. By virtue of its use of 'or,' the language could be interpreted to allow linings to be utilized for permanent repairs. Without corrective action, the Regulation directly contradicts (iii) below and API 653.

Response 4.4.28. DEC has modified clause 613-4.2 (d)(1)(i)(b) to refer to the lining practices for AST systems as specified in paragraph 613-4.2(d)(3) and has removed subparagraph 613-4.2(d)(1)(iii) so that there is no contradiction.

Comment 4.4.29. 613-4.2 (d) (Repairs) states:

- (5) Manufacturers guarantee. An interior coating must be installed under the direction of the lining manufacturer or a certified representative. The manufacturer or representative must guarantee to the owner in writing that the coating will not leak the product specified in storage and the lining will not deteriorate in any way for a period of 10 years. A copy of the guarantee must be kept by the owner for the life of the tank.

Using an interior coating to protect against leakage of product violates the language and intention of API 653 which is intended to govern the inspection, repair, alteration and reconstruction of above ground storage tanks. Linings should never be used to prevent leaks of the product specified. All matter deteriorates over time and to require a lining material to not deteriorate in any way for a period of ten years violates fundamental laws of chemistry, physics, and entropy.

Linings serve to protect the steel from corrosion. They function in providing additional service life to the asset and are used in calculations to determine the next maximum out-of service inspection interval in accordance with API 653, notwithstanding any shorter out-of-service inspection interval requirements as determined by jurisdiction. No financially responsible manufacturer or representative within the United States would be willing to warrant in accordance with the above requirements.

Many warranties for coatings have disclaimers for conditions beyond the control of the manufacturer, including facility operations. Coating manufacturer are typically not privy to the tank inspection results, the repair criteria and the quality of the welding repairs. Proper welding

repairs are critical. Coatings should not substitute for this. These would most likely be disclaimed. The warranty would only be possibly called into effect upon an inspection at the next out-of-service interval. Even properly installed linings may need minor repairs at a ten-year out-of-service inspection.

This regulation does not distinguish between existing linings and new linings. Existing linings in good condition may be repaired and maintained if they continue to demonstrate effective service life.

This regulation may actually discourage responsible owner/operators from installing linings, where the use of linings should be encouraged, but otherwise not required by regulation.

In the interest of improved regulation, the agency should consider adopting the following verbiage to completely replace Section 3 Coating (lining) specifications:

Tank lining installation and repair activities shall be done in accordance with *API 652, Lining of Aboveground Petroleum Storage Tank Bottoms*, Fourth Edition, September 2014, or in accordance with an equivalent consensus code, standard or practice developed by a nationally recognized association or independent testing laboratory.

API Standards and Recommended Practices that are otherwise cited in the proposed regulations are internationally recognized documents that are incorporated in many federal and state regulations. These documents are developed by industry experts, seeking to develop and encourage industry best practices. They are current, concise and consistent.

While API 650 and 653 are continually reviewed and developed, API RP 651 (cathodic protection) and API RP 652 (linings) are reviewed every five years. The latest editions of these documents were published in fall of 2014 and represent current best industry practices.

Response 4.4.29. See Response 4.4.27.

Comment 4.4.30. The proposed Regulation (613-4.2(d)(3)(iv)) must differentiate between the inspection and repair of new versus existing coatings. Holiday testing is not recommended for linings that have previously been in service, since the presence of moisture in the film can cause damage when exposed to voltage (according to API 653 10.2e 4th ed. (2012)).

Response 4.4.30. See Response 4.4.27.

Comment 4.4.31. 613-4.2(d) (Repairs) states:

- (4) Inspection of coating. The coating must be checked for blisters, air pockets, and electrically tested for pinholes. The coating thickness must be checked with an Elcometer Thickness Gauge or equivalent and the hardness checked with a Barcol Hardness Tester or equivalent to assure compliance with manufacturers specifications. Any defects must be repaired.

For newly applied coatings, electrical testing for holidays is a suitable protocol. For existing coatings, there are limitations to electrical testing as outlined in API 652 Fourth Edition. If isophthalic-polyester-based coatings are not considered, Barcol hardness is not applicable. Some manufacturers rely on a Durometer reading to test for cure. Others require a solvent rub test per ASTM protocols.

Also, the proposed regulation does not distinguish between inspection and repair of existing linings and inspection of new linings.

Response 4.4.31. See Response 4.4.27.

Comment 4.4.32. Commenter recommends adding language in braces below. Guidance for the proper handling of accumulated water in the secondary containment area is recommended (under 613-4.2(f)):

- (f) Stormwater management. Stormwater which collects within the secondary containment system must be controlled by a manually operated pump or siphon, or a gravity drain pipe which has two manually controlled dike valves, one on each side of the dike. All pumps, siphons and valves must be properly maintained and kept in good condition. If gravity drain pipes are used, all dike valves must be locked in a closed position except when the operator is in the process of draining clean water from the diked area. {The accumulated water must be examined and determined to be free of oil contamination before secondary containment areas are drained. If any oil sheen or accumulation of oil is observed, an alternate method of draining the area must be employed. The contaminated water may be removed or diverted to an onsite treatment facility or oilwater separator prior to disposal. }

Response 4.4.32. DEC has modified section 613-4.2(f) to include text similar to that of former section 613.3(c)(6)(iv).

Comment 4.4.33. Regarding 10 year inspections outlined in 613-4.3(b)(2): existing regulations specifically state that, "(r)inspection of all tanks is required no later than ten (10) years from the date of the previous inspection." However, the proposed regulations do not explicitly state that 10-year inspections must be conducted every ten years (as opposed to a single, initial 10-year inspection).

Response 4.4.33. Section 613-4.3(a)(1)(ii) provides that subject facilities "must be inspected at 10-year intervals."

Comment 4.4.34. The proposed regulations require tightness testing every ten years on all ASTs. This again is an overly broad approach to regulation. By their very nature, leaks are readily detectable in aboveground tanks. The regulations require monthly inspections of the conditions of the tanks and immediate repairs. To require that businesses take tanks (regardless of size) out of service to be tested, undergo the cost of tightness testing for every tank, and be required to file even more paperwork in an already overburdened regulatory environment for tanks for which leaks can be visually observed even to the untrained eye is not warranted.

Response 4.4.34. Tightness testing of ASTs is just one option to comply with the ten-year inspection requirement and is not required for all ASTs. Ten-year inspections only apply to certain Category 1 ASTs.

Comment 4.4.35. [Commenter] suggests allowing 24/7 remote monitoring of the interstitial space of ASTs with electronic leak detection systems (613-4.3(b)(1)), in place of visual inspections, at unmanned facilities. This continuous monitoring is far more effective than a monthly visual

inspection in detecting anomalies in the tank system. [Commenter] suggests amending this section by adding:

- (iv) Continuous remote monitoring of the secondary containment of ASTs at unmanned sites can be conducted in lieu of a physical monthly AST inspection when applied in conjunction with a quarterly visual AST inspection.

Response 4.4.35. Monthly visual inspections of ASTs evaluate much more than leak detection. Continuous remote monitoring of the secondary containment does not substitute for monthly visual inspections.

Comment 4.4.36. Several of the timeframes for conducting investigations and repairs under 613-4.4 are unrealistic and burdensome. However; to be consistent with other sections of this proposal (i.e. 613-6.3(a)(6)), [commenter] recommends "as soon as practicable" is used in place of "immediate" under 613-4.4(a):

- (2): The word "immediately" should be omitted from this proposed requirement for repairs which includes "... unless system equipment is found to be defective but not leaking, and is [immediately] repaired or replaced as soon as practicable." Since it is not realistic to assume that a tank maintenance contractor will have all parts necessary for all repairs or replacement of monitoring devices. It may take several days for a tank operator's maintenance contractor to supply and install replacement parts or obtain all materials necessary to perform a repair.
- (3): Some release detection alarms will respond solely to the presence of water when no leak has occurred. The section on Reporting Suspected Leaks (from alarms) should be revised to state, "... unless the monitoring device is found to be defective and is [immediately] repaired, recalibrated or replaced as soon as practicable; or if within 48 hours. it is determined that a cause other than product release triggered the leak detection alarm, and additional monitoring does not confirm a release of product." Two-hour reporting is not practicable, nor is this sufficient time to permit a tank operator to determine if an interstitial leak alarm from a tank or piping system (including piping sumps) is from an actual leak of product, or is condensation or water intrusion. This will also place an undue burden on regional DEC office, with fielding and closing out unnecessary 'suspected leak' reports.

Response 4.4.36. See Response 4.2.20.

Comment 4.4.37. [Commenter] requests clarification on the requirements for the release, response and corrective action for spills that are less than five gallons. Below is the citation to paragraph (d) of Section 613-4.4 of the draft regulation that pertains to this matter, with emphasis on subparagraph (iv):

613-4.4 Reporting, investigation, and confirmation

(d) Response to spills and overfills.

- (1) A facility must report every spill to the Departments Spill Hotline (518-457-7362) within two hours, contain the spill, and begin corrective action in accordance with the



requirements of Subpart 613-6 of this Part except if the spill meets the following conditions:

- (i) it is known to be less than five gallons in total volume;
  - (ii) it is contained and under the control of the spiller;
  - (iii) it has not reached and will not reach the land or waters of the state; and
  - (iv) it is cleaned up in accordance with the requirements of subpart 613-6 of this part within two hours of discovery.
- (2) A facility must immediately discontinue operation of any leaking AST or associated equipment and temporarily close the AST system pursuant to provisions of section 4.5(a) of this Part.

The language in subparagraph (iv) above, which refers to Subpart 613-6 that deals with Release Response and Corrective Action, is very broad and would include all the release response and corrective action requirements for spills no matter how large. [Commenter] does not believe that this broad applicability is the intent of the DEC.

Instead, [commenter] thinks the DEC more likely intended, in the case of spills less than five gallons, to refer to Section 613-6.2 (a) and (b) that deal with Initial Response as cited below:

#### 613-6.2 Initial response

In response to a release from a tank system, a facility must immediately perform the following initial response actions:

- (a) Identify and mitigate fire, explosion, and vapor hazards;
- (b) Take immediate action to prevent any further release of petroleum into the environment; and
- (c) Report the release to Department Spill Hotline (518-457-7362) within two hours of discovery.

Accordingly, [commenter] recommends that subparagraph (iv) of Section 613-4.4(d)(1) quoted above be revised as follows to include the citation, Subpart 613-6.2 (a) and (b), as noted below in order to clarify applicability of the language:

- (iv) It is cleaned up in accordance with the requirements of Subpart 613-6.2 (a) and (b) within two hours of discovery.

The above revised citation would make clear the requirements for release response for spills less than five gallons.

Response 4.4.37. DEC has modified the language in section 613-4.4(d)(1)(iv), and corresponding provisions in Subparts 2 and 3, to remove the citation to Subpart 613-6.

Comment 4.4.38. Some of our member companies' unmanned sites are located in remote areas and in some instances it will take longer than two hours for a contractor to schedule and mobilize to a site, let alone complete the clean-up activities within two hours. As mentioned previously, DEC's desire for consistency with EPA requirements is not reflected in the proposed requirements; 613-4.4 (d)(1)(i) (Reporting, investigation and confirmation) states that one of the conditions to

qualify for an exception from the spill-reporting requirement is that the spill must be less than five gallons. Note that EPA 40 CFR 280.53 does not require the reporting of spills less than 25 gallons if cleaned up within 24 hours. [Commenter] recommends the following revision:

613-4.4(d) Response to spills and overfills

- (1) A facility must report every spill to the Department's Spill Hotline (518-457-7362) within two hours, contain the spill, and begin corrective action in accordance with the requirements of Subpart 613.6 of this Part except if the spill meets the following conditions:
  - (i) it is known to be less than twenty-five gallons in total volume;
  - (ii) it is contained and under the control of the spiller;
  - (iii) it has not reached and will not reach the land or waters of the state; and,
  - (iv) it is cleaned up in accordance with the requirements of subpart 613.6 of this part within two hours of discovery; or if not practicable, emergency response actions have been initiated (e.g. a contractor has been contacted and begun coordinating emergency response actions) within two hours.

Response 4.4.38. See Response 4.2.21.

Comment 4.4.39. Leak detection is not required as long as the AST system is empty (613-4.5).

However, the regulations do not specify whether or not a monthly inspection is required once we confirm that the AST system is empty. I believe future revisions to the Petroleum Bulk Storage Regulations should include further clarification on the requirement of a monthly AST inspection if the system is confirmed to be empty.

Response 4.4.39. DEC has modified section 613-4.5(a)(1) to clarify this requirement.

Comment 4.4.40. There appears to be no language in the proposed regulations which allows for the re-activation or re-commissioning of a tank which has undergone permanent closure under 613-4.5(b); is this accurate? The regulations need to address the re-commissioning of a tank that is otherwise capable of being used and/or has been used in the past in a facility, which however is not currently being used to store petroleum and may have been permanently closed. If this provision is not corrected there appears to be no avenue for an Oil and Gas operator to store such de-commissioned tanks (i.e. subject to permanent closure) that presumably are fully capable of being used again, at a temporary (longer than 12 months) location, with the intent of being able to use these tanks at another facility in the future.

Response 4.4.40. Tank systems that have been permanently closed may only be returned to service if they meet Category 3 standards. AST systems out-of-service for more than 12 months at facilities with one or more operating tank systems are not required to be permanently closed and may be returned to service.

Comment 4.4.41. The existing aboveground storage tank definition 612.1(c)(17) for 'out-of-service' allows for "...facilities or tanks which are used for seasonal storage, for surcharge storage, or for

standby storage, are not considered out-of service" but the proposed definition (613-4.5(a)(3)) excludes this common practice.

Both the existing and proposed Chemical Bulk Storage (CBS) regulations maintain that facilities or tanks which are used for seasonal storage, for surcharge storage, or for standby storage, are not considered out-of service as per 6 NYCRR Part 596.1(c)(35). Is there a risk or other justification demonstrating that a petroleum AST must be permanently closed while a chemical AST may remain out of service for periods greater than 12 months?

The proposed definition would demand permanent closure of such tanks, if empty of products for 12 months, even if the tank were clean, emitting no pollutants whatsoever, and maintained for efficient return to service. This could drive the permanent closure of dozens of large aboveground storage tanks, as well as compel terminals to operate any excess tankage – despite economic and environmental inefficiencies – solely to prevent the asset being taken from them due to the new provision.

As there is no process allowed by the regulations to return a permanently closed tank to service, this would render these assets unusable. At a value of approximately \$5MM per tank, this would mean a significant financial loss upon the effective date of these regulations. Will the Department be including provisions for returning a permanently closed tank to service?

Recommendation: The language "...facilities or tanks which are used for seasonal storage, for surcharge storage, or for standby storage, are not considered out-of service" should remain in the definition or amend the language in Subpart 613-4.5(a)(3) to read tanks that remain temporarily out-of-service for greater than 12 months must be emptied and cleaned by removing all liquids, vapors, and sludge and isolated to prevent product entry OR obtain an extension from the DEC OR meet the requirements of Permanent Closure in 4.5(b). There should also be provisions for bringing a tank that has been permanently closed back into service.

Response 4.4.41. See Response 4.1.15.

Comment 4.4.42. Section 613-4.5(a) requires:

- (2) When an AST system is temporarily out-of-service for a period of three to twelve months, the facility must also comply with the following requirements:
  - (i) Leave vent lines open and functioning; and
  - (ii) Cap and secure all other piping, ancillary equipment, and manways.

This requirement does not include the original 612.1(c)(17) regulations definition of 'Out of service,' which means a facility or portion thereof no longer in use. Facilities or tanks which are used for seasonal storage, for surcharge storage, or for standby storage, are not considered out-of-service. The elimination of this definition creates an additional burden for terminals if such a tank is not operated for over three months. As an example, tanks that might only be used for heating oil storage during the heating season, for approximately six months of the year, would have to be temporarily closed under the revised regulation. Due to market conditions and pricing, the heating oil tank might be filled shortly after the heating season concludes (in less than three months) or might be filled six months later, just before the new heating season begins. Based on the unpredictable nature of the heating oil market, it is usually not possible to determine exactly when a tank might be refilled. Based on this, [commenter] requests the Department consider retaining the current definition of 'Out-of-service' currently included in 612.1(c)(17) and

incorporating such operating flexibility into the revised regulation 613-4.5(a). This will allow the operational flexibility to fill such a tank according to the terminals needs, while not imposing a temporary closure that might only last for a few days or a few weeks.

Additionally, if an owner/operator continues to manage a nearly empty tank according to all industry and required management standards/practices (i.e. regular inspection, leak monitoring, corrosion protection, etc.), there is no reason to implement the Temporary Out-of-service requirements. The Temporary Out-of-service requirements should only be required if the operator wishes to suspend all normal and required management procedures used when the tank is in service. The Department should consider language in this section that allows a tank to remain active if all normal management practices continue to be implemented and allow for placement of a tank in Temporary Out-of-service status if the owner or operator wishes to suspend their normal management practices for that tank.

Section 613-4.5(a) also requires:

- (3) When an AST system is temporarily out-of-service for more than 12 months, the facility must permanently close the AST system in accordance with subdivision (b) of this section, unless the Department provides an extension of the 12-month temporarily out-of-service period.

The requirement for the Permanent Closure of an AST system if the system is temporarily out-of-service for more than 12 months presents possible operational issues and unnecessary burden, should the terminal operator need to return the tank to service. Due to market and operating conditions, it is possible for a tank to remain idled for a period of one year or longer. In general, an operator not using a tank for such a period of time would usually remove all product and its residues, clean and gas-free the tank and isolate the tank by disconnecting and capping all pipes to and from the tank. With the tank pipe connection points and man-ways left open, floatation is prevented by allowing excessive stormwater to enter and drain from the tank. Terminals will also usually keep all dike areas drained, which also will prevent floatation. If a tank remains out-of-service for a prolonged period, the general practice is to perform a full API-653 inspection and make any necessary repairs before the tank is placed back into service.

Permanent Closure of a tank, seems to imply that the tank will not ever be placed back into service. Due to the extraordinary cost of building a tank, terminals will idle a tank for long periods as described above. It is not uncommon for such a tank to be idled for several years and when business needs dictate, inspect the tank, repair the tank and return the tank to service. Based on this, [commenter] respectfully requests that the Department consider the difference of long-term idling of a tank (Temporarily Out-of-service) and Permanent Closure. The revised regulation does not seem to reflect typical long-term operating practices for what the industry might consider a longer term idling of a tank. At a minimum, flexibility should be added to the revised regulation to include renovation and reactivation of a tank idled for a long period. No matter how long a tank has been idle, if such a tank is properly inspected and properly repaired, it then can be safely returned to service. If an idled tank that is inspected and it cannot be economically repaired, then the tank should be managed as a Permanent Closure.

Response 4.4.42. See Response 4.1.15.

Comment 4.4.43. 613-4.5(a)(1)(2) provides requirements for an AST that is temporarily out-of-service for periods of less than 12 months. However, according to 613-4.5(a)(3), if the AST is

out-of-service for greater than 12 months, the facility must permanently close the AST system in accordance with 4.5(b) unless the DEC provides an extension. Permanent Closure is defined in 613-4.5(b) and requires that to permanently close a tank the facility must empty and clean it by removing all liquids, vapors and sludges and every tank permanently closed must, if not removed, be stenciled with the date of permanent closure

The proposed definition would demand permanent closure of such tanks, if empty for 12 months, even if the tank were clean, emitting no pollutants whatsoever, and maintained for efficient return to service. To keep tankage from being subject to Permanent Closure, terminal operators would be compelled to throughput oil through tanks, not because of market conditions or contractual obligations, but only to prevent the tanks being subject to Permanent Closure. This would result in unnecessary product transfers causing an increase in the potential for a spill and increased air emissions from tanks containing product that would otherwise be empty.

Recommendation: The language in Section 613-4.5(a)(3) be amended to read tanks that remain temporarily out of service for greater than 12 months must be emptied and cleaned by removing all liquids, vapors, and sludge or obtain an extension from the DEC or meet the requirements of Permanent Closure in 613-4.5 (b).

Response 4.4.43. See Response 4.1.15.

#### **4.5. Comments on Subpart 613-5: Delivery Prohibition.**

Comment 4.5.1. [Commenter] recognizes that DEC, in response to comments, has incorporated language into the proposed sections 598.13(a)(3) and 613-5.1(c) that allows DEC to "withhold the imposition of the delivery prohibition for a period that may not exceed 180 days, where there is no evidence that the tank system is leaking and imposing the delivery prohibition would jeopardize public health or safety." [Commenter] commends DEC for adding this provision. However, the 180-day limit on the withholding of the delivery prohibition is insufficient to protect public health and safety.

For example, New York City's Department of Environmental Protection provides water to millions of people daily, and also treats sewage for millions of people daily; interruptions in operations could incapacitate critical water supply and/or wastewater treatment operations. Moreover, since so many tank systems have secondary containment, even a leak in a tank does not necessarily represent an escape of product to the immediate surrounding environment.

EPA's "Grant Guidelines to States for Implementing the Delivery Prohibition Provision of the Energy Policy Act of 2005," page 4, rightly recognizes that delivery prohibition may be inappropriate when contrary to the best interests of the public:

A state retains the discretion to decide whether to identify an underground storage tank as ineligible to deliver, deposit, or accept product based on whether the prohibition is in the best interest of the public. In some cases, prohibition of delivery, deposit, or acceptance of product to an underground storage tank is not in the best interest of the public, even in the cases of significant and/or sustained noncompliance (e.g., certain emergency generator underground storage tanks). In other cases, states may choose to classify an underground storage tank as ineligible to receive product but then authorize delivery in emergency situations.

DEC should exclude public utilities from the delivery prohibition. Barring that solution, DEC should at least withhold the delivery prohibition from public utilities where there is no escape of

product from an unknown source to the immediate environment. Barring either of these solutions, DEC should at the very least remove the 180 day time limit on the withholding of the delivery prohibition when its imposition would jeopardize public health and safety.

Response 4.5.1. Under section 613-5.4, DEC can terminate the delivery prohibition at any time on its own initiative. If the situation calls for imposing a delivery prohibition, DEC's opinion is that it is reasonable for the violator to fix or replace the tank system or equipment within 180 days or to come into compliance with the terms of a consent order that includes an appropriate schedule and any needed remedial measures. If warranted, DEC could seek a summary abatement order, negating the need for a delivery prohibition.

The law forbids the operation of tank systems that are leaking petroleum. See ECL section 17-1007(3). There are no exceptions to this mandate.

Comment 4.5.2. Instead of "providing the facility operator, if one is present, a copy of the notification of the imposition of the delivery prohibition" (in 613-5.1(a)(2)), why couldn't the Department notify the Class A Operator or the Class B Operator, whose information must be maintained on site, of the imposition of the delivery prohibition and allow for immediate resolution?

Response 4.5.2. DEC will provide written notification to the facility at the time that the tag is affixed to the tank system. The Class A and/or Class B Operator can train the Class C Operator how to respond to DEC's notification of the imposition of a delivery prohibition.

Comment 4.5.3. In response to our initial comments that written notice of the imposition be also transmitted via email, the Department responded that it would use its discretion on how notice would be given. However, the regulations allow for written notification to be sent within five business days of the affixing of a tag. To provide facilities with immediate notification of, and the reasons for, the delivery prohibition (when an operator is not present to receive the written notification at the facility), 613-5.1(a)(2) should be amended to read:

At the time that it affixes a tag, the Department will provide to the facility operator, if one is present, a written notification of the imposition of the delivery prohibition that will include the finding of the relevant condition(s) at the facility. The Department will then send the written notification to the facility **immediately by email to the email address listed in the current facility registration or license and** via certified mail to the correspondence address listed in the current facility registration or license within five business days following the time that the tag is affixed to the tank system.

Response 4.5.3. DEC intends to use additional communication mechanisms when possible.

Comment 4.5.4. [Commenter] is concerned that this could potentially pose hardship to tank operators if appropriate enforcement discretion is not used. We respectfully request that DEC provide additional clarity to the process / procedures to be used before a tank system would be red-tagged. Furthermore, with respect to removal of tags, we would urge that the timeframe should be based on calendar days, rather than business days. Our facilities, and probably most businesses affected by this are not strictly a Monday-Friday operation.

Response 4.5.4. There is no procedure for the regulated community to follow before the imposition of a delivery prohibition, other than remaining in compliance. Regarding removal of tags, DEC intends to be as expeditious as possible, but there is a two-business-day limit on how long tags will remain.

Comment 4.5.5. Based on field inspection experiences, [commenter] members are wary of vesting regional DEC personnel with the authority to shut down their gas station on grounds that are subjective or open to interpretation.

The proposed Tier 1 conditions that can precipitate red-tagging – especially 613-5(a)(3)(ii) – can be confusing to tank operators due to the repeated references to other sections of regulation. To make it easier to follow, and thus facilitate compliance, we recommend listing all the specifics in this section, as opposed to having to refer back to previous pages.

613-5.1(a)(3)(ii)(a) of the draft references “missing equipment,” while ensuing subparagraphs (b), (c) and (d) do not. Consequently, improper maintenance could be interpreted as constituting a Tier 1 violation, which was not our understanding of the intent of Tier 1 violations.

While an expedited hearing conducted within 15 days seems reasonable with the burden of proof being on the Department, allowing another 30 days to render a decision is unacceptable. That could force a small business into bankruptcy if it is barred from selling gasoline for 45 days yet potentially not have leaked one drop of product. One business week should be more than sufficient time to render a decision.

Response 4.5.5. The hearing process is intended to address the situation in which a facility believes that a tag has been mistakenly applied. In all situations, a facility may submit information demonstrating that it is in compliance or has corrected the condition(s) that prompted DEC to impose the prohibition.

Comment 4.5.6. It is suggested that 613-5.4 be reviewed for ways to speed up the investigation and release of delivery prohibition. The way the regulations are currently written, the service station has three options for removal of delivery termination,

1. Department Initiative,
2. Review of Compliance Submissions, and
3. Expedited Hearing.

The first option has no timelines, the second option would take a minimum of 7 days, and the third option (expedited hearing) could take up to 47 days. It is suggested that the Department review data within one business day in option two. Additionally, once the Department makes a decision to remove the red tag, they have 2 business days to authorize removal. The process needs to be faster and it is suggested that after the department agrees the site has made their corrections and is back in compliance the red tag shall be allowed to be removed after a documented phone call or fax confirmation to the tank owner.

Response 4.5.6. DEC intends to be as expeditious as possible, but DEC has a limit of five business days to review compliance submissions. See Response 4.5.4 regarding how long tags will remain.

Comment 4.5.7. Red-tagging of a service station facility has significant economic costs, not only for the owner of the facility but also for the employees. Motor fuel retail sales operate on very thin margins, due in part to significant upfront costs including taxes for the product. The timeframe for resolving a red tag situation could be prolonged for more than several weeks. This situation could have serious implications on a service station locations financial viability.

There is no question that a red tag should be placed immediately in the case of a leak or probable leak. However, in the case of an equipment or operational deficit, it is submitted that providing a reasonable time frame to adjust a deficiency, with the red-tagging to occur if the deficiency is not remedied, would be more effective than immediately red-tagging a facility.

A procedure which would implement an approach to permit correction of equipment or operational deficiencies should be instituted.

Response 4.5.7. A tank system showing a Tier 1 condition due to the absence of essential equipment will not be allowed to receive deliveries. DEC believes that the process for resolving Tier 2 conditions (operational deficiencies) provides a reasonable time frame to correct a deficiency prior to imposition of the delivery prohibition.

Comment 4.5.8. [Commenter] is concerned that the provisions of proposed Subpart 613-5 and 598-13 dealing with delivery prohibition could create a significant hardship for tank operators if enforcement actions are not properly applied. [Commenter] operates very complex, yet extremely reliable electric, gas and steam systems for its customers. The ability to operate tank systems is a key component in maintaining reliability. The [commenter] recommends that additional guidance documents be issued to DEC field inspectors to clarify the tagging process and related procedures to be used before a tank system is "red-tagged."

For example, 613-5.1(a)(3)(i) states that a Tier 1 condition exists (mandating a delivery prohibition) when "a tank system is known to be releasing petroleum. If the source of the release cannot be determined upon inspection, then all tank systems at the facility that are probable sources of the release will be tagged."

If the [commenter] were to find a leaking pipe fitting in its fuel storage area that had resulted in a contained spill, [commenter] procedures require that the Department receive notification of that spill. If an inspector were to arrive on site and find the [commenter] actively attempting repairs while the leak into containment continued, the inspector could feel compelled to attach a delivery prohibition tag to the entire tank system. In such a case, the leak could be repaired and the spill cleaned up in a number of hours. However, the process to remove the tag could take days, possibly compromising the ability of the [commenter] to operate important systems associated with reliable service.

Furthermore, with respect to termination for delivery prohibition, we urge that compliance submission review and tag removal be performed within a shorter timeframe. [Commenter] requests that the following language be included in Subpart 613-5.4 and 598-13, "Termination of delivery prohibition;"

613-5.4(a)(2)(iii) / 598-13(d)(1)(ii)(c): The designated individual will provide a written decision to the facility within five business [calendar] days after the Department receives the facility's submission and tag.



613-5.4(b) / 598-13(d)(2): Within 2 business [calendar] days after a decision by the department that all Tier 1 and Tier 2 conditions at a facility have been resolved, the Department will remove or authorize the removal of the tag.

Response 4.5.8. DEC will issue appropriate guidance to inspectors on imposition of delivery prohibition. See Response 4.5.4 regarding how long tags will remain.

Comment 4.5.9. The provisions under the Expedited hearing section, 613-5.4(a)(3), do not contain a time limit for the ultimate decision nor do they state that the decision is a final and binding determination for Article 78 purposes. In contrast, 613-5.4(a)(2) titled Review of compliance submissions, specifically states the timeframe for issuance of the written decision and that the decision of the designated individual constitutes a final and binding determination. In our comments on the preliminary draft, the [commenter] pointed out that the Expedited Hearing process in the regulations ends with the hearing officer making a report to the Commissioner but does not indicate whether this report is the final agency determination or if there is some further decision issued by the Commissioner.

[Commenter] requests that the regulations clarify whether it is the hearing officer's report or a separate Commissioner determination that constitutes the agency's final and binding action for Article 78 purposes. If it is the Commissioner who issues the final decision, then the regulations should so state, there should be an opportunity to present arguments to the Commissioner concerning the hearing officer's report, and a time limit should be set for the issuance of the Commissioner's decision.

Response 4.5.9. DEC has decided to limit the opportunity to present arguments during the expedited hearing process such that all arguments must be presented finally before the hearing officer (administrative law judge) appointed to conduct the hearing. The record developed during the expedited hearing will be considered by the Commissioner. This process is intended to be expedited and having one full opportunity to develop the record will be sufficient. The issues presented will be very limited and will only relate to the existence of the Tier 1 or Tier 2 condition at the facility that prompted the imposition of the delivery prohibition. This process is somewhat akin to the summary abatement process under 6 NYCRR Part 620. There will be no deadline for a Commissioner decision. The delivery prohibition expedited hearing is almost certainly just one aspect of an overall enforcement action taken against the facility in which the DEC will seek penalties and any appropriate remedial action due to the violations at the facility. The delivery prohibition is likely aimed at immediately addressing just one aspect of the violations that will be subject of the overall enforcement action.

The Commissioner's decision following receipt of the hearing officer's report will constitute the final agency action as to the discrete issue resolved as part of the expedited hearing.

Comment 4.5.10. I'm still struggling with the concept of an "Expedited hearing" being not later than 15 days (613-5.4(a)(3)). We discussed the process of making sure that the violations are legitimate before reaching Delivery Prohibition, but it is pretty vague. As a multi-state and multi-site operator, I have encountered several "delivery bans" that were for wrong interpretations of a regulation (i.e. needing a 0.2 gph test on double-walled tanks doing interstitial monitoring) and there were no repercussions for being proven wrong, yet I'm out of business.

Response 4.5.10. A facility can avoid an expedited hearing by submitting information demonstrating that it is in compliance or has corrected the condition(s) that prompted DEC to impose a delivery prohibition.

#### **4.6. Comments on Subpart 613-6: Release Response and Correction Action.**

Comment 4.6.1. Subdivision 613-6.3(b) requires the facility to submit a report to the DEC summarizing abatement steps in the event of a release of petroleum from a tank system. This requirement appears to assume all releases require a subsurface investigation; it does not appear to consider that a release may be to a containment structure. This requirement should apply only to a release that has impacted the environment, and not to releases that are contained.

Response 4.6.1. The requirements referenced by the commenter are specific to releases, defined in 614-1.3(aw) as, "... spilling... of petroleum into the waters of the State or onto the lands from which it might flow into said waters." Therefore, a spill to a containment structure is not a release and the requirements of 613-6.3(b) would not be applicable.

### **5. General Comments on Rulemaking Documents and Process**

#### **5.1. The Regulatory Impact Statement/Regulatory Flexibility Analysis for Small Businesses or Local Government does not reflect certain costs/impacts that Part 613 will have on small businesses.**

Comment 5.1.1. [Commenter] is concerned, however, that a number of the proposed modifications are actually contrary to this goal. [Commenter] is particularly concerned that some of the proposed modifications go well beyond the requirements of the federal law and are unnecessarily burdensome and costly. As a result, contrary to the DEC representation, these proposed regulations, unless modified as discussed in this comment, will have additional fiscal and administrative impacts well beyond what is already required in state statute, and state and federal regulations. In addition, the administrative burdens resulting from this change could cause some tower owners to limit the number of parties on the tower, which could result in more tower construction or more likely present a barrier to new or smaller carriers because they may not be able to access existing towers.

Also, [commenter] notes that none of the following costs were addressed in the Regulatory Impact Statement and the Regulatory Flexibility Analysis for Small Business or Local Government:

- costs associated with modifying thousands of lease agreements to ensure that all parties are aware of their respective responsibilities;
- costs associated with facility upgrades;
- increased compliance monitoring and inspections;
- additional documentation and retention;
- increase in the number of regulated facilities;

- legal and administrative costs to property owners and to lessees;
- legal and administrative impacts to small business owners and landlords; and
- additional costs passed on to the public; resulting from compliance with the proposed technical standards imposed on existing tank systems

Additionally, if the DEC decides to leave the proposals which include additional financial burdens in place, [commenter] believes that these costs must be included in the Regulatory Impact Statement and the Regulatory Flexibility Analysis for Small Business or Local Government.

Response 5.1.1. The commenter fails to connect the purported cost impacts to any of the specific provisions of Part 613; therefore, DEC cannot respond to any of the specific bullet-point assertions of cost impacts. DEC's position in this rule making has been that there have been no substantive changes to existing requirements so no cost analysis is required.

Comment 5.1.2. Most, if not all of New York's oil and gas operators are small businesses. There are no large corporations involved in the extraction of crude oil in New York because the vast majority of oil wells are marginal stripper wells at best. The DEC Regulatory Flexibility Analysis for Small Businesses and Local Governments – regarding the proposed Repeal of Parts 612, 613, 614, and the new Part 613 – states, “None of the revisions to the proposed rules include any substantive changes to existing requirements concerning petroleum bulk storage (PBS) or used oil... The proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities.” This analysis of the current regulations and the impact of the proposed new regulations upon small business and particularly on the oil and gas operators involved in the extraction of crude oil in this state is simply NOT accurate.

I call your attention to the following current Part 612 regulations:

#### 612.1 General

- (a) Purpose. The purpose of this Part is to regulate petroleum storage facilities in order to protect the public health, welfare and the lands and waters of the state.
- (b) Applicability. This Part applies to all aboveground and underground petroleum storage facilities with a combined storage capacity over eleven hundred (1,100) gallons except the following:
  - (i) oil production facilities,
  - (ii) facilities licensed under Article 12 of the Navigation Law, and
  - (iii) facilities regulated under the Federal Natural Gas Act.
- (c) Definitions. Following is a list of terms and definitions which will be used in this Part:
  - (15) "Oil production facility" means all wells, flow lines, separation equipment, storage facilities, gathering lines and auxiliary non-transportation related equipment used for the storage and handling of unrefined petroleum.

With all due respect, these proposed regulations will have a HUGE impact on small oil and gas operators in the state of New York because, for the most part ALL oil production facilities that

are used currently to store and handle unrefined petroleum and are now excepted by the current regulations, would under the current proposed regulations, be required to register and operate all of their facilities at tremendous cost and expense. There is no way that anyone with any understanding of the oil and gas business could reasonably make the analysis that “none of the revisions to the proposed rules include any substantive changes to existing requirements concerning petroleum bulk storage (PBS) or used oil and further that the proposed rules contain no substantive changes to requirements that are imposed on subject facilities under existing statutory and regulatory authorities.” The practical effect of these proposed regulations would be crippling to the many small business that have for decades, operated in this state in the extraction of unrefined petroleum and to make any analysis to the contrary is not only NOT TRUE but it is also irresponsible.

Response 5.1.2. In 2008, the State Legislature changed the definition of “petroleum” so that oil production facilities came within the rule’s applicability. Pursuant to ECL section 17-1009(4), these facilities are required to be in compliance by July 21<sup>st</sup>, 2009. The statutory authority does not provide an exemption for oil production facilities.