

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of
Neighborhood Cleaners Association - International
for a Declaratory Ruling

DECLARATORY RULING
DEC #19-11

Introduction

Neighborhood Cleaners Association - International (“NCA-I”) petitions, pursuant to §204 of the State Administrative Procedure Act (“SAPA”) and 6 NYCRR Part 619, for a declaratory ruling with regard to the Department’s determination of the status of certain types of facilities under 6 NYCRR Part 232, “Perchloroethylene Dry Cleaners.” NCA-I refers to the facilities of concern as “integrated facilities” - a term found nowhere in the regulation. NCA-I defines integrated facilities to be those “which provide dry cleaning together with a similar service such as a coin-operated laundry or tuxedo rental service in a solely owned, stand-alone building.” Petition at 1-2. NCA-I specifically requests that the Department (1) “[i]ssue a declaratory ruling that a facility situated in an otherwise ‘stand-alone’ building consisting solely of a commonly owned commercial dry cleaner and coin-operated laundromat which is separated by a common wall ... is a ‘stand-alone’ facility” within the meaning of 6 NYCRR §232.2(b)(63), and (2) rescind the September 23, 1998 Environmental Notice Bulletin (“ENB”) notice in which the Department expressed that such facilities were “co-located” within the meaning of 6 NYCRR §232.2(b)(8), or (3), in the alternative, “promulgate a definitional exemption pursuant to [SAPA §202-b] to minimize the adverse economic impacts of the ‘co-located’ interpretation of the rule on NCA-I’s small business members who own or operate” such facilities. Petition at 3-4.

In making this declaratory ruling, the Department declines to employ the term “integrated facility” because the scope of the term is indefinite. Instead, the Department has focused its analysis on the status of dry cleaner/laundromat operations (“the relevant facilities”) which were the subject of the Department’s determination expressed in the September 23, 1998 ENB notice (“the September 23, 1998 determination”). The Department believes that restricting the scope of this declaratory ruling to this finite universe of facilities will adequately explain and show the rational basis for the Department’s interpretation of the regulatory provisions of concern to NCA-I.

Statement of Facts and Procedural History

For purposes of this declaratory ruling only, the Department will assume that the facts alleged in the petition are true. The Department may take official notice of any fact not subject to reasonable dispute if it is either generally known or can be accurately and readily verified. 6 NYCRR §619.2(b). Hence, this declaratory ruling is based on the assumed facts provided by the NCA-I and any other readily verifiable facts which are pertinent to this matter. The Department will engage in no fact finding for purposes of this declaratory ruling and the binding effect of the

ruling is limited by the assumed fact predicate. See Power Authority v. N.Y. State Dept. of Environmental Conservation, 58 N.Y.2d 427, 434, 461 N.Y.S.2d 769, 772 (1983)(6 NYCRR Part 619 “clearly indicate[s] the expectation that a declaratory ruling will be based on the facts developed in the petition and comments and set forth in the ruling as its assumed basis.”). The Department will not assume the truth of statements which are legal conclusions.

NCA-I is an international membership organization of dry cleaners and associations with its principal place of business located in New York City. NCA-I serves over 4,000 small business members and their communities by providing industry training, worker’s compensation safety training, insurance coverage, and representation before regulatory and legislative bodies. Approximately 2,000 of NCA-I’s members are located in New York State.

Under 6 NYCRR Part 232, the Department regulates the operations of dry cleaners who use the solvent perchloroethylene (“perc”). The potential effects of exposure to perc are described in the Regulatory Impact Statement (“RIS”) for 6 NYCRR Part 232 (produced pursuant to SAPA §202-a) as follows [See Attachment A]:

PERC may be absorbed into the human body after ingestion, inhalation, or contact with the skin. Human and animal data indicate that the central nervous system, kidneys, and liver are the primary targets of PERC toxicity. PERC exposure changes the functioning of the nervous system and behavior. PERC exposure damages liver and kidney cells, which impairs liver and kidney function. Animal data show that PERC exposure during pregnancy damages developing organisms, but usually at doses that are toxic to the mature female. Results of epidemiological studies suggest that occupational exposure to PERC interferes with human reproduction. PERC caused cancer in mice and rats exposed to high concentration in air for their lifetimes and in mice given large oral doses for their lifetimes. Epidemiological studies suggest, but do not conclusively establish, a positive association between occupational exposure to PERC and an increased risk of some types of cancer. The International Agency for Research on Cancer classifies PERC as probably carcinogenic to humans. The U.S. Environmental Protection Agency classifies PERC as a potential human carcinogen, but is currently determining whether it should be classified as a possible or a probable human carcinogen.

6 NYCRR Part 232 was the subject of a “negotiated rule making.” The negotiated rule making process for the regulation sprang from Governor Cuomo’s Executive Order #156 issued on June 8, 1992. The Executive Order included the directive that the Commissioner of the Department establish negotiated rule making committees to consider appropriate matters concerning the Clean Air Act. Once a negotiated rule making committee reached consensus on a proposed rule and issued a report containing details of the consensus reached, the Department, “to the maximum extent possible consistent with its statutory responsibilities and authority, [was to] use the consensus of the committee as the basis for the proposed rule.”

On October 26, 1992, the Department advised the Governor’s Office that it had selected 6 NYCRR Part 232 as a negotiated rule making project. Thereafter, a facilitator was selected. The facilitator conducted outreach efforts aimed at likely candidates for committee membership and

then issued a report on January 29, 1993 which recommended that the Department move forward with the negotiation process on this rule. The Notice of Proposed Negotiated Rule Making was published in the New York State Register and the ENB on March 31, 1993. The Notice of Establishment of the Negotiated Rule Making Committee was published in the New York State Register and the ENB on August 4, 1993.

The Negotiated Rule Making Committee convened for a total of twenty days in eleven different meeting sessions between May 18, 1993 and February 24, 1994. The Committee was composed of individuals representing a diverse range of interests with regard to the dry cleaning industry. NCA-I was a member of the Committee. The Committee produced a conceptual agreement which was completed on February 10, 1994. On February 24, 1994, all active Committee members signed a statement listing the areas of agreement and disagreement regarding the conceptual agreement. The report of the Committee was submitted to the Commissioner of the Department on January 5, 1995. This report indicates that the members of the Committee were provided with a draft of the Department's proposed regulation during July 1994.

Following the development of the Committee's conceptual agreement, Department staff used it as the basis for composing the draft rule. Following preproposal review and approval by the Governor's Office of Regulatory Reform, the Department published the Notice of Proposed Rule Making for 6 NYCRR Part 232 in the New York State Register on May 29, 1996. Public hearings were held during July 1996. Following receipt of public comments, the Department revised the draft rule in certain respects. The regulation went before the Environmental Board on March 19, 1997 and was approved. The effective date for the regulation was May 15, 1997.

By way of the affidavit of William Seitz, its representative on the Negotiated Rule Making Committee, NCA-I provides factual details concerning the deliberations of the Committee. Specifically, NCA-I claims that "there was no intention that additional services offered by a drycleaner (i.e., laundromat, tuxedo rental, boutique items, etc.) would qualify them for co-located status under Part 232," "services offered by a dry cleaner, related or otherwise, had no bearing on the determination as to whether or not a dry cleaner was deemed stand alone," and "the Committee decided that the term stand alone rested solely on whether or not the drycleaning facility was located in a free-standing building."¹ Seitz affidavit at 4.

At some outreach sessions held during 1997 following the effective date of the rule to inform members of the perc dry cleaning industry as to the requirements of 6 NYCRR Part 232, Department technical staff orally stated that the relevant facilities were not co-located under 6 NYCRR Part 232. Co-located dry cleaning facilities are subject to more stringent emission control measures, including installation of a vapor barrier around the dry cleaning machine, than are stand-alone dry cleaning facilities.

The Department later decided that the staff statements at the outreach sessions as to the

¹ As indicated below, comments received by two other members of the Negotiated Rule Making Committee (Barbara Warren of Consumers Union and Judith Schreiber, Ph. D. of the New York State Department of Health) are counter to these assertions by Mr. Seitz concerning the deliberations of the Committee. However, the Department will not engage in fact-finding on this issue and will merely note that there is uncertainty concerning the content of the deliberations of the Committee.

status of the relevant facilities were mistaken and acted to correctly state the Department's position. By letter dated July 30, 1998, the Department formally communicated its position with regard to the relevant facilities to NCA-I. See Attachment B. The Department wrote, in pertinent part, as follows:

“Co-located” is defined at 6 NYCRR §232.2(b)(8) as “[s]haring a common wall, floor, or ceiling with a residence or business.” The Department considers a dry cleaning facility which shares a common wall, floor or ceiling with a laundromat to be co-located. The services provided by a dry cleaner and a laundromat are sufficiently unrelated so as to constitute separate and distinct types of businesses. The fact that the same person owns and/or operates the dry cleaning facility and the laundromat is not determinative of this issue.

In response to specific enforcement concerns, the Department on September 23, 1998 published in the ENB a notice that reiterated the determination expressed in the July 30 letter to NCA-I and acknowledged the Department's mistaken statements made during the 1997 outreach sessions. See Attachment C. In light of the fact that reliance on these earlier statements caused some of the relevant facilities to be out of compliance with the requirements of 6 NYCRR Part 232 applicable to co-located facilities, the Department allowed the relevant facilities additional time in which to come into compliance. The Department wrote, in pertinent part, as follows:

The DEC recognizes that these earlier representations by DEC staff have resulted in a number of dry cleaner/laundromat facilities operating 1st and 2nd generation machines to now be in retro-active non-compliance. It has also left dry cleaner/laundromat facilities operating 3rd generation machinery with insufficient notice to install the necessary vapor barriers before the **November 15, 1998** deadline.

Due to the dry cleaning industry's reliance on the DEC's previous representations, the DEC is allowing dry cleaner/laundromats an extension of time, until **March 23, 1999** to come into compliance with all Part 232 requirements applicable to co-located facilities as of that date. All compliance deadlines for such facilities which fall after March 23, 1999, will remain unchanged and in full force and effect.

The purpose of this extension is to provide these facilities the time necessary to come into compliance with all applicable Part 232 requirements.

On May 12, 1999, the Department received the present petition. In the petition, NCA-I requested that “integrated facilities” be relieved from compliance with 6 NYCRR Part 232 and that enforcement proceedings with regard to the regulation as applied to those facilities be stayed pending a ruling of the petition and for a reasonable time thereafter. Petition at 2. On that same day, the Department sent a letter to NCA-I acknowledging receipt of the petition.

By letter dated May 26, 1999, the Department informed NCA-I that the petition is classified as one requesting a ruling with respect to the applicability to a person of a regulation or statute which the Department enforces and that, after initial review, the petition appears to contain

sufficient information. Additionally, the Department informed NCA-I that the Department had decided it is in the public interest to solicit public comments on the petition pursuant to 6 NYCRR §619(e) in view of the large number of facilities subject to the requirements of 6 NYCRR Part 232 relevant to co-located facilities generally. The Department also denied NCA-I's request for a stay of enforcement proceedings regarding the requirements of 6 NYCRR Part 232 applicable to co-located facilities.

On June 9, 1999, the notice soliciting public comments was published in the ENB. Within two or three days thereafter, the notice was also individually mailed to the last known address of each member of the Negotiated Rule Making Committee. By mutual agreement of the Department and NCA-I, the close of the comment period was extended to July 7, 1999 from its original date of June 29, 1999. The Department collected the comments received and mailed them to NCA-I on July 14, 1999 and, pursuant to 6 NYCRR 619(e)(2), provided NCA-I with a ten day period from its receipt of the copies to respond to the comments. At the mutual agreement of the Department and NCA-I, this response period was extended to August 17, 1999.

The Department received 36 comments during the comment period and NCA-I provided one response. The comments and response may be summarized as follows:

1. Thirty-one identical form comment letters from individual dry cleaners under the letterhead "Member Neighborhood Cleaners Association - International." See Attachment D which contains one of the form letters. None of these commenters claim to own or operate a relevant facility. These commenters express (1) general support for NCA-I's petition for a declaratory ruling; (2) that 6 NYCRR Part 232 is more stringent than the federal national emission standard for hazardous air pollutants [40 CFR Part 63, Subpart M]; (3) that the requirement for a vapor barrier for co-located facilities is supposed to address involuntary and possibly prolonged exposure of someone to perc in a neighboring space, outside the dry cleaner's establishment; (4) that the "posting notice" requirement of 6 NYCRR §232.18 indicates that customers exposure to perc is voluntary as they have the opportunity to read the sign posted in dry cleaners which indicates that perc is being used; (5) that exposure to such customers is not prolonged; (6) that laundry and dry cleaning are joint services which are offered traditionally by one cleaning business which has dry and wet cleaning aspects; and (7) that the Department initially characterized the relevant facilities as stand-alone.
2. A comment letter from Olivia B. Shoemaker, an individual dry cleaner who identifies herself as an owner of a relevant facility. See Attachment E. Ms. Shoemaker expresses (1) that her business is a family one; (2) that the Department initially expressed that her facility was stand-alone and she is shocked at the Department's later recharacterization of her facility as co-located; and (3) that the vapor barrier requirement for her co-located facility added \$8,500 dollars to the \$50,000 in costs that she incurred in upgrading to a fourth generation machine during the time that she understood her facility to be stand-alone.
3. A comment letter from Jack D. Lauber, a professional engineer who, when employed by the Department, attended sessions of the Negotiated Rule Making Committee. See Attachment F. As to the Committee's deliberations, Mr. Lauber expresses (1) that the main thrust of arguments for requiring vapor barriers was the need to protect against involuntary, lengthy

exposures of persons in adjacent residential and commercial settings to trace perc emissions emanating from dry cleaners and (2) that there was no appreciable concern about intermittent voluntary exposure of forewarned laundromat customers. Mr. Lauber also expresses (3) that the exposure of laundromat customers to perc emissions will, in light of the types of dry cleaning machines that may be used, amount to a small fraction of the exposure that is allowed under Occupational Health and Safety Administration requirements limiting permissible exposure of employees of dry cleaning facilities and (4) that requiring vapor barriers in the relevant facilities poses additional financial hardships on dry cleaners without any substantial public health benefits.

4. A comment letter from the Senator Owen H. Johnson, Vice President Pro Tempore of the New York State Senate. See Attachment G. Senator Johnson expresses (1) that it is his understanding that 6 NYCRR Part 232 was promulgated to protect individual dwellings and that the regulation was later extended during negotiations to include unrelated businesses that are located within the same structure as a dry cleaner and (2) that the Department should change its interpretation of stand-alone facility to encompass dry cleaners and traditionally related business such as laundromats, tailoring, formal wear rentals and cleaning when the related businesses occupy a building solely with a dry cleaner.
5. A comment memorandum from Assemblyman John J. Faso, Minority Leader of the New York State Assembly. See Attachment H. Assemblyman Faso expresses (1) that NCA-I's petition for a declaratory ruling was generated in response to the September 23, 1998 determination; (2) that the Department changed its position from that expressed at the 1997 outreach sessions; (3) that 6 NYCRR Part 232 provides no measure of certainty for dry cleaning facilities that might offer patrons ancillary services such as button repair, shoe service, tuxedo rental, etc. as the regulation does not specify what other types of businesses would be considered "sufficiently related" to dry cleaning services; (4) that the Department's decision to deem the relevant facilities co-located was made in an effort to protect patrons of coin-operated laundry machines from exposure to perc since these individuals spend more time at the facility than regular dry cleaning customers; (5) that the extra measure of protection afforded to these patrons has not been justified to the industry with any scientific data; (6) NCA-I's position as to the content of the deliberations of the Negotiated Rule Making Committee; (7) that motels and hotels with on-site dry cleaning services are held to less stringent standards than the relevant facilities because involuntary exposure to customers of hotels and motels is not long term; (8) that due to the posting notice requirement of 6 NYCRR §232.18, customers of the relevant facilities voluntarily expose themselves to perc and members of the public have a choice of taking their laundry to a relevant facility or a standard laundromat; (9) that installation of a vapor barrier is a significant expense for dry cleaners; (10) that the Department should re-evaluate its September 23, 1998 determination; (11) that a health risk analysis of exposure of transient customers to perc is warranted before 6 NYCRR Part 232 should be enforced as to the relevant facilities; and (12) support for an effort by the Department to clarify what types of businesses would and would not be considered "sufficiently related" to dry cleaning facilities.

6. A comment letter from Barbara Warren, a member of the Negotiated Rule Making Committee representing Consumers Union. See Attachment I. Ms. Warren expresses (1) that there is no factual documentation contained in the petition that supports NCA-I's opinions regarding the decisions made by the Committee regarding the relevant facilities; (2) that there is also no documentation supporting NCA-I's claims of adverse economic impacts related to vapor barrier installation; (3) that she was not party to any discussion of an exemption for the relevant facilities; and (4) that the Department's position regarding the co-located status of the relevant facilities appears consistent with a desire to protect the health of customers of the relevant facilities.
7. A comment letter from Judith Schreiber, Ph.D., a member of the Negotiated Rule Making Committee representing the New York State Department of Health. See Attachment J. Ms. Schreiber expresses (1) that 6 NYCRR Part 232 is intended to reduce the risk to, and chemical exposure of, the public to perc, and to protect public health by specifically requiring dry cleaning facilities operating in buildings with other uses to adhere to stricter requirements than those dry cleaning facilities operating at stand-alone locations; (2) that, from her recollection of the deliberations of the Committee, a dry cleaning facility that provides a laundry service operated solely by the facility employees would have been considered stand-alone but that a dry cleaning facility which shares a common wall, floor, or ceiling with a public coin-operated laundromat would have been considered co-located; (3) that risk of potential exposure of laundromat customers of the relevant facilities is similar to incidental exposures of customers at other businesses which are co-located with dry cleaners; (4) that the term "integrated facility" was not a term used by the members of the Committee; (5) that, from a standpoint of risk, public use creates the opportunity for public exposure to perc and common ownership of a relevant facility is irrelevant; and (6) that the presence of a common wall between a dry cleaning facility and a laundromat makes the dry cleaning facility co-located.
8. NCA-I provided a response letter from Paul A. Dugard, Ph.D., of the Halogenated Solvents Industry Alliance, Inc. See Attachment K. Mr. Dugard expresses (1) that some of the comments are inconsistent with the discussions of the Negotiated Rule Making Committee and with available animal and human data concerning exposure to perc; (2) that exposure to low level concentrations of perc is only a concern when exposure is long-term; (3) that 6 NYCRR Part 232 recognizes the distinction between prolonged and short-term exposures by excluding from the definition of "residential building" dwellings occupied by the same person for less than 180 days per year (4) that the regulation is not intended to protect occupants of a hotel room during one or two day stays and so cannot be properly construed to protect customers of the relevant facilities who are exposed for an hour or so to perc; (5) that, in any event, due to the posting notice requirement of 6 NYCRR §232.18, exposure to perc by customers of the relevant facilities is voluntary; and (6) that, by defining a co-located business as one that shares a common wall, floor, or ceiling with the cleaner, the regulation clearly implies that the business be separate from the cleaner.

Discussion

Essentially, NCA-I makes two arguments in support of its position that the Department's

determination that the relevant facilities are co-located is unsustainable. First, on a substantive level, NCA-I focuses on the term “stand-alone” and argues that the Department’s September 23, 1998 determination is counter to both the commonly understood meaning of the term and the meaning of the term as intended by the members of the Negotiated Rule Making Committee. Second, on a procedural level, NCA-I argues that the Department, in changing its position as to the status of the relevant facilities, imposed a new regulatory mandate without engaging in necessary notice and comment rule making. Should the Department fail to reverse its determination as to the relevant facilities, NCA-I requests that the Department craft a regulatory exemption for the relevant facilities pursuant to SAPA §202-b. These arguments are addressed seriatim below.

The Relevant Facilities Are Co-located

In construing administrative rules, the same canons of construction applicable to statutes are to be used. Cortland-Clinton, Inc. v. New York State Dept. of Health, 59 A.D.2d 228, 231, 399 N.Y.S.2d 492, 495 (4 Dept.1977). When interpreting statutes, one must consider the purpose of the act and the objectives to be accomplished. People v. Cypress Hills Cemetery, 208 A.D.2d 247, 251, 622 N.Y.S.2d 300, 303 (2 Dept. 1995). The legislative intent is the great and controlling principle and the primary consideration in interpreting the statute is to ascertain and give effect to that intent. Id. Where the legislative intent of a statute cannot be determined from a literal reading, one may go outside the statute to try to find its true meaning. Id. Where there is ambiguity about the meaning and intent of a statute, it is proper to resort to its legislative history for clarification. Id. at 252. In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended. Regan v. Heimbach, 91 A.D.2d 71, 72, 458 N.Y.S.2d 286, 287 (3 Dept. 1983). While general words in a statute ordinarily should be given their full significance, their meaning may, in a proper case, be restricted. Statewide Roofing v. Eastern Suffolk Bd., 173 Misc.2d 514, 517, 661 N.Y.S.2d 922, 925 (Sup. Ct. Suffolk Cty. 1997). Words, however general, must yield to their necessary particular application. Id. at 518. A construction of a statute which tends to sacrifice or prejudice the public interests or welfare is not favored and should be avoided if possible. Id.

NCA-I argues that the entire operation of a relevant facility is a stand-alone facility within the meaning of the regulation and NCA-I offers a dictionary definition for the term “stand-alone.” However, NCA-I neglects to observe that the term “stand-alone facility” is already defined at 6 NYCRR §232.2(b)(63) as “[a] facility that is not co-located.” Since the definition of stand-alone facility is stated as the opposite of co-located, the determination of whether a facility is stand-alone relies on an interpretation of the term co-located as applied to the relevant facilities. Co-located is defined at 6 NYCRR §232.2(b)(8) as “Sharing a common wall, floor, or ceiling with a residence or business.”

The Department views the dry cleaning facility component of a relevant facility as sharing a common wall, floor or ceiling with the separate business of a laundromat. The Department’s conclusion rests on its interpretation of the meaning of the term “business” in the definition of co-located. In interpreting the term business, the Department relies on the rules of statutory construction recited above.

Neither 6 NYCRR Part 232 nor the general definitions section for air quality control

regulations at 6 NYCRR §200.1 contains any definition of the term “business.” Pursuant to 6 NYCRR §232.1(a), the regulation applies to all perc dry cleaning facilities. The text of 6 NYCRR §232.6(b) demonstrates that the Department must limit its focus to the issue of whether a particular dry cleaning facility is co-located with any other business.² “Dry cleaning facility” is defined as a “facility with one or more dry cleaning systems.” 6 NYCRR §232.2(b)(22). “Dry cleaning system” is defined in detail at 6 NYCRR §232.2(b)(23). Thus, for purposes of interpreting the regulation, a dry cleaning facility constitutes a business different from all other businesses with which it may share a common wall, floor or ceiling.

An examination of the legislative intent behind 6 NYCRR Part 232 confirms the Department’s rationale of differentiating between dry cleaning facilities and other businesses. There is no particular statute which requires the Department to regulate perc dry cleaners in the manner set forth in 6 NYCRR Part 232. The regulation was promulgated pursuant to the Department’s plenary authority to enact rules for preventing, controlling or prohibiting air pollution as provided in §§3-0301.2(a) and (m), 19-0301.1, and 19-0303 of the Environmental Conservation Law. RIS at 1. Thus, the intent of the Department in drafting the pertinent terms of the regulation may be viewed as the appropriate legislative intent.³

The regulation contains no section explaining its purpose. However, in the RIS the Department wrote that it proposed 6 NYCRR Part 232 “to limit PERC emissions from dry

² 6 NYCRR §232.6(b) provides, in pertinent part, as follows:

To determine which standards will apply to a particular dry cleaning facility, first determine whether the facility is new or existing. Then determine whether the facility is a stand-alone or is co-located.

³ NCA-I and numerous commenters discuss the importance of the meaning that members of the Negotiated Rule Making Committee may have attributed to the terms “co-located” and “stand-alone.” However, the deliberations of the Committee as to terms that the Department later used in drafting 6 NYCRR Part 232 are irrelevant to the Department’s intent and are not part of the legislative history to which the Department may refer in interpreting the regulation.

As is evident from the above recitation of the mandate and activities of the Committee, the role of the Committee was temporary and advisory. Following receipt of the conceptual agreement from the Committee, the Department used the agreement as the basis for its draft of the rule. The draft that the Department put forth followed the outline provided by the conceptual agreement in most respects. However, the draft rule that was proposed did differ from the conceptual agreement and was, in the end, a Department product and one for which the Department was solely responsible for formally proposing and promulgating pursuant to the requirements of SAPA.

The Department may not abdicate its rule making responsibility under SAPA to non-governmental actors and cannot accord a parallel ability to the various parties to an ad hoc advisory process to interpret the terms of a Department regulation. While the Department welcomes and responds to all recommendations as to how it should interpret the terms of its regulations, it is the sole responsibility of the Department to exercise reasoned and independent deliberation in undertaking that task.

The relevant legislative history for 6 NYCRR Part 232 commenced when the Department proposed the rule and issued the SAPA documents (i.e., the Regulatory Impact Statement, the Rural Area Flexibility Analysis, etc.) and continued through the SAPA process until the rule became effective. A thorough review of the SAPA documents and the Department’s February 1997 Response to Comments document which was supplied to the State Environmental Board prior to the Board’s vote on whether to approve 6 NYCRR Part 232 reveals no discussion of the meaning of the term “business” as used in the definition of “co-located.”

cleaners to minimize potential health effects, contamination of surface and ground waters, and to reduce the environmental burden of hazardous air pollutants.” RIS at 2. The RIS details the harms that may occur from exposure to perc and includes a reference to a New York State Department of Health study which showed that indoor air exposure levels in some residences and businesses near dry cleaning facilities posed serious health concerns. See RIS at 2-6.

While the basic intent of the regulation is to protect public health, the Department’s actions in implementing and enforcing 6 NYCRR Part 232 as to an individual dry cleaner do not, as NCA-I and a number of the commenters conclude, include assessing the risk of harm that the dry cleaning facility may pose to its neighbors or the environment. In the absence of full compliance by a co-located dry cleaning facility, such potential for harm to neighbors or the environment is inherent in the facility’s operation. The regulation sets specific technology standards for dry cleaning facilities to meet.⁴ The provisions of 6 NYCRR Part 232 essentially constitute a very complicated checklist of various technology, reporting, and training requirements with which a dry cleaning facility must comply. For any particular dry cleaning facility, the exact mix of requirements to be complied with and the deadlines for compliance depend on the characteristics of the dry cleaning facility in terms of technology currently employed and location of the facility.

6 NYCRR Part 232 does not provide the basis for Department action to enforce against a dry cleaning facility simply for the release of emissions which may clearly be affecting a neighboring occupancy. Instead, the Department is limited to determining whether the particular dry cleaning facility is in compliance with the literal requirements of the regulation. Full compliance with the requirements of 6 NYCRR Part 232 is anticipated to eliminate the presence of perc in adjoining occupancies at levels above the guideline value of 100 micrograms of perc per cubic meter at which the New York State Department of Health or local health authorities may take

⁴ The Department has consistently adhered to this interpretation of the provisions of 6 NYCRR Part 232. See, e.g., comment #107 and the Department’s response thereto contained in the Department’s February 1997 Response to Comments document.

107. Comment: DOH studies have suggested that reintraintment of outdoor air containing elevated levels of tetrachloroethylene contribute to elevated indoor levels. Thus, heavily contaminated facility air not limited by concentration limits and vent location requirements is likely to have a significant impact on the local environment both indoors and outdoors.

Response: Part 232 is a technology standard. The Department of Environmental Conservation commits to ambient sampling to determine if the negotiated rule has reduced impacts below levels of concern. The rule can be revised in the future if ambient monitoring indicates a need to do so.

The lone possible exception to this general absence of risk assessment in the regulation is the section which authorizes the Department to consider variances from the requirements of the regulation. See 6 NYCRR §232.3.

action and order the shutdown of a dry cleaner.⁵ However, full compliance does not assure that the Department of Health's guideline value will not be exceeded in an adjoining occupancy and will not operate as a defense to the Department of Health taking enforcement action against a dry cleaner causing such an exceedance.⁶

Since risk assessment is fundamentally absent from the Department's implementation of 6 NYCRR Part 232, the Department, in determining the co-located status of the relevant facilities, does not consider technical information concerning the hazards that might befall the laundromat customers of the relevant facilities. Instead, the Department is left to focus completely on the legal issue of whether the laundromat component of a relevant facility is a different business from the dry cleaning facility component.

NCA-I argues that the common ownership of a "free-standing building" in which a dry cleaning facility is operated along with other activities (which may be completely unrelated to dry cleaning or apparel cleaning in general) is determinative of the stand-alone status of the dry

⁵ "[T]he need to require vapor barriers in mixed-use settings has been determined to be necessary to achieve the indoor air quality guidance value of 100 ug/m³ as recommended by the New York State Department of Health." RIS at 7.

See comment #249 and the Department's response thereto contained in the Department's February 1997 Response to Comments document.

249. Comment: The proposed regulation is insufficient to preclude perc concentrations in residences above dry cleaners in older building such as his in which concentrations as high as 7000 ug/m³ have been measured by NYSDOH. The commentator also cites lack of timely responses on the part of NYCDOH and inadequate equipment they have as issues which must be addressed if public health is to be safeguarded.

Response: The regulation does not establish an indoor air quality standard. The Department of Environmental Conservation lacks the jurisdiction to set such a standard. However, the Department has information which demonstrates that use of state-of-the-art equipment along with ventilated room enclosures can prevent perchloroethylene concentrations in co-located occupancies that exceed the NYSDOH guideline. State agency resources are subject to legislative appropriation.

⁶ See comments #265 and #278 and the Department's responses thereto contained in the Department's February 1997 Response to Comments document.

265. Comment: The DEC and State DOH should set an appropriate indoor air quality standard. The State DOH's existing guideline value of 100 micrograms per cubic meter should be considered as an indoor air quality standard. The NYSDOH indoor air perc guideline should be adopted as an indoor quality standard based upon both the long and short-term risks to humans of exposure to perchloroethylene.

Response: The local health departments already have authority to protect public health by requiring additional measures or facility closure in cases where the concentrations in co-located occupancies exceed Department of Health guidance levels.

278. Comment: DEC should clarify that compliance with the technical requirements does not relieve cleaners of the responsibility to comply with the State health guideline for perc.

Response: Compliance with one regulatory requirement does not relieve a source from complying with any other applicable regulatory requirement or obligation.

cleaning facility portion of the business.⁷ However, this argument ignores the facts that the term “free-standing” appears nowhere in the regulation and the definitions of “dry cleaning facility,” “co-located” and “stand-alone” are not delimited in any way by the ownership characteristics of any dry cleaning facility or the building in which it is operated.

The Department concedes that, from the perspective of NCA-I, certain dictionary definitions probably adequately explain the term “business” and accurately reflect the organizational and taxpaying status of the relevant facilities.⁸ However, the dictionary definitions of “business” lack the precision required for effective implementation of the regulation and the Department must interpret the term more restrictively.

If the Department were to adopt NCA-I’s position, it could lead to inconsistent treatment of facilities that the Department must consider similarly situated under the terms of the regulation. As an example, suppose a person owns a small free-standing strip shopping center consisting of two storefront rooms in which the person operates a dry cleaning facility in the first room and operates a laundromat in the second room and the entire strip shopping center is operated as one business (it has one corporate identity, pays taxes as a single corporation, and all of the workers in the strip shopping center are employees of the owner)⁹ If the Department adopted NCA-I’s position, the Department would determine that all of the operations conducted in this strip shopping center

⁷ There is some language in the petition which indirectly indicates that NCA-I may be asserting that, for the dry cleaning facility to be deemed stand-alone, the non-dry cleaning activities at a dry cleaning facility must be related in some way to the provision of apparel related goods and services like garment cleaning, mending, renting, and minor selling. See Petition at 1 (“integrated facilities which provide dry cleaning together with a similar service such as a coin-operated laundry or tuxedo rental...”) and Petition at 16 (“a dry cleaner’s ability to provide other apparel-related goods and services is both substantially related and, in many cases, economically necessary -- and was recognized as such by the rulemaking Committee. After careful consideration of all of these factors, the Committee determined that the fact that a drycleaner offered related services would have no effect on the business’s status as a stand-alone facility.”). However, NCA-I’s most direct statement regarding what types of non-dry cleaning services may be provided by a stand-alone dry cleaning facility expresses that the other services need not be related to dry cleaning. See Seitz affidavit at 4 (“The Committee decided that services offered by drycleaners, related or otherwise, had no bearing on the determination as to whether or not a drycleaner was deemed stand alone.”).

⁸ See e.g., Merriam-Webster’s Collegiate Dictionary, 176 (10th ed. 1993) defines “business,” in pertinent part, as follows:

3 a: a usu. commercial or mercantile activity engaged in as a means of livelihood: TRADE, LINE <in the restaurant : > **b:** a commercial activity or sometimes an industrial enterprise; *also* : such enterprises <the : district>

See also Black’s Law Dictionary, 198 (6th ed. 1990) defines “business,” in pertinent part, as follows:

Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit.

⁹ This is essentially the example presented by NCA-I in the petition at 3. See the quote in item #1 contained in the Introduction to this Declaratory Ruling.

constitute a stand-alone facility.¹⁰ This determination would remain the same whether the owner operates a tailoring shop, a sporting goods store, or a bagel shop in the second room. It would be irrelevant as to what goes on in the adjoining occupancy so long as the occupancies and businesses are commonly owned. However, if the owner sold the laundromat occupancy to someone else, the Department would conclude that the dry cleaning facility becomes co-located. Under this reasoning, it makes no difference whether a strip shopping center containing a dry cleaning facility has two occupancies or twenty. So long as they are commonly owned and operated, the dry cleaning facility remains stand-alone and does not need to upgrade its facility to more stringently control emissions of perc.

The Department observes that NCA-I has provided nothing to indicate that most or many dry cleaning facilities in New York State have a concomitant laundromat operation.¹¹ Laundromats involve the on-site short term rental of laundry machines which do not employ perc and are not used by customers to care for garments which have been dry cleaned. Laundromats are self-service in nature and allow customers to remain on the premises while the service is performed or undertaken. Furthermore, many laundromat operations lack an associated dry cleaning facility and survive as independent operations which are not ancillary to another business activity.

In coming to the conclusion that the dry cleaning facility component of a relevant facility is co-located with the laundromat component of the facility, the Department could have relied on a strict interpretation of the terms of the regulation and reasoned that any activity of any kind that is different from the activities involved in providing customers with dry cleaning services through the use of a dry cleaning system and which is conducted in a location that shares a common wall, floor or ceiling with a dry cleaning facility is co-located in relation to that dry cleaning facility. However, the Department chose to exercise some flexibility and decided only to consider as co-located a dry cleaning facility which provides additional services at the facility's location which are sufficiently unrelated to the operation of the dry cleaning facility. The Department considers those back-office activities carried out at the location that are necessary to allow the continued operation of the dry cleaning facility (e.g., bookkeeping, preparation of advertising materials, completion of government mandated paperwork) to be directly related to the services provided by a dry cleaning facility.

¹⁰ Despite NCA-I's assertion that dry cleaners located in strip shopping centers are co-located (See Seitz affidavit at 3 ("Many cleaners are located in strip shopping centers (co-located commercial facilities)")), many strip shopping centers are certainly free-standing structures in their own right.

¹¹ As stated above, NCA-I seeks a ruling with regard to an indefinite universe of "integrated facilities" which it defines as facilities "which provided dry cleaning together with a similar service such as a coin-operated laundry or tuxedo rental service in a solely owned, stand-alone building." Petition at 1 and 2. NCA-I's only indication of the number of integrated facilities in New York State is its statement that it "submits the petition of behalf of its approximately 500 New York members who are adversely impacted by the Department's revised construction of Part 232." Petition at 2. The exact makeup of the group of "integrated facilities" and the proportion of that group which consists of the relevant facilities is not completely detailed in the Mr. Seitz' affidavit accompanying the Petition. See, e.g., Seitz affidavit at 4 ("As a Committee member I can unequivocally state that there was no intention that additional services offered by a dry cleaner (i.e., laundromat, tuxedo rental, boutique items, etc.) would qualify them for co-located status under Part 232."). Only one commenter indicated that she owned a relevant facility.

The determination of whether a certain service provided by a particular dry cleaning facility is sufficiently related to the services provided by dry cleaning facilities so as to avoid a finding that the dry cleaning facility is co-located will have to be done on a case-by-case basis by Department staff. However, the following basic indicia of a sufficiently related service or activity are apparent from evaluating the status of the relevant facilities. The service or activity is one:

- (1) that was commonly found in dry cleaning facilities in New York State as of the effective date of 6 NYCRR Part 232 (May 15, 1997);
- (2) which is ancillary to the main business of providing dry cleaning services through operation of a dry cleaning facility;
- (3) which involves the supplementary care, repair or storage of materials and garments which are normally dry cleaned; and
- (4) that is not self-service in nature and which does not allow the customer to remain on the premises while the service is provided or undertaken;

The Department views these four indicia as cumulative. The Department does not view this list of indicia as exhaustive and does not anticipate that it will account for every set of circumstances. However, this list is likely to be useful in most situations.

**By Its September 23, 1998 Determination, The Department's Did Not Impose
A New Regulatory Mandate That Was Subject To The SAPA Rule Making Process**

NCA-I contends that the Department's September 23, 1998 determination "constitutes a substantial post-adoption amendment of Part 232" and that the Department's failure to undertake a rule making process with opportunity for notice and comment in adopting this amendment is fatal to the effectiveness of the determination.

NCA-I is mistaken that the Department's September 23, 1998 determination was an amendment of the terms of 6 NYCRR Part 232. It was not an action that can be likened to the promulgation of a "rule" as defined under SAPA §102.2 which must be the subject of formal rule making procedures. Rule making describes a process by which regulations of general applicability are generated, amended, or repealed by State agencies charged with administering a statute or program. Consolidated Rail. Corp. v. State, 175 Misc.2d 855, 857, 670 N.Y.S.2d 748, 750 (Sup. Ct. Albany Cty. 1998), aff'd, 259 A.D.2d 814, 686 N.Y.S.2d 201 (3 Dept. 1999). In making its determination, the Department was issuing an "interpretive statement" within the meaning of SAPA §102.2(b)(iv). The Department did not in any way amend the terms of 6 NYCRR Part 232. The Department was interpreting the meaning of the definition of "co-located" as it applies to the relevant facilities. The regulation contains no mention of laundromats, much less an explicit statement of how combined dry cleaning facility/laundromats are to be categorized. The Department's September 23, 1998 determination was merely an appropriate act by which the Department interpreted the terms of the regulation in light of a particular factual scenario. See id. at 858 ("The determination made was one of interpreting a statute on the facts of a particular, individual case. As such, petitioner's arguments that the determination constitutes improper rule-

making are without merit.”).

An administrative agency may correct its earlier erroneous interpretation of law. Matter of Charles A. Field Delivery Serv., 66 N.Y.2d 516, 519, 498 N.Y.S.2d 111, 114 (1985). Where an administrative agency has adopted an interpretation of a regulation which is the opposite of the interpretation originally expressed at the time of promulgation, the agency’s revised interpretation may stand only if the agency states reasons for changing its position. Richardson v. Commissioner of New York City Dept. of Social Services, 88 N.Y.2d 35, 39-40, 643 N.Y.S.2d 19, 21 (1996).

The Department changed its position within approximately one year from the original erroneous oral representations by technical staff at the outreach meetings. The Department provided an explanation in its July 30, 1998 letter to NCA-I and in the September 23, 1998 ENB notice. The present Declaratory Ruling elaborates on that explanation. In recognition of the fact that some of the relevant facilities had reasonably relied on the Department’s original statements, the Department accorded those facilities a six month period during which they could come into compliance with the requirements of the regulation that otherwise would have applied to them during that time. These actions demonstrate that the Department acted properly and equitably in changing its interpretation of the regulation.

The Department Has No Present Authority To Craft Any Definitional Exemption For Any Type Of Dry Cleaning Facility Pursuant To SAPA §202-b

As alternative relief to a reversal of the September 23, 1998 determination, NCA-I requests that the Department “promulgate a regulatory exemption [under SAPA §202-b] in order to avoid arbitrary and capricious regulatory action....” Petition at 12. In support of this request, NCA-I claims that 6 NYCRR Part 232 contains an exemption from the vapor barrier requirement for hotels and motels which contain dry cleaning facilities.¹² NCA-I contends it is anomalous for the Department to require the relevant facilities to install vapor barriers to protect laundromat customers when the Department allows hotels and motels to escape that requirement and guests of hotels and motels are subject to a greater risk of exposure.

It is clear from the language of SAPA §202-b that the Department is to issue a Regulatory Flexibility Analysis (“RFA”) when engaged in the rule making process. See, e.g., SAPA §202-b.1 (“In developing a rule....”) and SAPA §202-b.2 (“In proposing a rule for adoption or in adopting a rule”). SAPA §202-b provides no authority for any agency to craft any regulatory exemption for any regulated entity after a regulation has been promulgated.

The Department did issue an RFA during the rule making process for 6 NYCRR Part 232. See Attachment L. With regard to the applicability of the regulation, the RFA provides at 2 as follows:

¹² “The intent of the Committee at the time the rule was negotiated was plain, *i.e.*, that since hotels and motels present no opportunity for an involuntary, long-term exposure, the hotels and motels with drycleaning operations were being excepted from a residential identification, so that they would not be required to install a vapor barrier enclosure. The Committee went to great lengths to preclude the need for vapor barriers in hotels operating perchloroethylene drycleaning equipment.” Seitz affidavit at 3-4.

New Part 232 will apply to all new and existing PERC dry cleaning facilities. Many of the equipment and performance requirements vary depending on the type of equipment at the facility, and on the facility's location.

New Part 232 sets forth detailed equipment specifications for each of the equipment and location situations that may exist. Each of the four categories of equipment, designated as first, second, third, and fourth generations, are addressed. Differences in equipment specifications and in compliance deadlines are also dependent on whether the facility is a stand-alone establishment which is the sole occupant of the building, or whether it is a mixed-use facility where the dry cleaner shares the building either with residences or other businesses.

The RFA contains no discussion of any exemption for hotels and motels from the vapor barrier requirements of the rule because no such exemption exists. Hotels and motels containing dry cleaning facilities are co-located facilities which are required to have a vapor barrier. The latest compliance date for any existing hotel or motel with the vapor barrier requirement was May 15, 1999 under 6 NYCRR §232.6 (b)(6)(iv)(a) (requirements for existing dry cleaning facilities already using fourth generation equipment).

Conclusion

The dry cleaning facility component of a dry cleaner/laundromat operation which is characterized by the fact that the dry cleaning facility shares a common wall, floor, or ceiling with a self-service laundromat in which customers are allowed to use washers and/or dryers for a fee and are allowed to remain on the premises during the time that their laundry is being cleaned is co-located as defined at 6 NYCRR §232.2(b)(8). The services provided by a combined dry cleaning facility and laundromat operation are sufficiently unrelated so as to constitute separate and distinct businesses. Consequently, the Department will not rescind the September 23, 1998 ENB notice. In making the September 23, 1998 determination, the Department both reasonably interpreted the relevant provisions of 6 NYCRR Part 232 and did not violate SAPA by promulgating a "rule" within the meaning of SAPA §102.2 without undertaking the SAPA rule making process. The Department has no present authority to craft any definitional exemption for any type of dry cleaning facility pursuant to SAPA §202-b.

Dated: January 3, 2000
Albany, New York

_____/s/_____
Frank V. Bifera
General Counsel