

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations
of the Environmental Conservation Law
Article 19, Article 27 and Parts 232,
372, 373 and 374 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,

**RULING ON MOTION
FOR DEFAULT
JUDGMENT AND ORDER**

DEC Case No.
R4-2007-1119-160

- by -

GREENER CLEANERS, LTD.,

Respondent.

Summary

This ruling grants the motion of the staff of the New York State Department of Environmental Conservation (DEC staff) for a partial default with respect to liability against the respondent Greener Cleaners, Ltd. Issues involving civil penalty amount and remediation will be held in abeyance, pending the receipt and review by the parties of the results of environmental testing which are expected in August 2009.

Proceedings

On February 23, 2008, DEC Staff (Region 4 office) served the respondent Greener Cleaners, Ltd. by certified mail with a notice of hearing and complaint. In the complaint, staff alleged fourteen violations of Article 19 and Article 27 of the Environmental Conservation Law (ECL) and Parts 232, 372, 373 and 374 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) alleged to have occurred at the respondent's dry cleaning facility, located at 809 State Street, Schenectady, New York (the site). The alleged violations were discovered during: (1) a June 1, 2007 third party compliance inspection; (2) an October 23, 2007 Department Staff inspection; and (3) an October 26, 2007 Department Staff inspection.

The violations alleged in the complaint include the respondent's:

(1) failure to maintain a minimum inward air velocity of 100 feet per minute (fpm) for the door fan on Machine #2 in violation of 6 NYCRR 232.6(a)(3)(i);

(2) failure to maintain door fan/local exhaust ventilation emissions to a design emission standard of 5 parts per million (ppm) of perchloroethylene (perc) with an in use maximum compliance standard of 20 ppm in violation of 6 NYCRR 232.6(a)(3)(iii);

(3) failure to operate its refrigerated condensers to ensure that exhaust gases are recirculated until the air vapor stream temperature is 45° F or less at the outlet in violation of 6 NYCRR 232.6(a)(5)(i) and 6 NYCRR 232.8(d)(2)(ii);

(4) leakage of perc from Machines #1, #2, #4, and #5 in excess of 50 ppm in violation of 6 NYCRR 232.6(b)(1)(iii)(e) and 6 NYCRR 232.7(h);

(5) storage of uncovered buckets of perc in the wastewater treatment room in violation of 6 NYCRR 232.8(d)(8) and 6 NYCRR 232.10(b), (c);

(6) failure to have a containment area in the dry cleaning room and wastewater treatment room for waste containers in violation of 6 NYCRR 232.11(a)(1)(i);

(7) failure to maintain proper logs for all the machines and keep them up to date in violation of 6 NYCRR 232.12(a);

(8) failure to provide hazardous waste training to its employees in violation of 6 NYCRR 372.2(a)(8)(iii)(e)(3);

(9) operation of a non-exempt wastewater treatment system on site without a permit in violation of 6 NYCRR 373-1.2(c);

(10) failure to determine if perc-contaminated wastewater was a hazardous waste in violation of 6 NYCRR 372.2(a)(2);

(11) failure to keep its hazardous waste accumulation and storage containers closed when not in use, and failure to properly label and date such containers in violation of 6 NYCRR 372.2(a)(8)(i)(a) [373-3.9(d)(1)], 6 NYCRR 372.2(a)(8)(i)(a)(2), 6 NYCRR 372.2(a)(8)(ii) and 6 NYCRR 373-3.9(d)(3);

(12) failure to have a proper secondary containment system in place for its tanks and containers in violation of 6 NYCRR 373-2.9(f)(1)(i), 6 NYCRR 373-2.9(f)(1)(iii), 6 NYCRR 373-1.1(d)(1)(iii)(c)(3), 6 NYCRR 373-3.10(d)(2)(i), 6 NYCRR 373-3.10(d)(2)(ii), 6 NYCRR 373-3.10(d)(3)(iii) and 6 NYCRR 373-3.10(d)(3)(iv);

(13) failure to maintain its facility to minimize the likelihood for exposure to hazardous waste and constituents to humans and the environment in violation of 6 NYCRR 373-3.3(b); and

(14) failure to properly handle the bulbs at its facility in violation of 6 NYCRR 374-3.2(d)(4)(i), 6 NYCRR 374-3.2(e)(5) and 6 NYCRR 374-3.2(f)(3).

The complaint also sought a civil penalty of \$36,500 and the implementation of a remedial plan to clean up the site.

The respondent received the notice of hearing and complaint on February 23, 2009. Pursuant to 6 NYCRR 622.4(a), the respondent had 20 days from receipt of the complaint to serve an answer, that date was March 15, 2009 and no answer was received by DEC Staff.

By papers dated May 26, 2009, DEC staff filed a motion for default judgment with the Department's Office of Hearings and Mediation Services (OHMS) pursuant to 6 NYCRR 622.15. DEC Staff was not required to send a copy of the default motion to the respondent, nor did it send a courtesy copy of the motion.

Chief Administrative Law Judge James T. McClymonds assigned this matter to me on June 3, 2009.

By letter dated June 25, 2009, respondent's counsel requested that DEC Staff's motion for default judgment be denied without prejudice to renew 30 days after pending test results are provided to the respondent. Counsel explained that the delay in his response was due to the fact that the respondent, which was formerly known as Kem Cleaners, Inc., had filed bankruptcy in December 2008, and that due to the bankruptcy and a change in management, the respondent only forwarded DEC Staff's motion to counsel the day before. Counsel continued that the violations discovered in 2007 could not continue since the respondent had removed all its perc machines and perc materials from the site with the approval of DEC Staff. The respondent now operates its business using petroleum and liquid carbon dioxide technologies.

By papers dated July 2, 2009, DEC Staff responded. DEC Staff confirmed that in April 2009, DEC Staff conducted sub-surface and soil vapor testing to determine the extent of contamination at the site and that the test results are due in or about August 2009. DEC Staff argued that since the respondent did not contest liability, that a default finding of liability should be made. DEC Staff did not object to delaying the hearing on appropriate remediation until after the test results were available and analyzed. DEC Staff did not address issues related to its requested civil penalty in its response.

The respondent did not object to DEC Staff's proposal.

Discussion

Respondent does not dispute that the notice of hearing and complaint were properly served on February 23, 2009 or that an answer was due by March 15, 2009. DEC's Uniform Enforcement Hearing Procedures state that "[f]ailure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing" (6 NYCRR 622.4(a)). Therefore, the respondent is in default and does not seek to reopen the default.

In its July 2, 2009 papers, DEC Staff has modified its motion so as to only seek a determination on liability, which has not been opposed by respondent. The respondent seeks to review the April 2009 test results before questions involving remediation are addressed and DEC Staff concurs this is desirable. Accordingly, DEC Staff is entitled to a ruling on liability.

Ruling

Respondent Greener Cleaners, Ltd. is in default and has waived its right to a hearing on issues of liability in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

Specifically, respondent Greener Cleaners, Ltd., at its facility located at 809 State Street, Schenectady, New York, is adjudged to have violated:

(1) 6 NYCRR 232.6(a)(3)(i) by failing to maintain a minimum inward air velocity of 100 fpm for the door fan on Machine #2;

(2) 6 NYCRR 232.6(a)(3)(iii) by failing to maintain door fan/local exhaust ventilation emissions to a design emission standard of 5 ppm perc with an in use maximum compliance standard of 20 ppm;

(3) 6 NYCRR 232.6(a)(5)(i) and 6 NYCRR 232.8(d)(2)(ii) by failing to operate its refrigerated condensers to ensure that exhaust gases are recirculated until the air vapor stream temperature is 45° F or less at the outlet;

(4) 6 NYCRR 232.6(b)(1)(iii)(e) and 6 NYCRR 232.7(h) by having leaks of perc from Machines #1, #2, #4, and #5 in excess of 50 ppm;

(5) 6 NYCRR 232.8(d)(8) and 6 NYCRR 232.10(b), (c) by storing uncovered buckets of perc in the wastewater treatment room;

(6) 6 NYCRR 232.11(a)(1)(i) by failing to have a containment area in the dry cleaning room and wastewater treatment room for waste containers;

(7) 6 NYCRR 232.12(a) by failing to maintain proper logs for all the machines and keep them up to date;

(8) 6 NYCRR 372.2(a)(8)(iii)(e)(3) by failing to provide hazardous waste training to its employees;

(9) 6 NYCRR 373-1.2(c) by operating a non-exempt wastewater treatment system on site without a permit;

(10) 6 NYCRR 372.2(a)(2) by failing to determine if perc-contaminated wastewater was a hazardous waste;

(11) 6 NYCRR 372.2(a)(8)(i)(a) [373-3.9(d)(1)], 6 NYCRR 372.2(a)(8)(i)(a)(2), 6 NYCRR 372.2(a)(8)(ii) and 6 NYCRR 373-3.9(d)(3) by failing to keep its hazardous waste accumulation and storage containers closed when not in use, and failure to properly label and date such containers;

(12) 6 NYCRR 373-2.9(f)(1)(i), 6 NYCRR 373-2.9(f)(1)(iii), 6 NYCRR 373-1.1(d)(1)(iii)(c)(3), 6 NYCRR 373-3.10(d)(2)(i), 6 NYCRR 373-3.10(d)(2)(ii), 6 NYCRR 373-3.10(d)(3)(iii) and 6 NYCRR 373-3.10(d)(3)(iv) by failing to have a proper secondary containment system in place for its tanks and containers;

(13) 6 NYCRR 373-3.3(b) by failing to maintain its facility to minimize the likelihood for exposure to hazardous waste and constituents to humans and the environment; and

(14) 6 NYCRR 374-3.2(d)(4)(i), 6 NYCRR 374-3.2(e)(5) and 6 NYCRR 374-3.2(f)(3) by failing to properly handle the bulbs at its facility.

These proceedings will be held in abeyance, pending the results of DEC Staff's sub-surface and soil vapor tests. When available, DEC Staff shall share the results with the respondent and notify me. This matter shall then be reconvened, initially with a conference call.

/s/

Dated: Albany, New York
July 16, 2009

P. Nicholas Garlick
Administrative Law Judge