STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 19 of the New York State 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

DEC Case No. D1-2028-02-01[1]

- by -

MOO W. LEE,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Moo W. Lee by service of a notice of hearing and complaint dated June 1, 2006.

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"), a copy of the notice of hearing and complaint was sent via certified mail, return receipt requested, to respondent's address at 836 Carman Avenue, Westbury, New York.

The complaint alleged violations of the Environmental Conservation Law ("ECL") and 6 NYCRR part 232 arising out of respondent's ownership or operation of a perchloroethylene ("perc") dry cleaning facility as described in 6 NYCRR 232.1(a) and air contamination source as defined by 6 NYCRR 200.1(f). According to the complaint, on December 11, 2002, a third-party inspector performed an inspection of respondent's dry cleaning facility on behalf of Department staff and identified certain deficiencies documented in a Part 232 Dry Cleaning Compliance Inspection Report. As a result of these deficiencies, Department staff's complaint alleged that respondent:

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[1] By memorandum dated March 14, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

1. Operated the subject perc dry cleaning facility in the year 2001 without ever having applied for and received a registration certificate from the Department by the applicable deadline, in violation of 6 NYCRR 201-4.1 and 232.15; and

2. Operated the subject perc dry cleaning facility in the year 2002 without ever having applied for and received a registration certificate from the Department by the applicable deadline, in violation of 6 NYCRR 201-4.1 and 232.15.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on June 23, 2006, and has not been extended by Department staff. Respondent failed to file a timely answer or otherwise appear. Respondent also failed to appear at the pre-hearing conference held on August 2, 2006 at the Department's Region 1 headquarters in Stony Brook, New York. Accordingly, respondent is in default and has waived the right to a hearing.

Department staff filed a motion for default judgment, dated January 22, 2007, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached default summary report. I adopt ALJ Sanza's report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the proposed civil penalty and remedial measures sought by Department staff to address the violations are authorized and appropriate. I also conclude that the remedial measures are authorized and warranted, and the date by which respondent is to achieve compliance with applicable regulatory standards is reasonable.

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 against respondent Moo W. Lee is granted.

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

III. Respondent is adjudged to have violated the provisions

of ECL article 19 and 6 NYCRR 201-4.1 and 232.15 on December 11, 2002 by operating the subject perc dry cleaning facility in the year 2001 without having applied for and received a registration certificate from the Department by the applicable deadline.

IV. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 201-4.1 and 232.15 on December 11, 2002 by operating the subject perc dry cleaning facility in the year 2002 without having applied for and received a registration certificate from the Department by the applicable deadline.

V. Respondent Moo W. Lee is hereby assessed a civil penalty in the amount of three thousand dollars ($3,000). The civil penalty shall be due and payable within thirty (30) days after the 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:

Michael J. Derevlany, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

VI. Within sixty (60) days after service of this order, respondent is hereby directed to have the subject perc dry cleaning facility registered in accordance with the provisions of 6 NYCRR 201-4.1 and 232.15(b). The dry cleaning machinery at the subject facility cannot be operated until the registration required by this paragraph has taken place. If respondent fails to have the subject perc dry cleaning facility registered by the time period set forth herein, such failure shall be deemed grounds to seal all air contamination sources at the subject dry cleaning facility pursuant to 6 NYCRR 200.5.

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

VIII. The provisions, terms and conditions of this order shall bind respondent Moo W. Lee, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/S/

By: _____
Louis A. Alexander
Assistant Commissioner

Dated: March 16, 2007
Albany, New York

TO: Moo W. Lee (By certified mail)
c/o Lewis Cleaners
836 Carman Avenue
Westbury, New York 11590-6428

Michael J. Derevlany, Esq. (By regular mail)
New York State Department of
Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 19 of the New York State 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"),

DEFAULT SUMMARY REPORT

DEC Case No. D1-2028-02-01

- by -

MOO W. LEE,

Respondent.

Proceedings

On June 1, 2006, staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Moo W. Lee by mailing copies of a notice of hearing and complaint, both dated June 1, 2006, via certified mail, to respondent at 836 Carman Avenue, Westbury, New York 11590-6428, pursuant to 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").

According to the complaint, respondent Moo W. Lee owns or operates a dry cleaning facility known as Lewis Cleaners located at 836 Carman Avenue, Westbury (Nassau County), New York. The complaint maintains that respondent's facility is a perchloroethylene ("perc") dry cleaning facility as described in 6 NYCRR 232.1(a) and an air contamination source as defined by 6 NYCRR 200.1(f).

The complaint alleges that, on December 11, 2002, a third-party inspector performed an inspection of respondent's perc dry cleaning facility on behalf of Department staff and identified certain deficiencies documented in a Part 232 Dry Cleaning Compliance Inspection Report. As a result of these deficiencies, Department staff's complaint alleged that:

1. Respondent violated 6 NYCRR 201-4.1 and 232.15 by operating the subject perc dry cleaning facility in the year 2001 without having applied for and received a registration certificate from the Department by the applicable deadline;

and

2. Respondent violated 6 NYCRR 201-4.1 and 232.15 by operating the subject perc dry cleaning facility in the year 2002 without having applied for and received a registration certificate from the Department by the applicable deadline.

The June 1, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Moo W. Lee must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for August 2, 2006 at 10:45 a.m. at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive his right to a hearing.

With a cover letter dated January 22, 2007, Michael J. Derevlany, Esq., compliance counsel for the Division of Air Resources within the Department's Division of Environmental Enforcement, filed a notice of motion for default judgment and a motion for default judgment, both dated January 22, 2007, with supporting papers against respondent Moo W. Lee. The supporting papers consisted of an affirmation by Mr. Derevlany dated January 22, 2007, which documents respondent's failure to file a timely answer and failure to appear, along with attached Exhibits marked A, B, C, and D.

Exhibit A contains a copy of the notice of hearing and complaint, both dated June 1, 2006, as well as a copy of the Part 232 Dry Cleaning Compliance Inspection Report from the inspection of respondent's dry cleaning facility on December 11, 2002. Exhibit B is an affidavit of service for the notice of hearing and complaint upon respondent sworn to by Department staff attorney Alyce M. Gilbert, Esq. on January 22, 2007. Exhibit C is a technical affidavit of Department staff engineer Robert Waterfall sworn to on January 19, 2007. Exhibit D is a technical affidavit of Department staff scientist Thomas Gentile sworn to on January 19, 2007. The technical affidavits of Department staff describe the environmental harm and human health risks associated with perc releases and respondent's violations of the cited provisions of 6 NYCRR part 232. Pursuant to 6 NYCRR 622.15(b), Department staff also provided a copy of a proposed order with its default motion papers.

Department staff's cover letter accompanying the instant motion indicate that its motion papers were mailed to

respondent at his last known address and to the Department's Chief Administrative Law Judge ("Chief ALJ"), who assigned the matter to me in a letter dated January 26, 2007.

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory paper (such as a motion), and service is made by mail, CPLR 2101(b)(2) gives the party so served five additional days within which to act. Thus, respondent had until February 1, 2007 to file a response to Department staff's motion.

The bases for staff's motion for default judgment, as set forth in Mr. Derevlany's affirmation, are respondent's failure to file a timely answer to the June 1, 2006 complaint, and respondent's failure to appear at the August 2, 2006 pre-hearing conference. Mr. Derevlany's cover letter which accompanied Department staff's default motion, indicates that a copy of the motion and supporting papers, as described above, was mailed to respondent Moo W. Lee at 836 Carman Avenue, Westbury, New York on January 22, 2007.

Findings of Fact

1. On June 1, 2006, Department staff attorney Alyce M. Gilbert, Esq. served a notice of hearing and complaint, both dated June 1, 2006, in DEC Case No. D1-2028-02-01 upon respondent Moo W. Lee d/b/a Lewis Cleaners by certified mail, return receipt requested, at respondent's last known address pursuant to 6 NYCRR 622.2(a)(3). Respondent received and signed for the notice of hearing and complaint on June 3, 2006.

2. The June 1, 2006 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Moo W. Lee d/b/a Lewis Cleaners must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for August 2, 2006 at 10:45 a.m. at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive his right to a hearing.

3. With respect to the June 1, 2006 complaint, the time for

respondent Moo W. Lee to serve an answer expired on June 23, 2006. As of the date of Department staff's default motion, respondent had not filed an answer.

4. With respect to the August 2, 2006 pre-hearing conference, respondent Moo W. Lee failed to appear at the time and place as set forth in the June 1, 2006 notice of hearing.

Discussion

Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]).

Pursuant to the Department's uniform enforcement hearing regulations, a respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain:

a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;

b. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and

c. A proposed order.

The January 22, 2007 affidavit of service of Department staff attorney Alyce M. Gilbert, Esq. demonstrates service of the June 1, 2006 notice of hearing and complaint upon respondent in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3). (See Matter of Polanaya Corp., Order of the Acting Commissioner, April 12, 2005, at 1.) In addition, the January 22, 2007 affirmation of Department staff attorney Michael J. Derevlany, Esq. demonstrates that respondent did not timely file any answer to the June 1, 2006 complaint and did not appear at the pre-hearing conference held on August 2, 2006.

Based on these circumstances, respondent Moo W. Lee has defaulted and waived his right to a hearing, and Department staff

is entitled to a default judgment pursuant to 6 NYCRR 622.15(a). By operation of the default, respondent is deemed to have admitted the factual allegations set forth in staff's complaint. Staff's motion papers also set forth factual allegations that demonstrate respondent's liability for each cause of action alleged by staff. Therefore, respondent's liability is established.

Department staff has provided a proposed order with its default motion papers. The proposed order would assess a total civil penalty of $3,000.

When a respondent defaults, he waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages. (See Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 3-4.)

Any person (see Environmental Conservation Law ["ECL"] section 19-0107[1] and 6 NYCRR 200.1[bi]), who violates any provision of ECL article 19 or any code, rule or regulation which was promulgated thereto shall be liable, in the case of a first violation, for a penalty not less than three hundred seventy-five dollars nor more than fifteen thousand dollars for said violation and an additional penalty of not to exceed fifteen thousand dollars for said violation for each day during which such violation continues (see ECL 71-2103[1]). In this proceeding, Department staff are unaware of any specific prior 6 NYCRR part 232 violations at respondent's subject perc dry cleaning facility. (See affirmation of Michael J. Derevlany dated January 22, 2007 - "History of Noncompliance".)

Here, Department staff has proposed a total civil penalty that is substantially less than the potential maximum that could be assessed under the applicable provisions of law. This is particularly relevant given the inability of Department staff to monitor potential releases of perchloroethylene from the subject dry cleaning equipment resulting from the violations, as well as the continuing nature of them over the course of at least two years. In addition, the civil penalty requested by Department staff is appropriate and consistent with civil penalties assessed previously by the Commissioner in similar cases.

Finally, Department staff's default motion seeks to bring respondent's perc dry cleaning facility into compliance with the applicable regulations following the date of service of

a copy of an order in this matter. I conclude that a schedule for such compliance is authorized and reasonable.

Conclusions

1. Respondent Moo W. Lee has defaulted and, therefore, has waived the right to a hearing with respect to liability for the violations alleged in the complaint. By defaulting, respondent is deemed to have admitted the factual allegations set forth in the complaint.

2. Respondent's liability for the two causes of action alleged in the complaint has been established.

3. Department staff's proposed total civil penalty of $3,000 is rational and supported by the record. The penalty is justified particularly because of the environmental and human health risks that are posed by the types of violations committed by respondent. Furthermore, although staff have not apportioned the proposed penalty among the enumerated violations, the total penalty is well below the statutory maximum amount under ECL 71-2103(1) that could be assessed for any one of the Part 232 violations cited, individually. On that basis, and given the duration of the violations, there is ample statutory support for the penalty requested by Department staff.

4. Department staff has provided sufficient justification for a compliance schedule.

Recommendation

The motion for default judgment should be granted, and an order issued as described above providing the relief requested by Department staff.

/S/

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Mark D. Sanza
Administrative Law Judge

March 13, 2007
Albany, New York