

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 19 of the Environmental
Conservation Law ("ECL") and Part 232 of
Title 6 of the Official Compilation of
Codes, Rules and Regulations of the
State of New York ("6 NYCRR"),

ORDER¹

DEC Case No.
D1-2157-06-06

- by -

SAAD ADULAIMI,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Saad Adulaimi by service of a notice of hearing and complaint.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondent was served with a copy of the notice of hearing and complaint by certified mail delivered to 177 West Main Street, Smithtown, New York 11787-2606 and received by respondent on December 8, 2006.

By its complaint and supporting papers, Department staff alleged that respondent operated a dry cleaning facility in violation of provisions of article 17 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 232. Specifically, staff alleged that respondent: (1) failed to upgrade a third generation perchloroethylene ("PERC") dry cleaning machine; (2) failed to maintain required records at the facility; (3) operated a dry cleaning facility without a current and valid owner/manager certification; (4) operated dry cleaning machines at the facility without a current and valid dry cleaning operator certification; and (5) failed to have the facility inspected by an inspector registered with the Department or by an individual working under the supervision of such an inspector in 2002 and 2003.

¹ By memorandum dated March 13, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on December 28, 2006, and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated January 18, 2007, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Richard A. Sherman, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to my comments in this order.

Based upon the record, I conclude that the proposed civil penalty and the corrective measures recommended to address the violations are appropriate.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Saad Adulaimi is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint and supporting papers, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated: (A) 6 NYCRR 232.6(b)(3)(iii) by failing to upgrade a third generation PERC dry cleaning machine by June 26, 2003;² (B) 6 NYCRR 232.12 by failing to maintain required records at the facility; (C) 6 NYCRR 232.14(a)(1) by operating a dry cleaning facility without a current and valid owner/manager certification; (D) 6 NYCRR 232.14(a)(2) by operating dry cleaning machines at the facility without a current and valid dry cleaning operator certification; and (E) 6 NYCRR 232.16 by failing to have the facility inspected by an inspector registered with the Department or by an individual working under the supervision of such an inspector in 2002 and 2003.

IV. Respondent Saad Adulaimi is hereby assessed a civil penalty in the amount of sixteen thousand dollars (\$16,000). The civil penalty shall be due and payable within thirty (30) days

² The establishment of the June 26, 2003 date was addressed in the June 18, 2003 issue of the Environmental Notice Bulletin under "Public Notice."

after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500, Attention Michael Derevlany, Esq.

V. Respondent Saad Adulaimi is hereby directed, within thirty (30) days after service of this order, to fully comply with the requirements of 6 NYCRR part 232, and properly dispose of all PERC remaining in any decommissioned dry cleaning machine at the facility and file a "PERC Dry Cleaning Facility Notice of Equipment Shutdown" for any such decommissioned machine. In the event that respondent fails to take the directed corrective measures, Department staff may seal air contamination sources at respondent's facility in accordance with 6 NYCRR 200.5.

VI. All communications from respondent to the Department concerning this order shall be made to Michael Derevlany, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

VII. The provisions, terms and conditions of this order shall bind respondent Saad Adulaimi, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/
Louis A. Alexander
Assistant Commissioner

Dated: March 15, 2007
Albany, New York

TO: Mr. Saad Adulaimi (Via Certified Mail)
177 West Main Street
Smithtown, New York 11787-2606

Michael J. Derevlany, Esq. (Via Regular Mail)
NYS Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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of Article 19 of the Environmental
Conservation Law ("ECL") and Part 232 of
Title 6 of the Official Compilation of
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State of New York ("6 NYCRR"),

**DEFAULT
SUMMARY REPORT**

DEC Case No.
D1-2157-06-06

- by -

SAAD ADULAIMI,

Respondent.

Proceedings

Staff of the Department of Environmental Conservation ("Department") commenced this proceeding against respondent Saad Adulaimi by service of a notice of hearing and complaint, both dated December 4, 2006. The notice of hearing advised respondent that an answer must be served within 20 days of the receipt of the complaint and further advised respondent that he was required to attend a pre-hearing conference scheduled for January 4, 2007. Respondent failed to file a timely answer and did not appear at the pre-hearing conference.

By notice and motion dated January 18, 2007, staff moved the Office of Hearings and Mediation Services for a default judgment against respondent. Together with the motion for a default judgment, staff submitted the following: counsel's affirmation in support of the motion; a proposed order; a copy of the notice of hearing and complaint; an affidavit of mailing; and two affidavits of staff generally setting forth the potential environmental and public health hazards associated with respondent's violations, particularly in relation to perchloroethylene ("PERC"), a chemical used in dry cleaning.

Because staff's papers did not clearly establish the date of service of the complaint upon respondent, by letter dated February 2, 2007, I requested staff supplement its filing relative to proof of service. I further requested staff clarify (i) the basis of the first cause of action, as set forth in the complaint, and (ii) whether staff sought injunctive relief. A copy of my letter was also mailed to 177 West Main Street, Smithtown, New York 11787-2606; the address of respondent's dry cleaning facility as set forth in the complaint.

By supplemental affirmation dated February 13, 2007, staff provided: (i) proof of service upon respondent; (ii) an additional affidavit by program staff; (iii) a "Dry Cleaning Inspection Short Report" completed by staff in association with the June 22, 2004 inspection of respondent's facility; and (iv) a memorandum of law in support of staff's motion.

Default Procedures

Pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.15(b), a motion for default judgment must contain: (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order. Pursuant to 6 NYCRR 622.15(c), the assigned Administrative Law Judge is to determine whether "the requirements of subdivision (b) have been adequately met."

Findings

The following findings are based upon the papers submitted by staff, as identified above.

1. On December 4, 2006, staff served the notice of hearing and complaint upon respondent by certified mail, return receipt requested.
2. The postal return receipt was signed at respondent's dry cleaning business, Hi-Tech Cleaners, 177 West Main Street, Smithtown, New York, on December 8, 2006.
3. The notice of hearing and complaint advised respondent that a pre-hearing conference would be held on January 4, 2007 at the Department's Region 1 Office and that respondent's failure to attend the pre-hearing conference would result in a default and waiver of respondent's right to a hearing.
4. The notice of hearing and complaint advised respondent that he must answer the complaint within 20 days and that failure to answer would result in a default and waiver of respondent's right to a hearing.
5. Respondent did not file an answer to the complaint on or before December 28, 2006, and no extension of the time to answer was granted by staff. As of January 18, 2007, the date of

staff's motion for default order, staff had not received an answer to the complaint.

6. Respondent did not appear at the pre-hearing conference on January 4, 2007.

7. Staff included a proposed order with its motion for a default order.

Discussion

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made by certified mail and was complete upon respondent's receipt of same on December 8, 2006.

Respondent Saad Adulaimi failed to submit an answer to the complaint and his time to answer has expired. Additionally, respondent failed to attend the pre-hearing conference on January 4, 2007. In accordance with 6 NYCRR 622.15(a) respondent's failure to answer the complaint constitutes a default, as does respondent's failure to appear at the pre-hearing conference. Therefore, respondent is in default and has waived his right to a hearing.

The complaint set forth five causes of action relating to alleged violations of article 17 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 232 by respondent. Specifically, the complaint alleged respondent: (1) failed to upgrade a third generation PERC dry cleaning machine by June 26, 2003 in violation of 6 NYCRR 232.6(b)(3)(iii);¹ (2) failed to

¹ As originally pleaded in the complaint, this cause of action stated that respondent "violated 6 NYCRR 232.6(b)(3)(iii) by failing to drain perchloroethylene contained in a third generation machine prior to its removal." The affidavit of David R. Gardener, Division of Air Resources, submitted with staff's supplemental papers, clarified that the fact that the PERC reservoirs had not been drained, and the overall condition of the machine, indicated that it remained operational. Further, because the machine remained operational, respondent's failure to upgrade the machine violated 6 NYCRR 232.6(b)(3)(iii). As the Commissioner has previously noted "affidavits may be examined to confirm the factual allegations of the complaint or to otherwise assure the reviewer that the Department has a meritorious claim against the respondent" (Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7

maintain required records at the facility in violation of 6 NYCRR 232.12; (3) operated a dry cleaning facility without a current and valid owner/manager certification in violation of 6 NYCRR 232.14(a)(1); (4) operated dry cleaning machines at the facility without a current and valid dry cleaning operator certification in violation of 6 NYCRR 232.14(a)(2); and (5) failed to have the facility inspected by an inspector registered with the Department or by an individual working under the supervision of such an inspector in 2002 and 2003 in violation of 6 NYCRR 232.16.

By operation of the default, respondent is deemed to have admitted staff's factual allegations and has waived his right to a hearing. Staff's motion papers, including staff's supplemental filings, set forth factual allegations that demonstrate respondent's liability for each cause of action alleged by staff. Therefore, respondent's liability is established.

By his default, respondent is only deemed to have admitted the factual allegations in the complaint and staff still must establish that the relief sought is appropriate (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 4-5). Here, staff seeks a \$16,000 penalty.

Staff counsel relies on the gravity of respondent's violations to justify the penalty sought and states that the economic benefit derived by respondent was de minimis. Staff affidavits submitted in support of the motion for default speak to both the potential that poorly run dry cleaning facilities will release PERC into the environment and the potential harm such releases may cause. Counsel's affirmation states that "violations that involve failure to properly maintain and operate equipment that is necessary to prevent air pollution are extremely serious." Counsel also notes that respondent's violation of the record keeping requirements hampers staff's ability to assess the damages that may have been caused by respondent's unlawful activity. Further, because respondent violated the requirement for third-party inspections of the facility, "the violations were only discovered after an inspection by Department staff." Finally, counsel's affirmation notes the lack of cooperation by respondent, as demonstrated by respondent's failure to respond to the complaint and refusal to accept any settlement offers proposed by staff.

[internal citation omitted]).

The \$16,000 penalty sought by staff is well within the maximum penalty authorized by statute. There are six separately charged violations in the complaint.² ECL 71-2103(1) provides for a maximum penalty \$15,000 per violation and an additional penalty of \$15,000 per day the violation continues. Therefore, assuming solely for my purpose here that each violation represents a single, non-continuing offense, the maximum penalty authorized by statute for the six violations set forth in the complaint is \$90,000.

By its motion for default, staff also seeks a Commissioner's order directing respondent to, within 30 days of service of the order, (i) operate in compliance with 6 NYCRR part 232, and (ii) properly dispose of all PERC remaining in any decommissioned machine at the facility and file a "PERC Dry Cleaning Facility Notice of Equipment Shutdown" for any such decommissioned machine. Additionally, in the event that respondent fails to take the directed corrective measures, staff requests that such failure be deemed proper grounds for staff to seal air contamination sources at respondent's facility, in accordance with 6 NYCRR 200.5.

With regard to staff's request for corrective action, I note that respondent is required by law and regulation to operate in compliance with 6 NYCRR part 232, including requirements relating to decommissioning PERC dry cleaning machines. Respondent has never been, and is not now, authorized to act at variance with these requirements. Nevertheless, staff's request that respondent be in full compliance within 30 days of service of the Commissioner's order provides the necessary triggering mechanism with respect to the Department's authority to seal an air contamination source under 6 NYCRR 200.5. Therefore, staff's request that the Commissioner's order direct compliance with regulatory requirements within 30 days is appropriate and should be granted.

² There are five causes of action set forth in the complaint, however, the fifth cause of action alleges two separate violations; specifically, failure to have the facility inspected in 2002 and 2003. I also note that some of the causes of action relate to violations that appear to be of a continuing nature. For example, the third and fourth causes of action relate to allegations that respondent operated the facility without a valid owner/manager certification or operator certification, respectively.

Conclusions

Department staff provided proof of service upon respondent of the notice of hearing and complaint. Respondent failed to answer the complaint and also failed to appear at the pre-hearing conference. Therefore, respondent is in default and has waived his right to a hearing. The complaint states a claim upon which relief may be granted and Department staff has provided a sufficient basis for the requested civil penalty and corrective action.

Recommendation

I recommend Department staff's motion for default judgment be granted. I further recommend that the Commissioner issue an order assessing a sixteen thousand dollar (\$16,000) penalty against respondent and directing respondent to, within 30 days of service of the order, (i) operate in compliance with 6 NYCRR part 232, and (ii) properly dispose of all PERC remaining in any decommissioned machine at the facility and submit the required notice to the Department relative to any such decommissioned machine.

_____/s/
Richard A. Sherman
Administrative Law Judge

Dated: February 22, 2007
Albany, New York