STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law ("ECL") and Parts 201 and 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ALVIN HUNT, d/b/a OUR CLEANERS,

Respondent.

DEC File Nos. R2-20011030-219 and R2-20040310-61

DECISION AND ORDER OF THE COMMISSIONER

July 25, 2006

DECISION AND ORDER OF THE COMMISSIONER

By motion dated August 11, 2005, staff of the New York State Department of Environmental Conservation ("Department") seeks a default judgment against respondent Alvin Hunt, doing business as Our Cleaners ("respondent"). For the reasons that follow, Department staff's motion for a default judgment is granted. In addition, in response to some of the Administrative Law Judge's recommendations in the default summary report, I take this opportunity to clarify the current procedures and standards to be used by Administrative Law Judges when reviewing motions for a default judgment pursuant to section 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Facts and Procedural Background

Department staff commenced this administrative enforcement proceeding against respondent pursuant to 6 NYCRR 622.12 by service of a motion for an order without hearing and a complaint. In accordance with 6 NYCRR 622.3(a)(3), respondent was served with a copy of the motion for order without hearing and complaint by certified mail. The motion and complaint were received by respondent on or before July 19, 2005.

The complaint dated July 7, 2005 alleges that respondent owns, operates, or maintains two dry cleaning

facilities in Manhattan, New York -- one at 272 West 135th Street and the other at 2021 Lexington Avenue (“Facility # 1" and Facility #2,” respectively). The complaint further alleges that both facilities are doing business as Our Cleaners. Respondent allegedly operates a fourth generation perchloroethylene (“PERC”) dry cleaning machine at each facility, each of which is subject to the requirements of 6 NYCRR part 232.

The complaint alleged the following violations:

1. Respondent failed to timely submit to the Department a National Emission Standard for Hazardous Air Pollutants (“NESHAP”) compliance report for each of the facilities, in violation of 6 NYCRR 232.5(g) and 232.12(g), and part 63, subpart M of title 40 of the Code of Federal Regulations (“40 CFR”);

2. Respondent failed to timely submit a valid Air Facility Registration Certificate (“Registration”) for each of the facilities, in violation of 6 NYCRR 232.15 and 6 NYCRR subpart 201-4;

3. Respondent failed to timely submit the notification letter required by 6 NYCRR 232.5(a)(3) for each of the facilities;

4. Respondent failed to properly seal the vapor barrier room at Facility # 1 for a period from March 6, 2000 to May 14, 2003, in continuing violation of 6 NYCRR 232.6(a)(1); and

5. Respondent failed to retain on-site copies of the operation and maintenance checklists required under 6 NYCRR 232.8, for the period from January 24, 2001 to January 20, 2002.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired, and was not extended by Department Staff. Department Staff filed a motion for default judgment, dated August 11, 2005, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois who prepared the attached summary report.

DISCUSSION

I adopt the ALJ's report as my decision in this matter, subject to the following comments.

Section 622.15(a) of 6 NYCRR authorizes Department staff to move for a default judgment upon a respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at a hearing or pre-hearing conference, if one is scheduled pursuant to 6 NYCRR 622.8. The consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged (see 6 NYCRR 622.15[a]; Matter of Singh [Kuldeep], Decision and Order of the

Commissioner, Dec. 17, 2003, at 10; Rokina Opt. Co., Inc. v Camera King, Inc., 63 NY2d 728, 730 [1984]; McClelland v Climax Hosiery Mills, 252 NY 347, 351 [1930]).

A respondent in default, however, is not deemed to have admitted the allegation of damages in the complaint (see Rokina, 63 NY2d at 730; McClelland, 252 NY at 351). Accordingly, when a respondent defaults, only liability for the violations alleged in the complaint is established as a matter of law. Damages must still be proven. Thus, Department staff must offer some proof on its motion to support both the penalty and any remedial measures sought to be imposed against a respondent.

When reviewing a motion for a default judgment, the ALJ examines, among other things, (1) the proof of service upon the respondent of the notice of hearing and complaint or such other document that commenced the proceeding, and (2) proof of respondent's failure to appear or failure to file a timely answer (see 6 NYCRR 622.15[b][1], [2]). If the respondent is entitled to notice of the motion for a default judgment, the ALJ also examines the proof of service of the motion on respondent (see Matter of Singh (Makhan), Decision and Order of the Commissioner, March 19, 2004, at 2-3).

Once it is concluded that the aforementioned requirements have been met, the ALJ then considers whether the complaint states a claim upon which relief may be granted, and

examines whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.[1] Where the ALJ has questions concerning the penalty phase of the motion, the ALJ may conduct an inquiry, ordinarily on written submissions. Once it is concluded that staff's motion may be granted, the ALJ submits a summary report containing the ALJ's findings, conclusions of law, and recommendations on the motion to the Commissioner together with a proposed order (see 6 NYCRR 622.15[c]). Where the ALJ concludes that the motion must be denied, the ALJ issues a ruling stating the reasons for the denial. Department staff has the option of seeking leave to appeal to the Commissioner if it wishes to challenge an ALJ ruling denying a default judgment motion.

For the following reasons, based upon Department staff's submissions, I conclude that the motion for a default judgment may be granted, and that the proposed civil penalty and remedial measures may be imposed to address the violations charged in the complaint.

[1] To the extent that Matter of Myra Proffes, d/b/a M&B Cleaners (Commissioner's Order, Feb. 7, 2001) is read as limiting an ALJ's authority to analyze the penalty sought by staff, that is not the current practice. In 2003, the Department's internal procedures on default judgment motions were revised, among other things, to expand the role of the ALJ in reviewing and making recommendations on the motions, as reflected in this decision.

Proof of Service of the Complaint and Respondent's Default

I agree with the ALJ's conclusion that Department staff has established that respondent was served with the notice of motion for order without hearing and the complaint. Such service was complete upon respondent's receipt of the certified mailing containing the motion and complaint. Respondent received the mailing on or before July 19, 2005, the date postmarked on the signed return receipt. I also agree that the submissions prove that respondent defaulted in answering the complaint. Thus, respondent is in default.

Liability

As noted above, a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them (see Woodson v Mendon Leasing Corp., 100 NY2d 62, 71 [2003]; Rokina, 63 NY2d at 730). Accepting the factual allegations of the complaint as true, the ALJ in the first instance, and ultimately the Commissioner, examines the complaint to determine whether a violation of the ECL, any other statutes enforced by the Department, or the regulations implementing such statutes, is stated (see, e.g., Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 634 [1976]). If so, respondent's liability for the violations charged may be determined.

Proof of the substance of the allegations concerning liability need not be submitted on an administrative motion for a default judgment pursuant to 6 NYCRR 622.15 (see Feller, DEC's New Hearing Rules, 5 Environmental Law in New York [Matthew Bender & Co., Inc.], April 1994, at 61). However, where, as here, the motion is accompanied by evidentiary affidavits supporting the factual assertions underlying the claims of liability, those 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 (see, e.g., Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635-636 [1976]).[2]

In this case, I conclude that the factual allegations of the July 7, 2005 complaint state meritorious claims that respondent violated the regulatory provisions charged. Moreover, the factual allegations of the complaint are confirmed by the affidavit of Rasheed Carter, an Environmental Engineer in the Department's Region 2 office, and the notices of violation

[2] The standards applicable to a motion for a default judgment are somewhat different from those applicable to an unopposed motion for order without hearing under 6 NYCRR 622.12. Where a respondent fails to answer a motion for an order without hearing, and Department staff does not file a motion for a default judgment, but seeks, instead, a determination on the merits of its motion for order without hearing, summary judgment principles are applied in analyzing the motion (see, e.g., Matter of Wilder, Order of the Commissioner, Nov. 4, 2004, adopting ALJ's Ruling/Hearing Report, at 9-10).

attached to the motion for order without hearing and complaint. Thus, a default judgment against respondent on the issue of liability may be granted.

Penalty and Remedial Measure

As noted above, because a defaulting respondent is deemed to admit liability only, the appropriate penalty and remedial measures sought to be imposed must still be proven. As in this case, such proof is provided on a motion for a default judgment by a staff attorney's affirmation with supporting documentation justifying each component of the relief sought in the complaint.

On a motion for a default judgment, the ALJ reviews the proof offered in support of the penalty and remedial relief sought by staff, and makes a recommendation to the Commissioner whether such relief should be approved. In reviewing staff's submissions, the ALJ should consider whether the penalty sought (1) falls within the potential maximum penalty authorized by law, (2) is consistent with the Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990) and any other program specific guidance documents for assessing penalties after hearings (see Matter of Singh [Kuldeep], supra, at 10), (3) is warranted by the circumstances of the case (see Matter of Bice, Order of the Commissioner, April 19, 2006, at 2), and (4) is

generally consistent with penalties imposed in other hearings in cases involving similar circumstances (see id.). Similar consideration should be given to the remedial measures proposed by staff, including whether the measures are authorized by law and warranted.

The ALJ's review of the penalty phase relief sought by staff is not an opportunity for the ALJ to substitute his or her own judgment for staff's. Where the penalty phase relief sought by staff reasonably satisfies the above criteria, the ALJ should recommend that the Commissioner impose the relief sought in the order on default. If, however, one or more of the above criteria are not satisfied, the ALJ may recommend an alternative penalty and provide an explanation of how the alternative penalty was determined, with reference to the above criteria.

In the default summary report, the ALJ recommends that the Commissioner seek written comments from Department staff explaining how the penalty would be calculated taking into account Program Policy DAR-9 (Dry Cleaner Enforcement Guidance, May 26, 2004) and a March 12, 1999 draft guidance mentioned in the Commissioner's order in Matter of Myra Proffes (Feb. 7, 2001). As mentioned above, the ALJ has the authority to conduct an inquiry on penalty and remedial relief where reasonable questions exist concerning staff's penalty calculation. Such an inquiry would ordinarily be conducted through written submissions

from staff. Thus, as a general proposition, the ALJ could have sought the written comments from staff herself.

In this case, however, I conclude that such an inquiry is not necessary. Program Policy DAR-9 is intended for use by Department personnel during enforcement proceedings conducted prior to referral for hearings pursuant to 6 NYCRR part 622 ("Part 622"), and provides guidance for calculating the minimum payable penalty that should be recovered in an enforcement action against respondents who promptly and voluntarily enter into settlements to achieve compliance (see Program Policy DAR-9, Schedule A). The relevance of such a guidance to Part 622 proceedings is, at most, to provide a floor below which a penalty should not fall, and to assist in evaluating the relative weight and importance Department staff assigns to the various violations specified. As noted above, however, the more relevant guidance to consider in matters referred for Part 622 proceedings are program specific guidance documents for assessing penalties after hearings, if any, and the Department's Civil Penalty Policy.[3]

Based upon my review of penalty and remedial measure sought by staff, and the justification therefor provided by staff in the motion papers, I conclude that the penalty falls within the statutorily authorized maximum, is consistent with the

[3] In light of the issuance of Program Policy DAR-9, the draft penalty assessment guidance referred to in Matter of Myra Proffes need not be addressed.

Department's Civil Penalty Policy, is justified by the circumstances of this case, and is consistent with penalties awarded in comparable cases. I also conclude that the remedial measures are authorized and warranted.

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 Alvin Hunt, d/b/a Our Cleaners, 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 July 7, 2005 complaint are deemed to have been admitted by respondent.

III. Respondent is determined to have committed the violations charged in the July 7, 2005 complaint as specified therein.

IV. Respondent Alvin Hunt is hereby assessed a civil penalty in the amount of EIGHTY NINE THOUSAND EIGHT HUNDRED THIRTY ONE DOLLARS ($89,831.00). The civil penalty shall be due and payable within thirty (30) days after service of this decision and 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 delivered to the Department at the following address: Region 2 Office, Legal Affairs, New York State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York, 11101, ATTN: Louis P. Oliva, Esq., Regional Attorney.

V. If respondent is currently operating either Facility # 1 or Facility # 2 as a drop shop, Department staff is hereby granted permission to seal the dry cleaning machines at such drop shops.

VI. All communications from respondent to the Department concerning this order shall be made to John F. Byrne, Esq., Assistant Regional Attorney, Region 2, Legal Affairs, New York

State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York, 11101.

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

For the New York State Department of Environmental Conservation

By: /s/
Denise M. Sheehan
Commissioner

Dated: July 25, 2006
Albany, New York

TO: Mr. Alvin Hunt (VIA CERTIFIED MAIL)
d/b/a Our Cleaners
272 West 135th Street
New York, New York 10030

John F. Byrne, Esq. (VIA REGULAR MAIL)
Assistant Regional Attorney
Region 2 -- Legal Affairs
New York State Department of Environmental Conservation
47-40 21st Street
Long Island City, New York 11101

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of articles 19 and 71 of the New York State Environmental Conservation Law and parts 201 and 232 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York	DEFAULT SUMMARY REPORT
by	DEC File Nos. R2-20011030-219 and R2-20040310-61
ALVIN HUNT, d/b/a/ OUR CLEANERS, Respondent.	October 4, 2005

Staff of the Department of Environmental Conservation (DEC Staff) commenced this administrative proceeding by serving a notice of motion for order without hearing and a complaint upon Alvin Hunt, doing business as Our Cleaners (Respondent). The complaint alleges violations of Environmental Conservation Law (ECL) articles 19 and 71 and parts 201 and 232 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). The motion was made pursuant to the enforcement hearing procedures of 6 NYCRR part 622.

DEC Staff alleges that Respondent violated certain reporting, registration and record-keeping requirements at two dry cleaning facilities he owns that are located at 272 West 135th Street (Facility #1) and 2021 Lexington Avenue (Facility #2), New York, New York. DEC Staff also alleges that Respondent failed to properly seal the vapor barrier room at Facility #1. The motion for order without hearing and the complaint were served by delivering them to an employee and a relative of the Respondent at the two facilities on July 11, 2005 and by certified mail on or before July 20, 2005.

By motion dated August 11, 2005, DEC Staff sought a judgment by default against Respondent on the basis that Respondent failed to timely file an answer to the complaint. In support of its motion for a default judgment, DEC Staff submitted an affirmation of John F. Byrne, Esq., Assistant Regional Attorney, DEC Region 2, to which are attached a proposed order and proof of service of the notice of motion for an order without hearing and the complaint in this matter.

DEFAULT PROCEDURES

Section 622.15 of 6 NYCRR (Default Procedures) provides, in pertinent part, that 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."

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

FINDINGS

1. On July 11, 2005, DEC Staff served a motion for order without hearing upon Bill (no last name specified in DEC Staff's affidavit), an employee of Respondent at Facility #1. On July 11, 2005, DEC Staff also served the same motion for order without hearing upon on Mack Hunt, a nephew of the Respondent, at Facility #2.

2. On or about July 19, 2005, DEC Staff mailed the notice of motion for an order without hearing and the complaint to the Respondent, at the address of Facility #1, by certified mail, return receipt requested. The return receipt was signed by Sharon Hunt and was received at the Department of Environmental Conservation (DEC or Department) Region 2 Office on July 20, 2005. There is no date in the "Date of Delivery" box on the card.

3. On or about July 18, 2005, DEC Staff mailed the notice of motion for an order without hearing and the complaint to the Respondent, at the address of Facility #2, by certified mail, return receipt requested. The return receipt bears a signature that appears to be the signature of Mack Hunt. There is no date in the "Date of Delivery" box on the card. The return receipt was received at the DEC Region 2 Office on July 19, 2005.

4. The notice of motion for order without hearing directed the Respondent to serve his response to the motion upon the Chief Administrative Law Judge of the DEC, at the DEC Office of Hearings and Mediation Services' Albany address that was provided in the motion.

5. Based upon Mr. Byrne's August 11, 2005 affirmation, the Respondent failed to serve an answer by July 31, 2004 (*sic*, 2005 based upon the context). The DEC Chief Administrative Law Judge

has not received an answer or response from the Respondent as of October 4, 2005.

6. The complaint alleged the following violations:

a. Failure to timely submit to the Department a National Emission Standard for Hazardous Air Pollutants (NESHAP) compliance report for the fourth generation dry cleaning machine that Respondent owns, operates and/or maintains at Facility #1, in violation of 6 NYCRR 232.12(g) and 40 Code of Federal Regulations (CFR) 63 subpart M. Such reports must be submitted within 30 days of commencing operation of new equipment. The complaint alleges that this machine was installed on June 15, 1998.[1] DEC Staff issued a notice of violation to Respondent on October 29, 2002 concerning this violation, based upon inspections conducted at Facility #1 on March 6, 2000 and May 23, 2001. DEC Staff received a completed NESHAP compliance report from the Respondent for this machine on April 21, 2004.

b. Failure to timely submit to the Department a NESHAP compliance report for the fourth generation dry cleaning machine that Respondent owns, operates and/or maintains at Facility #2, in violation of 6 NYCRR 232.12.(g) and 40 CFR 63 subpart M. This machine was installed on or about February 25, 1998. DEC Staff issued a notice of violation to Respondent concerning this violation on September 26, 2001, based upon an inspection conducted at Facility #2 on January 24, 2001. DEC Staff received a completed NESHAP compliance report from the Respondent for this machine on October 18, 2001.

c. Failure to timely apply for a valid Air Facility Registration Certificate (Registration) from the Department for the fourth generation dry cleaning machine operating at Facility #1, in violation of 6 NYCRR 232.15 and subpart 201-4. DEC Staff issued a notice of violation on October 29, 2002 for this violation, based upon inspections conducted at the facility on March 6, 2000 and May 23, 2001. DEC Staff

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[1] The complaint, at paragraph 8, states that the machine at Facility #1 was installed on or about June 15, 1998. DEC Staff's justification for penalty calculations, attached with the complaint, states this same installation date (page 17, violation #1, paragraph 3) but also states that a machine at Facility #1 was installed on or about May 1, 1998 (page 19, violation #3, paragraph 2).

received Respondent's Registration application for this machine on November 15, 2002.

d. Failure to timely apply for a valid Registration from the Department for the fourth generation dry cleaning machine at Facility #2, in violation of 6 NYCRR 232.15 and subpart 201-4. DEC Staff issued a notice of violation, based upon an inspection conducted at this facility on January 24, 2001.[2] DEC Staff received Respondents' Registration application for this machine on October 18, 2001.

e. Failure to timely submit the required notification letter to the Department, stating that the vapor room and exhaust system had been constructed at Facility #1 and met the required standards, in violation of 6 NYCRR 232.5(a)(3). DEC Staff issued a notice of violation for this violation on October 29, 2002, based upon inspections conducted at this facility on March 6, 2000 and May 23, 2001.[3]

f. Failure to timely submit the required notification letter to the Department, stating that the vapor room and exhaust system had been constructed at Facility #2 and met the required standards, in violation of 6 NYCRR 232.5(a)(3). DEC Staff issued a notice of violation for this violation on September 26, 2001, based upon an inspection conducted at this facility on January 24, 2001. DEC Staff subsequently issued a second notice of violation on September 5, 2002 for failure to submit this letter, based upon a January 20, 2002 inspection of this facility.

g. Failure to properly seal the vapor barrier room at Facility #1, in violation of 6 NYCRR 232.6(a)(1). DEC Staff issued a notice of violation for this violation on October 29, 2002, based upon inspections conducted at this facility on March 6, 2000 and May 23, 2001. Respondent corrected this violation prior to a third-party inspection of the facility that was conducted on May 14, 2003.

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[2] Although paragraph 15 of the complaint does not include the date on which a notice of violation was issued concerning failure to register Facility #2, Exhibit C attached with the affidavit of Rasheed Carter demonstrates that this notice of violation was issued on September 26, 2001.

[3] Mr. Carter's affidavit, at paragraphs 11 and 13, states that the Respondent has corrected this violation and the related violation concerning a notification letter for Facility #2.

h. Failure to maintain operation and maintenance checklists at Facility #2 at the time of the January 24, 2001 inspection, in violation of 6 NYCRR 232.12(d). DEC Staff issued a notice of violation for this violation on September 26, 2001. Respondent corrected this violation prior to the January 20, 2002 third-party inspection.

7. The motion for order without hearing included a penalty calculation and an affidavit of Rasheed Carter, Environmental Engineer, DEC Region 2. The motion for a default judgment included a proposed judgment and order.

CONCLUSIONS

1. Paragraph 622.3(b)(1) of 6 NYCRR provides for DEC administrative enforcement proceedings to be commenced by service of a motion for order without hearing pursuant to 6 NYCRR 622.12. A motion for order without hearing is to be served in the same manner as a notice of hearing and complaint (6 NYCRR 622.12(a)). Notices of hearing and complaints must be served by personal service consistent with the Civil Practice Law and Rules (CPLR) or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received (6 NYCRR 622.3(a)(3)).

2. CPLR 308 governs personal service upon a natural person. Section 308(1) provides that service may be made by delivering the summons within the state to the person to be served. Section 308(2) provides, in part, that service may be made by delivering the summons within the state to a person of suitable age and discretion at the actual place of business of the person to be served and by mailing the summons to the person to be served at that persons' last known residence or actual place of business, as further described in that section. Under section 308(2), service is complete ten days after filing of proof of this service with the clerk of the court.

3. In the present case, service by delivery and mailing was not completed by the July 11, 2005 delivery of the motion for order without hearing and complaint to Respondent's employee and nephew at Respondent's two places of business, because the motion and complaint also needed to be mailed under that procedure. Based upon the documents provided by DEC Staff, mailing did not occur until the certified mailing on or about July 18 and 19, 2005.

4. DEC Staff served the notice of motion for order without hearing and the complaint upon the Respondent by certified mail,

return receipt requested, on or about July 18 and 19, 2005. This service was complete on or before July 20, 2005. The Respondent's response to the motion was due on or before August 9, 2005, twenty days after July 20, 2005 (6 NYCRR 622.12(b) and (c)). No such response was received by the DEC Chief Administrative Law Judge on or before August 9, 2005, nor has any such response been received by the DEC Chief Administrative Law Judge as of October 4, 2005. Therefore, the Respondent is in default.

5. Pursuant to 6 NYCRR 622.15(a), "A respondent's failure to file a timely answer...constitutes a default and a waiver of respondent's right to a hearing." The motion for a default judgment and order should be granted.

RECOMMENDATION

The motion for a default judgment was accompanied by a penalty calculation and a proposed judgment and order that would impose the penalty arrived at through the calculation. The proposed penalty is within the maximum penalties authorized by ECL 71-2103 for these violations.

DEC Program Policy DAR-9 (Dry Cleaner Enforcement Guidance, issued on May 26, 2004) is not mentioned in DEC Staff's justification of its penalty calculation, nor does this calculation mention a March 12, 1999 draft guidance that the Commissioner applied in Matter of Myra Proffes d/b/a M&B Cleaners (Order of the Commissioner [Feb. 7, 2001]). I recommend that, prior to issuing the order and imposing penalties in the present case, the Commissioner obtain from DEC Staff a written explanation of how the penalty would be calculated taking into account Program Policy DAR-9.

_____/s/_____
October 4, 2005 Susan J. DuBois
Albany, New York Administrative Law Judge