

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

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

ORDER

DEC Case No.
D1-2130-05-06

- by -

SOUTH BAY CLEANERS INC.,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent South Bay Cleaners Inc. by service of a notice of hearing and complaint, both dated April 12, 2006. In accordance with 6 NYCRR 622.3(a)(3), respondent was served by certified mail with a copy of the notice of hearing and complaint, which was received on April 17, 2006, thereby completing service.

Respondent owned and operated a dry-cleaning facility at 369 Merrick Road, Amityville, New York ("facility").¹ The complaint alleged that respondent:

(1) failed to keep the vapor barrier door closed at its facility, in violation of 6 NYCRR 232.6(a)(1);

(2) operated the facility without a current and valid owner/manager certification and operated a dry cleaning machine at the facility without a current and valid dry cleaning operator certification, in violation of 6 NYCRR 232.14(a)(1) and 6 NYCRR 232.14(a)(2), respectively;

(3) operated the facility without having applied for and received a registration certificate from the Department by December 25, 1999, in violation of 6 NYCRR 201-4 and 232.15;

(4) failed to have its mixed-use facility inspected in calendar year 2001, in violation of 6 NYCRR 232.16(a)(2);

¹ The record indicates that, at some point following service of the notice and complaint, respondent relocated its facility operations from 369 Merrick Road, Amityville, New York to 393 Merrick Road, Amityville, New York.

(5) failed to have the facility inspected in calendar year 2002, in violation of 6 NYCRR 232.16(a)(2);

(6) failed to have the facility inspected in calendar year 2003, in violation of 6 NYCRR 232.16(a)(2);

(7) failed to have the facility inspected in calendar year 2004, in violation of 6 NYCRR 232.16(a)(2);

(8) failed to maintain an inspection checklist of perceptible leaks at the facility, in violation of 6 NYCRR 232.7 and 232.12(c)(1); and

(9) failed to post a notice of potential health effects associated with exposure to dry cleaning substances in a conspicuous location at the facility, in violation of 6 NYCRR 232.18(a).

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on May 8, 2006 and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated April 26, 2007 with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Richard A. Sherman, who prepared the attached summary report. I adopt the ALJ'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 the measures recommended to address respondent's violations are appropriate. However, in recognition of the time that may be required for respondent to satisfy certain of these measures, I am modifying the time period for compliance from fifteen to thirty days from the service of this order on respondent.

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

III. Respondent is adjudged to have violated:

A. 6 NYCRR 232.6(a)(1) by failing to keep the vapor barrier door closed at the facility;

B. 6 NYCRR 232.14(a)(1) and 6 NYCRR 232.14(a)(2) by operating the facility without a current and valid owner/manager certification and operating a dry cleaning machine at the facility without a current and valid dry cleaning operator certification, respectively;

C. 6 NYCRR 201-4 and 232.15 by operating the facility without having applied for and received a registration certificate from the Department prior to December 25, 1999;

D. 6 NYCRR 232.16(a)(2) by failing to have its mixed-use facility inspected in calendar year 2001;

E. 6 NYCRR 232.16(a)(2) by failing to have the facility inspected in calendar year 2002;

F. 6 NYCRR 232.16(a)(2) by failing to have the facility inspected in calendar year 2003;

G. 6 NYCRR 232.16(a)(2) by failing to have the facility inspected in calendar year 2004;

H. 6 NYCRR 232.7 and 232.12(c)(1) by failing to maintain an inspection checklist of perceptible leaks at the facility; and

I. 6 NYCRR 232.18(a) by failing to post a notice of potential health effects associated with exposure to dry cleaning substances in a conspicuous location at the facility.

IV. Respondent South Bay Cleaners Inc. is hereby assessed a civil penalty in the amount of twenty thousand dollars (\$20,000). The civil penalty shall be due and payable within thirty (30) days after 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: Michael J. Derevlany, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

V. A. In the event that respondent is continuing to operate a perchloroethylene dry cleaning facility at its new location on 393 Merrick Road, Amityville, New York ("393 Merrick Road"), respondent shall, within thirty (30) days after service of this order upon respondent:

(1) submit a completed National Emission Standards for Hazardous Air Pollutants ("NESHAP") form to the Department and to the federal Environmental Protection Agency or provide documentation to the Department that the NESHAP form has been submitted for 393 Merrick Road;

(2) submit an Air Facility Registration to the Department or provide documentation to the Department that the registration has been submitted for 393 Merrick Road;

(3) properly complete and retain on-site the "Weekly Leak Inspection and Operation and Maintenance Checklists Form," Department form 232-2, and submit a copy of one completed form to the Department or provide documentation to the Department that such checklists have been previously prepared for 393 Merrick Road;

(4) register appropriate dry cleaning facility personnel to take classes and examinations necessary to achieve State certification as a dry cleaner operator and as owner/manager, and such certification(s) shall be obtained within one hundred twenty (120) days after service of this order upon respondent, or hire within thirty (30) days after service of this order upon respondent an individual(s) possessing the required state certifications or provide documentation to the Department that such certifications have been obtained or that certified individual(s) have been hired for 393 Merrick Road;

(5) have its 393 Merrick Road facility inspected by a registered third party or provide documentation to the Department that such inspection has occurred at 393 Merrick Road; and

(6) post a notice prepared and supplied by the Department in a conspicuous location at its 393 Merrick Road facility to inform building tenants and/or customers of the substances used in the dry cleaning system and the potential health effects associated with exposure to them or provide documentation that such notice has been posted at 393 Merrick Road.

B. In the alternative, respondent shall within thirty (30) days after service of this order upon respondent submit documentation that respondent is not using perchloroethylene at its facility on 393 Merrick Road and that it has obtained all required Department permits or registrations for that facility.

VI. In the event that respondent fails to comply with this Order, Department staff may seal air contamination sources at respondent's facility at 393 Merrick Road in accordance with 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 South Bay Cleaners Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Alexander B. Grannis
Commissioner

Dated: August 16, 2007
Albany, New York

TO: South Bay Cleaners Inc. (By certified mail)
393 Merrick Road
Amityville, New York 11701

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

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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of Article 19 of the Environmental
Conservation Law (ECL) and Part 232 of
Title 6 of the Official Compilation of
Codes, Rules and Regulations of the
State of New York (6 NYCRR),

**DEFAULT
SUMMARY REPORT**

DEC Case No.
D1-2130-05-06

- by -

SOUTH BAY CLEANERS INC.,

Respondent.

Proceedings

Staff of the Department of Environmental Conservation (Department) commenced this proceeding against respondent South Bay Cleaners Inc. by service of a notice of hearing and complaint, both dated April 12, 2006. The notice of hearing advised respondent that an answer must be served within 20 days of the receipt of the complaint and further advised respondent that it was required to attend a pre-hearing conference scheduled for May 16, 2006. Respondent failed to file a timely answer and did not appear at the pre-hearing conference.

By notice and motion, both dated April 26, 2007, Department staff filed a motion for default judgment against respondent. Together with the motion for default judgment, staff submitted the following: counsel's affirmation (Affirmation) in support of the motion; a proposed summary report; a proposed order; a copy of the notice of hearing and complaint; an affidavit of mailing; and two affidavits of staff generally setting forth the potential environmental and public health hazards associated with respondent's violations, particularly in relation to perchloroethylene (PERC), a chemical used in dry cleaning.

Separately, by letter dated April 27, 2007, staff counsel provided this office with an affidavit of service of the motion for default judgment upon respondent.

Default Procedures

Pursuant to section 622.15(b) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), a motion for default judgment must contain: (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order. Pursuant to 6 NYCRR 622.15(c), the assigned Administrative Law Judge is to determine whether "the requirements of subdivision (b) have been adequately met."

Findings

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

1. On April 12, 2006, Department staff served the notice of hearing and complaint upon respondent by certified mail, return receipt requested.
2. The postal return receipt was signed at respondent's dry cleaning facility (facility), South Bay Cleaners Inc., 369 Merrick Road, Amityville, New York, on April 17, 2006.
3. The notice of hearing and complaint advised respondent that it must answer the complaint within 20 days and that failure to answer would result in a default and waiver of respondent's right to a hearing.
4. The notice of hearing and complaint also advised respondent that a pre-hearing conference would be held on May 16, 2006 at the Department's Region 1 Office and that respondent's failure to attend the pre-hearing conference would result in a default and waiver of respondent's right to a hearing.
5. Respondent did not file an answer to the complaint on or before May 8, 2006,¹ and no extension of the time to answer was granted by Department staff. As of April 26, 2007, the date of staff's motion for default order, staff had not received an answer to the complaint.

¹ The 20th day after service was complete fell on Sunday, May 7, 2006, therefore, respondent's answer was due on or before May 8, 2006 (see General Construction Law § 25 and 6 NYCRR 622.6[b][1]).

6. Respondent did not appear at the pre-hearing conference on May 16, 2006.

7. On April 26, 2007, Department staff served the motion for default judgment upon respondent by hand delivering one original and one copy to staff of the New York State Department of State (DOS) at its Albany, New York, offices and by mailing a copy of the motion by first class mail addressed to South Bay Cleaners Inc., 393 Merrick Road,² Amityville, New York.

8. Department staff included a proposed order with its motion for default judgment.

Discussion

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made by certified mail and was complete upon respondent's receipt of same on April 17, 2006.

Respondent South Bay Cleaners Inc. failed to submit an answer to the complaint and its time to answer has expired. Additionally, respondent failed to attend the pre-hearing conference on May 16, 2006. In accordance with 6 NYCRR 622.15(a) respondent's failure to answer the complaint on or before May 8, 2006 constitutes a default, as does respondent's failure to appear at the pre-hearing conference. Therefore, respondent is in default and has waived its right to a hearing.

Because less than a year had elapsed since respondent's default and respondent had not appeared, Department staff was not obligated to serve respondent with notice of the motion for default judgment (see section 3215[g][1] of the Civil Practice Law and Rules [CPLR]; see also Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2 [noting that, in the absence of notice requirements in the default procedures under NYCRR part 622, the CPLR "should be consulted" for the appropriate procedure]). Nevertheless, nearly a year had elapsed and staff opted to serve notice of the motion on respondent.³

² The affidavit of service of the motion for default judgment states that respondent relocated from 369 to 393 Merrick Road after the notice of hearing and complaint was served.

³ Generally, to satisfy the notice requirements of CPLR 3215(g)(1), service of a motion for default judgment may be effected by using any method prescribed under CPLR 2103, including first class mail. Under the circumstances presented

Thus, respondent has had ample opportunity to appear or otherwise respond to staff's allegations in this proceeding.

The complaint set forth nine causes of action relating to alleged violations of article 19 of the Environmental Conservation Law (ECL) and 6 NYCRR part 232 by respondent. Specifically, the complaint alleged respondent: (1) failed to keep the vapor barrier door closed at the facility, in violation of 6 NYCRR 232.6(a)(1); (2) operated the facility without a current and valid owner/manager certification and operated a dry cleaning machine at the facility without a current and valid dry cleaning operator certification, in violation of 6 NYCRR 232.14(a)(1) and 6 NYCRR 232.14(a)(2), respectively; (3) operated the facility without having applied for and received a registration certificate from the Department by December 25, 1999,⁴ in violation of 6 NYCRR 201-4 and 232.15; (4) failed to have its mixed-use facility inspected in calendar year 2001, in violation of 6 NYCRR 232.16(a)(2); (5) failed to have the facility inspected in calendar year 2002, in violation of 6 NYCRR 232.16(a)(2); (6) failed to have the facility inspected in calendar year 2003, in violation of 6 NYCRR 232.16(a)(2); (7) failed to have the facility inspected in calendar year 2004, in violation of 6 NYCRR 232.16(a)(2); (8) failed to maintain an inspection checklist of perceptible leaks at the facility, in violation of 6 NYCRR 232.7 and 232.12(c)(1); and (9) failed to post a notice of potential health effects associated with exposure to dry cleaning substances in a conspicuous location at the facility, in violation of 6 NYCRR 232.18(a).

By operation of the default, respondent is deemed to have admitted staff's factual allegations and has waived its right to a hearing. Staff's motion papers set forth factual allegations that demonstrate respondent's liability for each cause of action alleged by staff. Therefore, respondent's liability is established.

here, personal service (e.g., personally delivering copies to DOS in accordance with Business Corporation Law § 306[b]) of the motion would not be required.

⁴ The complaint states only that the registration certification was required "by the applicable deadline" and does not specify a date. However, the date is set forth in the notice of violation attached to the complaint (See Affirmation, Exhibit A, notice of violation, at 1, 3).

By its default, respondent is only deemed to have admitted the factual allegations in the complaint and staff still must establish that the relief sought is appropriate (see Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 4-5). Here, staff seeks a \$20,000 penalty.

Staff counsel maintains that the economic benefit derived by respondent was several thousand dollars but relies on the gravity of respondent's violations to justify the penalty sought. Staff affidavits submitted in support of the motion for default speak to both the potential that poorly run dry cleaning facilities will release PERC into the environment and the potential harm such releases may cause. Counsel's Affirmation states that "[t]he potential harm and actual damage appear to have been very significant. . . . Unfortunately, in this case the amount of perchloroethylene released as a result of [respondent's] violations cannot be determined since records were missing or incomplete" (Affirmation, at 4). Counsel argues that a negative inference should be drawn from the absence of proper records.

Additionally, staff counsel cites several factors to demonstrate respondent's lack of cooperation with the Department. Counsel notes respondent's (i) failure to report violations, (ii) failure to answer or otherwise respond to the complaint, (iii) failure to attend the pre-hearing conference, and (iv) refusal to accept any settlement offers proposed by staff. Counsel also notes that respondent's violations "were only discovered after performance of an inspection by Department staff" and that the Department has had to "expend substantial resources" in pursuit of appropriate enforcement against respondent (Affirmation, at 6).

The \$20,000 penalty sought by staff is well within the maximum penalty authorized by statute. The ten separately charged violations in the complaint⁵ are established on this default judgment motion. ECL 71-2103(1) provides for a maximum penalty of \$15,000 for a first violation and for an additional penalty not to exceed \$15,000 per day the violation continues.

⁵ Nine causes of action are set forth in the complaint. However, the second cause of action alleges two separate violations; specifically, operation of the facility without a current and valid owner/manager certification and operation of a dry cleaning machine without a current and valid dry cleaning operator certification.

Further, in the case of a second or any further violation, the statute provides for a maximum penalty of \$22,500 and for an additional penalty not to exceed \$22,500 per day each violation continues.⁶ Therefore, even assuming that each violation alleged by staff represents a single, non-continuing offense, it is clear that the maximum penalty authorized by statute is many times greater than the \$20,000 penalty requested by staff.

By its motion for default judgment, staff also seeks a Commissioner's order directing respondent to comply with ECL article 19 and NYCRR part 232 and, within 15 days of service of the order, (i) submit a complete National Emission Standards for Hazardous Air Pollutants (NESHAP) form to the Department and to the Federal Environmental Protection Agency; (ii) submit an Air Facility Registration to the Department; (iii) submit sample log sheets for each category of record keeping requirements and commence using those sheets in regular operations at the facility; (iv) register to take the necessary classes and examinations to achieve certification as a dry cleaner operator and owner/manager; (v) have the facility inspected by a registered third party; and (vi) post a notice of potential health effects associated with exposure to PERC in a conspicuous location at the facility. Staff also seeks a directive requiring respondent to, within 120 days of service of the order, obtain a State certification as an owner/manager and operator of PERC dry cleaning facilities or hire a State certified owner/manager and operator to operate the facility until respondent achieves certification. Additionally, in the event that respondent fails to take the directed corrective measures, staff requests that such failure be deemed proper grounds for staff to seal air contamination sources at respondent's facility, in accordance with 6 NYCRR 200.5.

In light of respondent's violations, Department staff's request that the Commissioner direct respondent to comply with regulatory requirements within the time frames set forth above is appropriate and should be granted, as modified below. Staff's request for a directive concerning sample log sheets for each category of record keeping is somewhat vague. The record keeping

⁶ ECL 71-2103 was amended in 2003, increasing the maximum penalty amounts. For respondent's violations that occurred prior to May 15, 2003, the maximum penalty is \$10,000 for a first violation and is not to exceed \$10,000 for each day the violation continued and, for a second or any further violation, the maximum penalty is \$15,000 and is not to exceed \$15,000 for each day such violation continued.

violation alleged by staff in these proceedings relates to respondent's failure to maintain an inspection checklist for perceptible leaks in accordance with 6 NYCRR 232.12(c)(1). Therefore, I recommend that respondent be directed to properly complete and retain on-site the "Weekly Leak Inspection and Operation and Maintenance Checklists Form," Department form 232-2. I further recommend that respondent be directed to submit one copy of a completed form 232-2 to the Department to demonstrate respondent's compliance. This provision will avoid ambiguity in the order. Additionally, I note that respondent remains fully obligated to comply with all record keeping requirements under ECL article 19 and 6 NYCRR part 232.

Conclusions

Department staff provided proof of service upon respondent of the notice of hearing and complaint. Respondent failed to answer the complaint and also failed to appear at the pre-hearing conference. Therefore, respondent is in default and has waived its right to a hearing. The complaint states a claim upon which relief may be granted and Department staff has provided a sufficient basis for the requested civil penalty and corrective action.

Recommendation

I recommend Department staff's motion for default judgment be granted. I further recommend that the Commissioner issue an order assessing a twenty thousand dollar (\$20,000) penalty against respondent and directing respondent to implement the corrective measures described herein.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: May 25, 2007
Albany, New York