

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:)
Neal Foster d/b/a Fifth Avenue Cleaners)
Auburn, Lee County, Alabama) CONSENT ORDER NO. 21-_____-CAP
ADEM Facility No. 206-D004)

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (the "Department" or "ADEM") and Neal Foster d/b/a Fifth Avenue Cleaners ("Fifth Avenue") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-17, as amended, and the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 through 22-28-23, as amended, and the regulations promulgated pursuant thereto.

STIPULATIONS

- 1. Fifth Avenue owns and operates a perchloroethylene (PERC) dry cleaning facility ("Facility") located at 1550 Opelika Road Suite 38, Auburn, Lee County, Alabama, which utilizes one dry-to-dry PERC machine.
2. The Department is a duly constituted agency of the State of Alabama pursuant to Ala. Code §§22-22A-1 through 22-22A-17, as amended.
3. Pursuant to Ala. Code §22-22A-4(n), as amended, the Department is the state air pollution control agency for the purposes of the Federal Clean Air Act, 42 U.S.C. 7401 through 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 through 22-28-23, as

amended.

4. The National Emission Standard for Hazardous Air Pollutants (NESHAP), 40 CFR Part 63, Subpart M, for National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities is incorporated into ADEM Admin. Code r. 335-3-11-.06(12) by reference, thereby making the standard applicable to PERC dry cleaners in Alabama.

5. Pursuant to ADEM Admin. Code r. 335-3-1-.04(1), the Department has been delegated the authority to request regulatory compliance information from PERC dry cleaners in Alabama.

6. 40 CFR, Part 63, Subpart M §63.322 (k)(1) through (11) state:

The owner or operator of a dry cleaning system shall inspect the system weekly for perceptible leaks while the dry cleaning system is operating. Inspection with a halogenated hydrocarbon detector or PCE gas analyzer also fulfills the requirement for inspection for perceptible leaks. The following components shall be inspected:

- (1) Hose and pipe connections, fittings, couplings, and valves;
- (2) Door gaskets and seatings;
- (3) Filter gaskets and seatings;
- (4) Pumps;
- (5) Solvent tanks and containers;
- (6) Water separators;
- (7) Muck cookers;
- (8) Stills;
- (9) Exhaust dampers;
- (10) Diverter valves; and
- (11) All filter housings.

7. 40 CFR, Part 63, Subpart M §63.322 (o)(1) states:

The owner or operator of a dry cleaning system shall inspect the components listed in paragraph (k) of this section for vapor leaks monthly while the component is in operation.

8. 40 CFR, Part 63, Subpart M §63.323 (a) (1) states:

(a) When a refrigerated condenser is used to comply with §63.322(a)(1) or (b)(1): (1) The owner or operator shall monitor on a weekly basis the parameters in either paragraph (a)(1)(i) or (ii) of this section. (i) The refrigeration system high pressure and low pressure during the drying phase to determine if they are in the range specified in the manufacturer's operating instructions. (ii) The temperature of the air-perchloroethylene gas-vapor stream on the outlet side of the refrigerated condenser on a dry-to-dry machine, dryer, or reclaimer with a temperature sensor to determine if it is equal to or less than 7.2 °C (45 °F) before the end of the cool-down or drying cycle while the gas-vapor stream is flowing through the condenser. The temperature sensor shall be used according to the manufacturer's instructions and shall be designed to measure a temperature of 7.2 °C (45 °F) to an accuracy of ± 1.1 °C (± 2 °F).

9. 40 CFR, Part 63, Subpart M §63.324 (d)(3), (4), and (5) state:

Each owner or operator of a dry cleaning facility shall keep receipts of perchloroethylene purchases and a log of the following information and maintain such information on site and show it upon request for a period of 5 years: (3) The dates when the dry cleaning system components are inspected for leaks, as specified in §63.322(k), (l), or (o)(1), and the name or location of dry cleaning system components where leaks are detected; (4) The dates of repair and records of written or verbal orders for repair parts to demonstrate compliance with §63.322(m) and (n); (5) The date and monitoring results (temperature sensor or pressure gauge) as specified in §63.323 if a refrigerated condenser is used to comply with §63.322(a), (b), or (o).

10. 40 CFR, Part 63 Subpart M §63.324 (e) states:

Each owner or operator of a dry cleaning facility shall retain onsite a copy of the design specifications and the operating manuals for each dry cleaning system and each emission control device located at the dry cleaning facility.

DEPARTMENT'S CONTENTIONS

11. On April 19, 2021, the Department conducted an unannounced inspection of the Facility. The operating manual and the following records were not available at the time of inspection:

- (a) PERC purchase receipts, with the exception of two receipts (1/6/21 for 30 gallons and 1/27/21 for 15 gallons);
- (b) Records of monthly PERC purchases;
- (c) A 12-month rolling total for PERC purchases;
- (d) Documentation showing that weekly leak detection inspections were conducted;
- (e) Documentation showing that weekly temperature and/or pressure monitoring of the refrigerated condenser was conducted;
- (f) Monthly documentation showing that leak detection and repair (LDAR) inspections were conducted; and,
- (g) Complete operating manual.

12. On May 26, 2021, the Department issued a Notice of Violation (NOV) to Fifth Avenue for failure to have the compliance records available for review or a complete operating manual in violation of ADEM Admin. Code rs. 335-3-1-.04(1) and 335-3-11-.06(12). The NOV requested that Fifth Avenue submit a written response to the questions regarding:

- (a) Recordkeeping and an explanation of how it will prevent any future compliance issues concerning the PERC NESHAP; and,
- (b) Copies of the 2019-2021 calendar year's records and receipts.

13. On June 28, 2021, Fifth Avenue provided copies of records in response to the NOV, but no responses to the questions. The copies of records provided and not provided are as follows:

(a) Copies of the 2018-2020 dry cleaner records, excluding the 2021 dry cleaner records.

(b) Copies of the 2018-2019 PERC purchase receipts. It was noted that no PERC was purchased for 2020.

(c) Fifth Avenue submitted a copy of a generic owner's manual for PERC machines, but has had some trouble procuring a manufacturer's manual for this specific machine.

14. On August 3, 2021, the Department returned corrected copies of the 2019-2020 calendars to Fifth Avenue, since the calculations it submitted in response to the NOV were incorrect.

15. Pursuant to Ala. Code § 22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATION:** The Department considers these violations to be serious, although it is not aware of any evidence of irreparable harm to human health or the environment due to these violations.

B. THE STANDARD OF CARE: By not maintaining the required records in such a manner as to comply with the applicable regulations, Fifth Avenue did not exhibit the requisite standard of care.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: Fifth Avenue likely derived little, if any, economic benefit from its non-compliance.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is not aware of any efforts made by Fifth Avenue to minimize or mitigate the effects upon the environment due to its non-compliance.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department has previously issued Fifth Avenue warning letters for the following reasons:

1) October 2, 2015 – A Warning Letter was issued to Fifth Avenue due to no records or receipts available on-site during inspection.

2) March 17, 2017 – A Warning Letter was issued to Fifth Avenue due to no records or PERC purchase receipts available on-site during inspection.

3) April 3, 2019 – A Notice of Violation was issued to Fifth Avenue due to no repair receipt for a noted repair, no recordings for leak detection and repair from May 2018 onward, no temperature and/or pressure recordings from January 2018 onward, and no PERC recordings (or rolling total) from June 2018 onward.

F. THE ABILITY TO PAY: Fifth Avenue has alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty

warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

16. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code §22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement and, based upon the foregoing and attached contentions, has concluded that the civil penalty herein is appropriate (*See* Attachment A, which is hereby made a part of the Department's Contentions).

17. The Department neither admits nor denies Fifth Avenue's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

FIFTH AVENUE'S CONTENTIONS

18. Fifth Avenue neither admits nor denies the Department's contentions. Fifth Avenue consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

ORDER

THEREFORE, Fifth Avenue, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement, and the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and Fifth Avenue agree to enter into this ORDER with the following terms and conditions:

A. Fifth Avenue agrees to pay to the Department a civil penalty in the amount of \$1,000.00 in settlement of the violations alleged herein in four equal monthly installment payments. The first \$250.00 monthly payment shall be paid on the first day of the month following execution of the Consent Order by the Department. The remaining three \$250.00 installment payments shall be paid on or before the first day of each succeeding month. Failure to pay the civil penalty within the specified timeframe may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. Fifth Avenue agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. Fifth Avenue agrees that it shall submit a plan to the Department, not later than forty-five days from the effective date of this Consent Order, detailing how it will ensure that the required equipment and manual are onsite, and that the records will be kept current.

D. Fifth Avenue agrees to comply with the terms, limitations, and conditions of 40 CFR, Part 63, Subpart M and the applicable air regulations immediately upon the effective date of this Consent Order and every day thereafter.

E. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents

to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

F. That, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

G. Fifth Avenue agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

H. For purposes of this Consent Order only, Fifth Avenue agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. Fifth Avenue also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Fifth Avenue shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of Fifth Avenue, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of Fifth Avenue) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the

extension request, finds the work was delayed because of conditions beyond the control and without the fault of Fifth Avenue, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

I. The Department and Fifth Avenue agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and Fifth Avenue shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

J. The Department and Fifth Avenue agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and Fifth Avenue does hereby waive any hearing on the terms and conditions of same.

K. The Department and the Fifth Avenue agree that this Order shall not affect the Fifth Avenue's obligation to comply with any Federal, State, or local laws or regulations.

L. The Department and Fifth Avenue agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

M. The Department and Fifth Avenue agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to

be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

N. The Department and Fifth Avenue agree that any modifications of this Order must be agreed to in writing and signed by both parties.

O. The Department and Fifth Avenue agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve Fifth Avenue of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

FIFTH AVENUE CLEANERS

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT



Neal Foster
Owner and Operator

Lance R. LeFleur
Director

Date Signed: _____

Date Executed: _____

Attachment A

**Fifth Avenue Cleaners
Auburn, Lee County, Alabama
Air Facility Number: 206-D004**

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Not maintaining required records	5	\$750	\$500	\$950	
No complete operating manual	1	\$100	\$100	\$100	Total of Three Factors
TOTAL PER FACTOR		\$	\$	\$	\$2,500

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	-\$1,500
Other Factors (+/-)	
Total Adjustments (+/-) Enter at Right	-\$1,500

Economic Benefit (+)	
Amount of Initial Penalty	\$2,500
Total Adjustments (+/-)	-\$1,500
FINAL PENALTY	\$1,000

Footnotes

* See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.