STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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)

ORDER

-by-

DEC File No. R1-20030326-71

LE FRENCH CLEANERS and MARSHALL MANDOVAL, individually and as principal officer of LE FRENCH CLEANERS,

(Nassau County) Respondents.

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WHEREAS:

1. Pursuant to a notice of hearing and complaint dated April 3, 2003, New York State Department of Environmental Conservation ("DEC" or the "Department") Region One staff commenced an administrative enforcement proceeding against respondents Le French Cleaners, and Marshall Mandoval, individually and as principal officer of Le French Cleaners.

2. Respondents were personally served with the notice of hearing and complaint on May 9, 2003, as appears by the affidavit of service of Mark Colesante sworn to May 12, 2003. The notice informed respondents that failure to submit an answer to the complaint would result in default pursuant to 6 NYCRR 622.15.

3. Service of process complied with title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") section 622.3.

4. Respondents failed to serve an answer to the complaint.

5. DEC Region One staff made a motion for default judgment pursuant to 6 NYCRR 622.15.

6. A copy of the notice of motion and supporting papers seeking the judgment by default were filed with the Office of Hearings and Mediation Services and the matter was assigned to Administrative Law Judge (ALJ) Richard R. Wissler. A copy of the ALJ's default summary report is attached. I adopt the ALJ's report.

NOW, THEREFORE IT IS ORDERED THAT:

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

II. Pursuant to 6 NYCRR 622.15, respondents Le French Cleaners and Marshall Mandoval, individually and as principal officer of Le French Cleaners, are adjudged to be in default and to have waived their right to a hearing in this enforcement proceeding. Accordingly, the allegations in the complaint are deemed admitted. The allegations deemed admitted include:

a. that respondents violated 6 NYCRR 232.16 by failing to make available records of third-party compliance inspections for the years 2000, 2001 and 2002;

b. that respondents violated 6 NYCRR 232.9(b) by failing to pre-treat perc-contaminated wastewater prior to evaporation;

c. that respondents violated 6 NYCRR 232.12 by failing to produce for the Department the records as required; and

d. that respondents violated 6 NYCRR 232.15(b)(3) by failing to register with the Department ninety days before the respondents replaced their second generation dry cleaning machine with a fourth generation dry cleaning machine.

III. For having violated ECL article 19 and 6 NYCRR part 232, respondents are assessed a civil penalty of TEN THOUSAND DOLLARS ($10,000). Respondents shall, within ten days of the receipt of this order, pay this penalty by cashier's check, certified check or money order payable to the order of "NYSDEC" and deliver the payment to the Department at the following address: Regional Attorney, NYSDEC Region One, Attention Karen A. Murphy, Esq., SUNY Building 40, Stony Brook, New York 11790-2356.

IV. Respondents shall immediately comply with the provisions of 6 NYCRR 232 and correct all violations thereof.

V. All communications with the Department concerning this order shall be made to: Craig L. Elgut, Esq., Assistant Regional Attorney, NYSDEC Region One, SUNY Building 40, Stony Brook, New York 11790-2356.

VI. The provisions, terms and conditions of this order shall bind respondents and their successors and assigns.

For the New York State Department
of Environmental Conservation

_____/s/_____
By: Erin M. Crotty, Commissioner

Dated: Albany, New York
May 21, 2004

To: Mr. Marshall Mandoval
Le French Cleaners
3572 Long Beach Road
Oceanside, NY 11572

Craig L. Elgut, Esq.
Assistant Regional Attorney
NYSDEC - Region 1
SUNY Building 40
Stony Brook, NY 11790-2356

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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)

SUMMARY REPORT

-by-

DEC File No. R1-20030326-71

LE FRENCH CLEANERS and MARSHALL MANDOVAL, individually and as principal officer of LE FRENCH CLEANERS,

(Nassau County) Respondents.

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Proceedings

On April 3, 2003, Region 1 Staff of the Department of Environmental Conservation (Department Staff or Staff) commenced this enforcement action by duly serving a notice of hearing and complaint, dated and verified April 3, 2003, along with a cover letter of the same date, on Respondents, Le French Cleaners and Marshall Mandoval, by certified mail, return receipt requested. The notice of hearing stated that Respondents would be in default and would waive their right to a hearing if Respondents did not answer the complaint within 21 days of its receipt, or attend the pre-hearing conference scheduled for May 28, 2003, at the Department's Region 1 office in Stony Brook. After attempts at delivery failed, these documents were returned by the US Postal Service to the Region 1 office on May 8, 2003, marked "Unclaimed" and "Refused."

On May 9, 2003, Environmental Conservation Officer (ECO) Mark Colestante personally served a copy of the aforementioned notice of hearing and complaint, but with a cover letter dated April 23, 2003, on Respondent Marshall Mandoval. ECO Colestante signed an affidavit on, May 12, 2003, attesting to such personal service on May 9, 2003. The cover letter dated April 23, 2003, and served by ECO Colestante, indicated that a pre-hearing conference in the matter would be held at the Department's Region 1 office on May 28, 2003, at 11:30 a.m. The notice of hearing served by the ECO indicated that the pre-hearing conference would be held on May 28, 2003, at 11:30 p.m. A pre-hearing conference was held on May 28, 2003, at 11:30 a.m., at which the undersigned was present, by phone. Respondents did not appear.

The notice of hearing served on May 9, 2003, advised Respondents that they had twenty days from the service of the complaint on them to serve an answer thereto on the Department. Moreover, the notice of hearing advised Respondents that failure to timely answer or attend the pre-hearing conference would result in a default being taken against them pursuant to the provisions of 6 NYCRR 622.15, as well as a waiver of their right to a hearing in the matter. No

answer to the complaint has been served upon the Department.

The complaint alleges that at all times relevant Respondent Marshall Mandoval was the owner and operator of a dry cleaning facility known as Le French Cleaners, located at 3572 Long Beach Road in the Town of Oceanside, Nassau County, New York (the facility). The facility is subject to the provisions of 6 NYCRR 232 regulating perchloroethylene (perc) dry cleaning facilities. Located in a shopping center, it is a "mixed use facility" as provided in 6 NYCRR 232.2(b) and operates non-vented equipment, including a fourth generation dry cleaning machine. Department Staff inspected the facility on October 30, 2002.

The complaint alleges four causes of action. Respondent allegedly violated:

1. 6 NYCRR 232.16 by failing to make available compliance inspection records documenting required annual compliance inspections for the years 2000, 2001 and 2002.

2. 6 NYCRR 232.9(b) by failing to pre-treat perc-contaminated wastewater with double carbon filtration prior to evaporation.

3. 6 NYCRR 232.12 by failing to produce the spill, incident, maintenance, operational logs and other records thereby required upon Department request.

4. 6 NYCRR 232.15(b)(3) by failing to register with the Department ninety days before it replaced its second generation dry cleaning machine with a fourth generation dry cleaning machine.

As relief, the complaint seeks an Order of the Commissioner (a) finding Respondents in violation of the aforementioned sections of 6 NYCRR 232, (b) directing that they cease and desist from any further violations of Part 232 and comply with all outstanding and effective permits and licenses, and (c) assessing a civil penalty in the amount of $10,000.

By motion dated July 10, 2003, Department Staff moved for a default pursuant to 6 NYCRR 622.15. This motion was made on notice to Respondents. Annexed to the notice of motion and in support thereof was an affirmation by Assistant Regional Attorney Galen Wilcox, also dated July 10, 2003, as well as an Exhibit A, the envelope of the original certified mailing returned and marked by the USPS as unclaimed and refused, along with a copy of the notice of hearing and complaint and a cover letter all dated April 3, 2003; an Exhibit B, a copy of the notice of hearing and a cover letter dated April 23, 2003, as well as a copy of the complaint dated April 3, 2003; an Exhibit C, a copy of the affidavit of service by personal delivery upon Respondents sworn to and signed by ECO Mark Colesante on May 12, 2003; and an Exhibit D, a proposed Order. As part of its application, Department Staff also filed with the Office of Hearings and Mediation Services an affidavit of service by mail of the present notice of motion for default and supporting papers on Respondents, sworn to and signed by Galen Wilcox on July 10, 2003.

On November 13, 2003, Department Staff forwarded to the undersigned a memorandum

setting forth its justification for the civil penalty sought in the complaint.

To date, neither the Department Staff nor the Office of Hearings and Mediation Services has received any response to Staff's motion of a default of July 10, 2003.

Findings of Fact

1. On October 30, 2002, Respondent Marshall Mandoval was the owner and operator of a dry cleaning facility known as Le French Cleaners located at 3572 Long Beach Road in the Town of Oceanside, Nassau County, New York (the facility).

2. The facility is subject to the provisions of 6 NYCRR 232 regulating perchloroethylene (perc) dry cleaning facilities. Located in a shopping center, it is a "mixed use facility" as provided in 6 NYCRR 232.2(b) and operates non-vented equipment, including a fourth generation dry cleaning machine.

3. Despite requests made by Department Staff on October 30, 2002, January 17, 2003, and February 28, 2003, Respondents failed to make available compliance inspection records documenting required annual compliance inspections for the years 2000, 2001 and 2002.

4. During Department Staff's inspection on October 30, 2002, Respondents' employee advised Department Staff that perc-contaminated wastewater that comes out of the dry cleaning machine's separator was placed in the cooling tower basin from which the perc would be evaporated without any further pre-treatment, in particular, without double carbon filtration prior to evaporation.

5. Despite requests made by Department Staff on October 30, 2002, January 17, 2003, and February 28, 2003, Respondents failed to make available for inspection records for the current and previous five years of all spills, incidents, emergency response episodes, air cleaning equipment maintenance, exhaust system maintenance, drying sensor maintenance, activated carbon amounts, wastewater treatment carbon cartridge replacement, perchloroethylene purchases, leak inspection dates, refrigerated condenser temperature readings, operation and maintenance checklists required by 6 NYCRR 232.8, and compliance inspection reporting forms required by 6 NYCRR 232.16.

6. During Department Staff's inspection on October 30, 2002, Department Staff observed that Respondents were operating a fourth generation dry cleaning machine. A review of Nassau County Department of Health records indicated that in 1997 Respondents were operating a second generation dry cleaning machine, which machines were required to be replaced pursuant to 6 NYCRR 232.6. Respondents did not register with the Department ninety days before replacing their second generation dry cleaning machine with a fourth generation dry cleaning machine.

7. On May 9, 2003, Environmental Conservation Officer (ECO) Mark Colestante personally served a notice of hearing and complaint in this matter, dated April 3, 2003, with a cover

letter dated April 23, 2003, on Respondent Marshall Mandoval. The cover letter dated April 23, 2003, indicated that a pre-hearing conference in the matter would be held at the Department's Region 1 office on May 28, 2003, at 11:30 a.m. The notice of hearing served by the ECO indicated that the pre-hearing conference would be held on May 28, 2003, at 11:30 p.m. A pre-hearing conference was held on May 28, 2003, at 11:30 a.m. at which Respondents did not appear.

8. The notice of hearing advised Respondents that they had twenty days from the service of the notice of hearing and complaint on them to serve an answer thereto on the Department. Moreover, the notice of hearing advised Respondents that failure to timely answer or attend the pre-hearing conference would result in a default being taken against them pursuant to the provisions of 6 NYCRR 622.15, as well as a waiver of their right to a hearing in the matter. No answer to the complaint has been served upon the Department.

9. The time for Respondents to serve an answer to the complaint personally served on May 9, 2003, expired on May 29, 2003. Respondents did not file an answer to the complaint within the twenty day period as required by regulation, nor has any answer to the complaint been served upon the Department, to date.

10. The present motion by Department Staff for a default pursuant 6 NYCRR 622.15 was made on notice to Respondents on July 10, 2003. To date, Respondents have not served a response to the motion for default.

Discussion

Motion for Default Judgment

According to the Department's enforcement hearing regulations, a Respondent's failure to file a timely answer, or even if a timely answer has been filed, a Respondent's failure to appear at the pre-hearing conference, constitutes a default and a waiver of Respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, DEC Staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), Staff's motion must contain:

1. Proof of service upon Respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
2. Proof of Respondent's failure to appear at a pre-hearing conference, or to file a timely answer; and
3. A proposed order.

The affidavit of ECO Colestante, sworn to on May 12, 2003, demonstrates that service of the notice of hearing and complaint was made personally upon Respondents on May 9, 2003, and was thus in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). Accordingly, Respondents' time to answer expired on May 29, 2003 (see 6 NYCRR 622.4[a]).

According to the July 10, 2003, affidavit of Galen Wilcox, Esq., Assistant Regional Attorney, Respondents neither answered the complaint nor appeared at the scheduled pre-hearing conference. Although there is a discrepancy in the time of day of the scheduled pre-hearing conference on May 28, 2003, in the notice of hearing and the cover letter of April 23, 2003, it is clear that Respondents failed to answer the complaint. Since Respondent did not answer the complaint as required by 6 NYCRR 622.4(a), the Commissioner may conclude that Respondents are in default, and therefore grant Staff's motion pursuant to 6 NYCRR 622.15.

Relief

The relief requested by Department Staff in the complaint is similar to what is outlined in the proposed order. In particular, while seeking future compliance with Part 232 regulations, Staff also seeks the imposition of a civil penalty in the amount of $10,000, and has justified this amount in a memorandum provided to the Office of Hearings and Mediation Services.

With respect to the first cause of action, Staff seeks a penalty in the amount of $1,000 for each of the three years compliance inspection reports were not produced by Respondents, 2000, 2001, and 2002, for a total of $3,000. Staff estimates that a compliance inspection would have cost Respondents approximately $500 for each year, and thus Respondents realized a total economic benefit of $1,500. Staff seeks to disgorge this economic benefit as well as deter future non-compliance. In Staff's view, a penalty of $1,500 is an effective deterrent. Accordingly, a total penalty of $3,000 is proposed for the first cause of action. This sum and justification are consistent with ECL 71-2103 and the Department's Civil Penalty Policy.

With respect to the second cause of action, Staff seeks a penalty of $6,000. In the estimation of Staff, by avoiding the expense associated with proper treatment of perc-contaminated wastewater, Respondents have realized an economic benefit of $3,000. Moreover, given the potential health impacts associated with allowing perc to evaporate into the atmosphere, an appropriate penalty to deter such future non-compliance is warranted, which should be $3,000, Staff asserts. Thus, a total penalty of $6,000 is justified for this violation. This sum and justification are consistent with ECL 71-2103 and the Department's Civil Penalty Policy.

With respect to the third cause of action, Staff seeks a penalty of $500. In failing to maintain required records, Respondents realized an economic benefit, which Staff estimates to be $250. An additional penalty of $250 is appropriate to deter such future non-compliance, Staff asserts. Accordingly, a total civil penalty of $500 is justified for this violation. This sum and justification are consistent with ECL 71-2103 and the Department's Civil Penalty Policy.

With respect to the fourth cause of action, Staff seeks a penalty of $500. By failing to advise the Department of its intent to install a fourth generation dry cleaning machine through required registration, Respondents realized an economic benefit of $250, in Staff's estimation. An additional penalty of $250 to deter such future non-compliance is justified, according to Staff. This sum and justification are consistent with ECL 71-2103 and the Department's Civil Penalty Policy.

Pursuant to ECL 71-2103, as was in effect at the time the complaint was served, the first violation of ECL article 19, or any regulation promulgated thereto, subjects the violator to a penalty of not less than $250 nor more than $10,000, plus an additional penalty of $10,000 for each day the violation continues. For additional violations, the violator is subject to a penalty not to exceed $15,000, plus an additional penalty of $15,000 for each day the violation continues. A total civil penalty of $10,000 is consistent with the parameters set forth in ECL 71-2103.

Conclusions

Respondents defaulted by their failure to file an answer to Department Staff's April 3, 2003 complaint. As a result, Respondents waived their right to a hearing in the matter. Moreover, Staff's complaint sets forth a prima facie case with respect to each cause of action articulated and provides the jurisdictional basis upon which the relief requested can be ordered by the Commissioner. Finally, Staff established the procedural requisites of 6 NYCRR 622.15(b) upon which judgement by default can be granted.

Recommendation

The Commissioner should grant Department Staff's motion for default in this matter made pursuant to 6 NYCRR 622.15, and on notice to Respondents.

_____/s/_____
Richard R. Wissler
Administrative Law Judge