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In the Matter of the Alleged Violations of
Articles 19, 71 and 72 of the Environmental
Conservation Law of the State of New York
and Parts 201, 211 and 228 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,

ORDER

-- by --

**FREDERICK MONTALTO as owner and
operator of MONTALTO UNITED AUTO
BODY, INC.,**

Case No. R1-20031024-248

and

**MONTALTO UNITED AUTO BODY,
INC.,**

Respondents.

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WHEREAS:

1. Pursuant to section 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") duly served a notice of hearing and complaint upon respondent, Frederick Montalto, as owner and operator of Montalto United Auto Body, Inc., and respondent Montalto United Auto Body, Inc. ("respondents").

2. Respondent Montalto United Auto Body, Inc. is an automobile body repair and painting facility located at 404 Falmouth Road, North Babylon, New York ("facility").

3. The notice of hearing included a statement that, pursuant to 6 NYCRR 622.15, failure to timely answer or failure to attend the pre-hearing conference would result in a default under 6 NYCRR 622.15 and a waiver of respondents' right to a hearing.

4. The affidavit of service of Department staff attorney Louise M. DeCandia states that respondent was served with a copy of the notice of hearing and complaint by certified mail, return receipt requested (receipt # 7002 0860 0002 4490 0808) on February 25, 2004.

5. In the complaint, DEC staff alleged one cause of action against respondents for engaging “in the operation of an auto body repair facility, which is equipped with a spray paint booth for the purpose of applying automotive surface coatings.” DEC staff alleged that respondents were operating the facility without a permit or registration in violation of 6 NYCRR 201-1.1 and 6 NYCRR 201-1.2, that air contaminants were being released from the facility in violation of 6 NYCRR 211.2, and that respondents failed to comply with 6 NYCRR part 228 which establishes compliance, reporting and record-keeping rules for owners and operators of surface coating process facilities.

6. Department staff, as part of the relief requested in the complaint, seeks an order that directs respondents to apply to the Department for an air permit or registration as required by 6 NYCRR part 201, to pay a civil penalty, and to pay three years of past due state air quality control (“regulatory program”) fees (see Environmental Conservation Law (“ECL”) § 72-0302(1)).

7. Department staff attorney Louise M. DeCandia, in her affirmation dated March 25, 2004, states that respondents failed to serve on staff an answer within 20 days of respondents’ receipt of the notice of hearing and complaint or in an otherwise timely manner, and that respondents failed to attend the pre-hearing conference.

8. Department staff filed the notice of motion and supporting papers seeking judgment by default with the Office of Hearings and Mediation Services and the matter was assigned to Administrative Law Judge (“ALJ”) P. Nicholas Garlick. A copy of the ALJ’s Summary Report is attached. I adopt the Summary Report, subject to the comments in this order.

9. Department staff attorney Louise M. DeCandia submitted to ALJ Garlick, with a copy to respondents, an affirmation dated April 22, 2004 in support of the assessment of a civil penalty in this proceeding.

NOW, THEREFORE, having considered this matter, it is **ORDERED** that:

- I. Pursuant to 6 NYCRR 622.15, respondents are adjudged to be in default and to have waived their right to a hearing in this enforcement proceeding. Accordingly, the allegations in the complaint are deemed to have been admitted by respondents.
- II. Department staff’s motion for a default judgment is granted.
- III. Respondents are found to have violated 6 NYCRR subpart 201-1, 6 NYCRR 211.2, and 6 NYCRR part 228, and to have failed to pay the regulatory program fees as required by ECL § 72-0302(1).
- IV. Respondents are jointly and severally liable for the violations and are assessed a civil penalty of Five Thousand Dollars (\$5,000), and shall pay the penalty within thirty (30) days of the service of this order. Payment of this penalty shall be by cashier's check,

certified check or money order drawn to the order of "New York State Department of Environmental Conservation" and delivered to: Louise M. DeCandia, Esq., NYSDEC, Region 1, SUNY, Building 40, Stony Brook, New York 11790-2356.

- V. Within ten (10) days of the service of a copy of this order, respondents shall submit a check or money order for the payment of regulatory program fees for the spray paint booth for the past three years which, pursuant to ECL § 72-0302, amounts to a total of four hundred and eighty dollars (\$480). The check or money order shall be drawn to the order of "New York State Department of Environmental Conservation" and delivered to: Louise M. DeCandia, Esq., NYSDEC, Region 1, SUNY, Building 40, Stony Brook, New York 11790-2356.
- VI. Respondents shall, within ten (10) days of the service of a copy of this order, submit an application to the Department for a permit or registration as required by 6 NYCRR part 201 for the spray paint booth.
- VII. All communications from respondents to the Department concerning this order shall be made to Louise M. DeCandia, Esq., NYSDEC, Region 1, SUNY, Building 40, Stony Brook, New York 11790-2356.
- VIII. The provisions, terms and conditions of this order shall bind respondents, their heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: Erin M. Crotty, Commissioner

Dated: Albany, New York
July 6, 2004

To: Mr. Frederick Montalto
Montalto United Auto Body, Inc.
404 Falmouth Road
North Babylon, NY 11704

Montalto United Auto Body, Inc.
404 Falmouth Road
North Babylon, NY 11704

Louise M. DeCandia, Esq.
Assistant Regional Attorney
NYSDEC Region 1
Building 40, SUNY Campus
Stony Brook, NY 11790-2356

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

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In the Matter of the Alleged Violation of Article 19 of the Environmental Conservation Law of the State of New York and Parts 201, 211 and 228 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

SUMMARY REPORT

-- by --

Case No. R1-20031024-248

**FREDERICK MONTALTO as owner and operator of
MONTALTO UNITED AUTO BODY, INC.**

and

MONTALTO UNITED AUTO BODY, INC.

Respondents.

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PROCEEDINGS

By a Complaint dated February 25, 2004, staff of the Department of Environmental Conservation ("DEC Staff") alleged one cause of action against Frederick Montalto as owner and operator of Montalto United Auto Body, Inc. and Montalto United Auto Body, Inc. ("respondents") for operating an auto repair business with a spray paint booth for the purpose of applying automotive surface coatings without a permit or registration as required by Part 201 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The operation of the spray booth released air contaminants in violation of 6 NYCRR 211.2. In addition, respondents failed to comply with 6 NYCRR Part 228 relating to compliance, reporting and record-keeping rules for owners and operators of surface coating process facilities.

By notice of motion dated March 25, 2004, DEC Staff sought a judgment by default against respondents for these alleged violations. In support of the motion, DEC Staff submitted an affirmation of DEC Staff Attorney Louise M. DeCandia.

The Notice of Hearing and Complaint were served on respondents at respondents' place of business, 404 Falmouth Road, North Babylon, NY 11704, on February 27, 2004 (receipt # 7002 0860 0002 4490 0808). To date, respondents have failed to serve an answer or otherwise move, although the time to do so expired on or about March 18, 2004.

In her affirmation, DEC Staff Attorney Louise M. DeCandia states the penalty of ten thousand dollars (\$10,000) sought by DEC Staff is based upon a penalty of \$5,000 for each of two unpermitted spray booths. However, the Complaint alleges only a single unpermitted spray booth and the default motion cannot be used to alter the Complaint, only amending the Complaint or the filing of a Motion for an Order Without Hearing can accomplish this. The maximum penalty authorized for this violation is \$15,000 (ECL §71-2103) so the penalty amount sought by DEC Staff is below the minimum for a single violation. DEC Staff base its penalty calculation upon a penalty of \$5,000 per unpermitted spray booth. In her affirmation, DEC Staff Attorney Louise M. DeCandia states that the penalty sought is in conformance with law and DEC's Civil Penalty Policy. Spray paint booths can pose a threat to public health if not properly controlled and the penalty amount is designed to ensure future compliance on the part of the respondents and dissuade non-compliance within the regulated community. However, based upon DEC Staff's justification of the \$10,000 penalty on two unpermitted spray booths, it is appropriate to half the penalty to \$5,000, since DEC Staff allege only one in its complaint. A new complaint may be filed by DEC Staff regarding the second spray booth.

In addition to the monetary penalty, DEC Staff also seek an Order of the Commissioner to require respondent to pay past due air program operating fees in the amount of nine hundred and sixty dollars (\$960) and to apply for a registration or permit. These past operating fees are calculated by multiplying the \$160 annual fee times the 3 years when fees were not paid times the two spray booths. As explained above, since only one spray booth was alleged in the Complaint, DEC Staff is limited to \$480 in past operating fees.

The Notice of Motion for Default Judgment and supporting papers were mailed to respondents on or about March 25, 2004. Respondents have not opposed the motion.

DEFAULT PROCEDURES

Section 622.15, "Default Procedures" provides, in pertinent part: "(b) the motion for a 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."

The following Findings are based upon the papers submitted, as identified above.

FINDINGS OF FACT

1. On February 27, 2004, DEC Staff served a Notice of Hearing and Complaint on the respondents. The time to answer or otherwise move expired on or about March 18, 2004. No answer has been served to date.
2. A pre-hearing conference in this matter was scheduled for March 16, 2004 at 1:00 p.m. at the Department's office at Building 40, SUNY, Stony Brook, NY. Respondents failed to attend or send a representative.

3. Staff mailed the motion for default judgment and supporting papers to respondents on or about March 25, 2004. Respondents have not opposed said motion.
4. The requirements for a default judgment have been adequately met as prescribed by 6 NYCRR Section 622.15(b).

CONCLUSION

The motion for default judgment should be granted regarding the single violation alleged in the Complaint. This Default Summary Report and a proposed Order (attached hereto) are referred to the Commissioner for final determination.

/s/

P. Nicholas Garlick
Administrative Law Judge

To: Mr. Frederick Montalto
Montalto United Auto Body, Inc.
404 Falmouth Road
North Babylon, NY 11704

Louise M DeCandia, Esq.
Assistant Regional Attorney
NYSDEC Region 1
Building 40, SUNY Campus
Stony Brook, NY 11790-2356