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

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

**ORDER**

DEC File No.
R4-2009-0219-25

- by -

**WILLIAM MARDEROSIAN, JR.,**

Respondent.

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This administrative enforcement proceeding alleges that respondent William Marderosian, Jr., violated article 19 of the Environmental Conservation Law ("ECL"), part 232 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Order on Consent DEC Case No. R4-2009-0219-25 that respondent signed on April 14, 2009 ("2009 consent order") in the operation of a dry cleaning business known as Admiral Cleaners ("facility"). The facility is located at 617 19th Street, Watervliet, New York.

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding against respondent Marderosian by serving a notice of hearing and complaint by certified mail return receipt requested, dated May 2, 2012, upon respondent. Respondent received the papers on May 3, 2012. Accordingly, service of process was accomplished pursuant to 6 NYCRR 622.3.

Department staff's complaint, which respondent failed to answer, sets forth three causes of action:

(1) respondent owns and operates a dry cleaning business without a dry cleaning owner/manager certification and without having hired a certified facility manager and certified operator, in violation of 6 NYCRR 232.14(a) and the 2009 consent order;
(2) respondent failed to have a registered third party annual inspection conducted for the facility in 2010 and 2011, in violation of 6 NYCRR 232.16; and
(3) respondent failed to pay a civil penalty of three thousand five hundred dollars ($3,500) assessed against him in the 2009 consent order.

By notice of motion dated July 11, 2012, Department staff moved for a default judgment and order and referred the matter to the Office of Hearings and Mediation Services ("OHMS"). The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached default summary report. In her report, ALJ Goldberger recommends that the Department's motion for default judgment be granted and respondent be found in violation of 6 NYCRR 232.14(a) and 232.16 and the 2009 consent order, and that the staff-requested penalty

of seven thousand dollars ($7,000) be assessed. She also recommends that respondent be directed to

(1) obtain the required dry cleaning owner/manager and operator certifications and have the facility inspected by a registered compliance inspector; or
(2) hire a certified facility manager and a certified operator and have the facility inspected by a registered compliance inspector; or
(3) cease perchloroethylene ("perc") dry cleaning operations at the facility and properly shutdown the perc dry cleaning machine.

The ALJ further requests that I direct staff to assess respondent's compliance with the order and that staff "promptly respond" to future non-compliance by seeking a summary abatement order or requesting a referral to the Attorney General's office for an injunction closing the facility down (see Default Summary Report, at 8). In addition, the ALJ recommends that I direct staff to "promptly inspect" the facility and assess its condition with respect to compliance with laws and regulations "governing hazardous waste including wastewater disposal" (see id.).[1]

Based on the record, I adopt the ALJ's default summary report as my decision in this matter, subject to the following comments.

The ALJ states that respondent has failed to comply with the certification requirements of 6 NYCRR 232.14(a) and the inspection requirement of 6 NYCRR 232.16, as well as the terms and conditions of the 2009 consent order, including the payment of the civil penalty assessed by that order. I concur.

With respect to penalty, Department staff requests that respondent pay a civil penalty of seven thousand dollars ($7,000) and undertake certain remedial actions, including obtaining the requisite certifications and having the facility inspected by a registered compliance inspector, or hiring a certified manager or operator and having the facility inspected by a registered compliance inspector, or ceasing perc dry cleaning operations and shutting down the perc dry cleaning machine.

ECL 71-2103 provides that "any person who violates any provision of article nineteen or any code, rule or regulation which was promulgated pursuant thereto; or any order except an order directing such person to pay a penalty by a specified date issued by the commissioner pursuant thereto, shall be liable, in the case of a first violation, for a penalty not less than five hundred dollars nor more than eighteen thousand dollars . . . and an additional penalty of not to exceed fifteen thousand dollars for each day during which such violation continues" (emphasis added). The penalty amount requested by staff is comprised of the following:

[1] Respondent sent a letter dated August 1, 2012 to ALJ Goldberger, which OHMS received on August 6, 2012. In that letter, respondent stated that he is a certified perc dry cleaning operator and included his December 2009 New York State perc dry cleaning examination certification for operator test results. On August 17, 2012, ALJ Goldberger sent a letter to respondent and staff allowing staff until August 30, 2012, to respond to respondent's letter. Department staff filed a response dated August 27, 2012, in which staff stated that, although respondent had passed the dry cleaner operator certification exam, his check for the required fee bounced. Accordingly, respondent was never issued a dry cleaner operator certification. Staff also noted that respondent must have a dry cleaner owner/manager certification, which he has not obtained.

-three thousand five hundred dollars ($3,500) of the amount unpaid and already due and owing under the 2009 consent order;

-one thousand dollars ($1,000) for the failure to have a dry cleaner operator or owner/manager certification;

-one thousand dollars ($1,000) for the failure to conduct third party inspections of the facility; and

-one thousand five hundred dollars ($1,500) based on respondent's history of non-compliance.

See affidavit of Gary J. McPherson, P.E., in support of motion for default judgment and order, sworn to on July 11, 2012 ("McPherson Affidavit"), ¶¶ 4-6. Because the amount allocated to the 2009 consent order is already due and owing, it does not constitute a new penalty to which the exception in ECL 71-2103 might apply, and accordingly I do not need to consider the scope of the statutory exception in that regard. Furthermore, as set forth in the papers, respondent's failure to obtain the required certifications or hire individuals with those certifications and the failure to conduct registered third party inspections has continued since the execution of the consent order in 2009 up until the date of staff's complaint (May 2, 2012). The requested individual penalties of $1,000 apiece, as well as the imposition of an additional penalty $1,500 for respondent's failure to comply with these regulatory standards since 2009, are authorized.

I understand the ALJ's concerns about respondent's continuing violations. I, however, reject the ALJ's conclusion in her default summary report that Department staff requested a penalty that does not meet the intentions of DEE-1: Civil Penalty Policy (June 20, 1990) (see Default Summary Report, at 7). The record establishes that staff evaluated the penalty and assessed an amount in its consideration of the circumstances of this specific matter (see Affirmation of Jill Phillips, Esq., in support of motion for default judgment and order dated July 11, 2012, ¶ 9; McPherson Affidavit, ¶¶ 3-7). In the event of any future enforcement action with respect to this respondent, these violations will need, of course, to be taken into account. Also, the ALJ, in her report, states that staff should be directed to "carefully assess the respondent's compliance with the order" (Default Summary Report, at 8). Staff has the ongoing responsibility to monitor respondent's compliance with an order and, therefore, no direction is necessary.

The proposed remedial activities that Department staff requests, and the ALJ recommends, are authorized and warranted, and are hereby incorporated into this order.

Regarding any future non-compliance, the ALJ recommends that staff "promptly respond by seeking a summary abatement order or requesting a referral to the Attorney General's office for an injunction closing the facility down" (id.). I do not accept that recommendation. In the event that Department staff determines that respondent has failed to comply with this order or any other applicable legal requirement, it will be appropriate for staff at that time, based on the circumstances of any violation, to take appropriate action. It is premature to decide the enforcement response for any prospective violation in the context of this proceeding.

In light of respondent's history of non-compliance, I agree with the ALJ that a facility inspection is warranted and hereby direct staff to schedule an inspection of the facility as soon as practicable to assess the extent to which the facility is in compliance with all applicable legal

requirements, including but not limited to those cited in staff's complaint and in the 2009 consent order.

**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 William Marderosian, Jr., is adjudged to be in default and to have waived his right to a hearing in this enforcement proceeding. Accordingly, the allegations in Department staff's complaint against respondent are deemed to have been admitted by respondent.

III. Respondent William Marderosian, Jr., is adjudged to have violated 6 NYCRR 232.14(a) and 232.16, and the 2009 consent order.

IV. Respondent William Marderosian, Jr. is hereby assessed a civil penalty in the amount of three thousand five hundred dollars ($3,500) for the violations of 6 NYCRR 232.14(a) and 232.16. In addition, respondent Marderosian also owes the Department three thousand five hundred dollars ($3,500) pursuant to the terms of the 2009 consent order. The total amount for the assessed penalty and the amount owed under the 2009 consent order (seven thousand dollars [$7,000]) are due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand-delivered to:

Jill T. Phillips, Esq.
Assistant Regional Attorney
NYSDEC, Region 4
1130 North Westcott Road
Schenectady, New York 12306

V. Respondent William Marderosian, Jr. shall, within sixty (60) days after service of this order on respondent:

A. obtain the required dry cleaning owner/manager and operator certifications and have the facility inspected by a registered compliance inspector; or

B. hire a certified facility manager and a certified operator and have the facility inspected by a registered compliance inspector; or

C. cease perchloroethylene dry cleaning operations at the facility and properly shutdown the perchloroethylene dry cleaning machine in accordance with Department regulations.

Respondent shall submit copies of the certifications or the notice of equipment shutdown to the Department no later than sixty (60) days after the service of this order upon him.

VI. All communications from respondent to the Department concerning this order shall be directed to Jill T. Phillips, Esq., at the address referenced in paragraph IV of this order.

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

New York State Department of
Environmental Conservation

/s/

By:_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
November 14, 2012

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of Article 19 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

**DEFAULT SUMMARY REPORT**

DEC Case No. R4-2009-0219-25

- by -

**William Marderosian, Jr.,**

Respondent.

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Proceedings

By notice of motion dated July 11, 2012, the staff of the New York State Department of Environmental Conservation (DEC or Department) moved for a default judgment and order against the respondent William Marderosian, the owner and operator of a dry cleaning business known as Admiral Cleaners, located at 617 19th Street, Watervliet, New York. Department staff referred this matter for decision to the Department's Office of Hearings and Mediation Services (OHMS) on July 11, 2012. Chief Administrative Law Judge James T. McClymonds (CALJ) assigned the case to me on July 17, 2012.

By certified mail, Department staff served the respondent with a notice of hearing and complaint dated May 2, 2012. These pleadings were delivered to the respondent on May 3, 2012, according to the Domestic Return Receipt Card and USPS.COM Track & Confirm. According to staff, the respondent failed to answer the complaint.

On August 14, 2012, I received a handwritten letter from Mr. Marderosian that included a copy of the results of a *New York State Perchloroethylene Dry Cleaning Certification Examination for Operator – December 2009*. On August 17, 2012, I sent a copy of the correspondence and the attachment to Department staff. On August 28, 2012, I received Department counsel's response dated August 27, 2012 which included an

attachment regarding the respondent's drycleaner operator certification status.

In its pleadings, the Department staff alleges that the respondent has violated two consent orders, executed in 2007 and 2009, respectively, and Part 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by operating a dry cleaning facility without a dry cleaning owner/manager certification and by failing to hire a certified facility manager and a certified operator; by failing to have a registered third party annual inspection conducted for the dry cleaning facility for 2010 and 2011; and by failing to pay the civil penalty required under the 2009 consent order.

**DISCUSSION**

**Default Requirements**

According to the Department's hearing regulations, a respondent's failure to file a timely answer or to attend a pre-hearing conference constitute a default and waiver of respondent's right to a hearing. 6 NYCRR § 622.15(a). In such circumstances, Department staff may move for a default judgment, such motion to contain:

proof of service of the notice of hearing and complaint;
proof of the respondent's failure to file a timely answer; and
a proposed order. 6 NYCRR § 622.15(b).

Department staff's motion papers include an affirmation by Assistant Regional Attorney Jill Phillips dated July 11, 2012, which adequately demonstrates service of the notice of hearing and complaint. Attached to Ms. Phillips' affirmation (Aff.) is the affidavit of Jill Viscusi, a secretary in the Department's Region 4 office, who states that she served the notice of hearing and complaint on May 2, 2012 by certified mail. Phillips Aff., Exhibit (Ex.) A. In addition, Ms. Viscusi provides the USPS.COM Track & Confirm statement indicating that the U.S. Postal Service delivered the pleadings to the respondent on May 3, 2012. Viscusi Aff., Attachment 4.

Ms. Phillips also affirms that the respondent failed to answer the staff's complaint. Phillips Aff., ¶4. And, staff has provided a proposed order as Ex. E to Phillips Aff.

The staff has met the requirements of 6 NYCRR § 622.15(b) and therefore, has established liability by the respondent.

In Mr. Marderosian's letter of August 1, 2012, he claims that he is a certified operator (since 2009) but does not address the complaint's allegations specifically nor does he explain why he failed to answer the complaint in a timely manner (or the staff's motion for a default). In Ms. Phillips' letter of August 27, 2012, staff has produced evidence that the respondent has never been issued an operator's certification.[1] Consequently, I do not find that the respondent has established a meritorious defense to the charges or good cause for the default as is required by 6 NYCRR § 622.15(d) for reopening of a default judgment.

**Penalty Considerations**

In its motion, Department staff requested an order that grants the staff the relief requested in the complaint. The complaint seeks an order containing a penalty of $7,000 and directing compliance with the Part 232 requirements within 60 days of the effective date of the order by 1) obtaining dry cleaning owner/manager and operator certifications and a facility inspection by a registered compliance operator; or 2) hiring a certified facility manager and a certified operator and arranging for an inspection by a registered compliance inspector; or 3) ceasing the perchloroethylene (Perc) dry cleaning operations at the facility including the shutdown of the Perc dry cleaning machine in accordance with Department regulations. The complaint also includes a request for the respondent to submit proof of the certifications or a notice of equipment shutdown to DEC.

The complaint contains three causes of action: 1) failure to own and operate the dry cleaning facility with a dry cleaning owner/manager certification or certified facility manager/certified operator, a continuing violation of the 2009 consent order and 6 NYCRR § 232.14(a); 2) failure of the respondent to conduct a registered third party inspection for the facility for 2010 and 2011, a violation of 6 NYCRR

[1] Assistant Regional Attorney Phillips explains in her letter of August 27, 2012 that while the respondent did take and pass the drycleaner operator certification examination, he paid the required fee with a check drawn on an account with insufficient funds and therefore was never issued a certification. Attached to her letter is a copy of the testing company's printout indicating the certificate was held due to the "bounced check."

§ 232.16; and 3) failure to pay the $3,500 penalty agreed to in the 2009 order, a violation of the 2009 consent order. Phillips Aff., Ex. B.

In the Phillips affirmation and the accompanying affidavit of DEC Environmental Engineer 2 Gary J. McPherson (Ex. D to Phillips Aff.), the staff emphasizes the Department's policy to reduce impacts of Perc and protect the public health from hazards related to toxic Perc emissions. In Mr. McPherson's affidavit he sets forth the staff's "baseline" penalty calculation of $5,500 as: $1,000 for the failure to have a dry cleaner operator and/or owner/manager certification; $1,000 for failure to conduct third party inspections; and $3,500 for payment of the outstanding penalty due from the 2009 consent order requirements. McPherson Aff., ¶4. He cites the respondent's recalcitrance as justification for increasing the penalty to $7,000. *Id.*, ¶¶ 5-7. Both Ms. Phillips and Mr. McPherson maintain that the penalty request is consistent with the *1990 Civil Penalty Policy* as it reflects the respondent's continuing failure to come into compliance with the applicable regulations even after signing two consent orders related to these same violations.

The Commissioner's *1990 Civil Penalty Policy (DEE-1)* provides that the starting point for any penalty calculation should be a computation of the statutory maximum for all provable violations. ECL § 71-2103 (effective May 28, 2010) provides for a penalty not to exceed $18,000 for each violation of Article 19, or any regulation or order promulgated pursuant thereto, and a penalty not to exceed $15,000 for each day the violation continues. The statute also provides for a penalty not to exceed $26,000 for a second or any further violation and an additional penalty of $22,500 per day for each day such violation continues. Clearly, the $7,000 penalty that staff has requested is well below the maximum amount that could be requested pursuant to ECL § 71-2103.[2]

As provided in the *Civil Penalty Policy*, factors of economic benefit of noncompliance, the gravity of the

[2] Prior to the Legislature's determination to increase the air pollution penalties in 2010 (L.2010, c. 99), the minimum penalty was $375 and the maximum $15,000. *See, McKinney's Consolidated Laws of New York*, Book 17 ½, ECL § 71-2103, *Historical and Statutory Notes*, L. 2012, c.99 legislation. For second or further violations, the maximum penalty was $22,500. *Id.* The violations in this matter are continuing and therefore, the increased penalties are applicable. In any case, the staff's request falls far below the maximum penalties that could be assessed under either version of the statute.

violations, and the culpability of the respondent's conduct are also to be taken into account in determining the appropriate penalty.

With respect to economic benefit, while the staff does not quantify the amounts that the respondent saved by failing to comply with the dry cleaning regulations, it is apparent that the respondent has saved money by his non-compliance. This puts dry cleaning operations that do comply with the laws at a disadvantage. *See, DAR-9, Dry Cleaner Enforcement Guidance* (May 26, 2004).

With respect to gravity, the staff's request in its motion for default judgment appears significantly lower than what should be assessed based upon the respondent's repeated and longstanding failure to comply with the applicable dry cleaning regulations. As explained in DEC's *Part 232 Dry Cleaning Certificate Renewal Booklet*:

> "The United States Environmental Protection Agency (USEPA) lists Perc vapor as a Hazardous Air Pollutant (HAP). Perc is classified as a Possible Human Carcinogen. Studies show that workers exposed to Perc have a slightly higher risk of developing cancer and are more likely to have reproductive problems. Long-term exposure to Perc has been shown to cause brain and nervous system damage: decreased hand-eye coordination, lower scores on vision tests, less ability to distinguish colors, decreased learning speed, and a decreased ability to memorize or pay attention. Long-term exposure can also cause liver and kidney damage.
>
> Perchloroethylene exposure is harmful even at low concentrations. In a study of healthy people who lived in apartments near dry cleaning shops, individuals were tested for their ability to see subtle differences in color, to pay attention and to react quickly. Their test scores were lower than healthy people who did not live near dry cleaning shops."

http://www.dec.ny.gov/chemical/38088.html. *See also, DAR-9, Dry Cleaner Enforcement Guidance, supra.*

DEC promulgated Part 232 in order to protect public health and the environment. Section 232.14(b) of 6 NYCRR provides that in unforeseen/unpredictable circumstances where it is not possible to have a certified operator operating the dry cleaning equipment, the Department would allow the owner/manager to continue to operate for a period not to exceed three days per occurrence and that in any case, "[u]nder no circumstances may an uncertified operator operate dry cleaning equipment at any facility for a total of more than 10 days in any calendar year." While there is no evidence that the respondent was faced with

unforeseen or unpredictable circumstances, in any case, the respondent in this case has grossly exceeded these parameters by operating for at least five years since the April 6, 2007 consent order without the necessary certification.

The failure of this respondent to adhere to the regulations that are meant to curtail the entry of Perc into the environment should have resulted in prompt and strict enforcement. In 2007, the respondent signed an order that required him to perform many of the same compliance measures he is continuing to ignore. Phillips Aff., Ex. C, ¶ 4. In the order on consent the respondent signed on April 14, 2009, it is noted that a November 29, 2008 third party inspection revealed that the Perc concentration in the dry cleaning drum was 545 parts per million (ppm) above the permitted limitations contained in 6 NYCRR § 232.6(a)(6). *Id.*, ¶¶ 7-8. In addition, in the same 2009 consent order, staff noted that the respondent had failed to provide any evidence of proper disposal of hazardous waste from his operation nor could the respondent explain to DEC inspectors what he did with the wastewater generated by the dry cleaning machine. *Id.*, ¶¶ 12-17.

The *Civil Penalty Policy* also provides for factors that could adjust the gravity component: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The respondent's culpability in this matter merits an upward penalty adjustment. The respondent was repeatedly notified of the violations by DEC staff and failed to correct them. With respect to violator cooperation, the respondent has not shown cooperation as he has failed to comply with the terms of two consent orders including payment of a fine and has not answered the complaint. In addition, as noted, despite being informed of the violations, the respondent has persisted in failing to correct them. In his August 1, 2012 letter to me, he admits that he has put off an inspection because his equipment is in disrepair. With respect to ability to pay, as the respondent has defaulted in this matter, there was no evidence presented with respect to his financial status.

The *Civil Penalty Policy* does provide for the consideration of "unique factors" in calculation of the penalty. As noted by Mr. McPherson, the unique factors in this case weigh against the respondent – his agreement to comply with the regulations in two separate consent orders and his failure to do so. In referring to the inspection and repair of his equipment, Mr. McPherson states in his August 1, 2012 letter to me that "[i]t will get done, in time." Apparently, this respondent believes that he

can operate outside the law and according to his own schedule. His inactions are both harmful to the economy by putting law abiding drycleaners at disadvantage and to the environment and public health by the continued operation of faulty equipment.

Despite the respondent's serious and repeated violations of Part 232 for over five years, the staff has requested a penalty that does not meet the intentions of the *Civil Penalty Policy*.[3] Moreover, the staff's pleadings do not provide any information about the status of the respondent's compliance with Parts 370-376 of 6 NYCRR. But because the Department staff's complaint only provides for a penalty of $7,000, I am unable to increase that amount. *See, Matter of 134-15 Rock Management Corp., et* al., 2008 NY ENV LEXIS 79 (Commissioner's Decision, December 10, 2008).

**Conclusions and Recommendation**

William Marderosian, Jr. failed to answer the complaint. The respondent is liable for violations of 6 NYCRR §§ 232.14(a) and 232.16, as well as violations of the 2009 consent order.

The Commissioner should grant the $7,000 penalty sought by Department staff for the violations alleged in the complaint.

The Commissioner should grant the staff's additional requests for an order requiring, within sixty days of the effective date of the order, the respondent to 1) obtain the required dry cleaning owner/manager and operator certifications and have the facility inspected by a registered compliance inspector, or 2) hire a certified facility manager and a certified operator and have the facility inspected by a registered compliance inspector, or 3) cease Perc dry cleaning operations at the facility which shall include the proper shutdown of the Perc dry cleaning machine in accordance with Department regulations and provide copies of the certifications or a Notice of Equipment Shutdown to the Department.

[3] It appears that staff has relied upon the recommended penalties set forth in *DAR-9, Dry Cleaner Enforcement Guidance*. However, the policy specifically provides for variance from the penalty guidelines set forth in Schedule A to the guidance stating: "[i]ndividual circumstances may warrant assessment of higher penalties . . ." While the staff did increase the penalty slightly from the baseline of $5,500, it is apparent that the facts in this matter called for significantly higher penalties.

Based upon the respondent's poor compliance record and his own admissions of lack of compliance, I recommend that the Commissioner direct the staff to carefully assess the respondent's compliance with the order and promptly respond to future non-compliance by seeking a summary abatement order or requesting a referral to the Attorney General's office for an injunction closing the facility down. In addition, I recommend the Commissioner direct staff to promptly inspect the facility and assess its condition with respect to compliance with laws and regulations governing hazardous waste including wastewater disposal.

/s/

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Helene G. Goldberger
Administrative Law Judge

Dated: August 28, 2012
Albany, New York