

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1

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Boston, MA 02109-3912

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REGIONAL HEARING CLERK

**IN THE MATTER OF:**

**Munce's Superior Petroleum Products, Inc.  
620 Main Street  
Gorham, New Hampshire, 03581**

**and**

**Munce's Superior, Inc.  
620 Main Street  
Gorham, New Hampshire, 03581**

Respondents.

Docket No. CWA-01-2010-0040

Proceeding Pursuant to § 309(g) of the  
Clean Water Act, 33 U.S.C. 1319(g)

**ORDER TO CLARIFY AND SUPPLEMENT THE RECORD**

This case is before the undersigned on the Complainant's Motion for Default and Memorandum in Support of Motion for Default Order (collectively the "Motion"). Before proceeding to the finding of a violation and appropriate penalty, it is necessary to clarify and supplement certain aspects of the record. The Complainant has moved for the entry of a default order and the assessment of a \$46,403 penalty against both Munce's Superior Petroleum Products, Inc. (MSPPI) and Munce's Superior Inc. (MSI). The Motion is based on a Complaint that the Complainant filed on July 21, 2010, which has not been answered by either MSPPI or MSI. Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, a party may be found in default by failing to file an Answer to a Complaint in a timely manner. 40 C.F.R. § 22.17(a). Default

by a Respondent amounts to an admission of all factual allegations made in the Complaint and a waiver of the Respondent's right to contest those findings. *Id.*

The Consolidated Rules require the proper service of the Complaint. *See* 40 C.F.R. § 22.5(b)(1) (requiring service of the complaint). There has been no challenge by the Respondents to service of process of the Complaint in this matter. However, default judgments are not favored by modern procedure. *See In the Matter of Rod Bruner and Century 21 Country North*, EPA Docket No. TSCA-05-2003-0009, May 19, 2003. Because a default order can be set aside for good cause, 40 C.F.R. § 22.17(c), it is imperative to determine whether service of the Complaint was proper prior to issuing a default order against either of the Respondents.

It is unclear from the filings by the Complainant what relationship the two captioned Respondents have to each other. Given the extensive use of the plural—"Respondents"—it would seem that these are two separate companies. However, in the Complainant's Exhibit 2, which is provided to prove service of the Complaint, *see Motion* at 8, only Harold Munce as President of MSPPI is referenced in the heading for the transmittal letter and addressed on the return receipt. Similarly, only Harold Munce in his role as President of MSPPI is listed as copied on the Certificate of Service for the present Motion. From the current record it appears that a Robert Munce or Butch Munce is President of MSI. It therefore appears that the Complainant may not have properly served MSI. However the "Company Profile" of MSI provided as Attachment 2 to Mr. Canzano's Affidavit suggests that MSI "also does business as" MSPPI. The relationship between the two companies—if there are indeed two companies—is unclear from the record. The Complainant is ordered to supplement the record to clarify the relationship

between these two entities and provide any evidence that MSI was also properly served with a Complaint.

In addition to the requirement for proper service in the Consolidated Rules, the Clean Water Act provides an additional precondition to the assessment of an administrative penalty. Section 309(g), 33 U.S.C. § 1319(g), which governs the issuance of administrative penalties, allows that “the Administrator . . . may, *after* consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.” 33 U.S.C. § 1319(g)(1) (emphasis added). The Consolidated Rules interpret this requirement as requiring the Complainant to notify the State in which the violation occurred within 30 days of proof of service of process and give the State the opportunity to consult on the issuance of any administrative penalty. 40 C.F.R. § 22.38(b). The current record shows that Mr. Robert Daniels of the New Hampshire Department of Environmental Services was copied on both the initial information request letter and the subsequent follow up letter. Exhibit 3; Attachment 1, Canzano Affidavit. The record does not disclose similar contact with the State of New Hampshire in the filing of the Complaint or in the present Motion. However, because the requirements of the Clean Water Act and Consolidated Rules do not require the State to be contacted specifically through these filings, it is possible that the Complainant has properly satisfied this precondition. Neither the Complaint nor the present Motion alleges that this condition has been satisfied. The Complainant is therefore ordered to supplement the record to offer any proof that the State of New Hampshire was notified and given an opportunity to consult as required by the Clean Water Act and the Consolidated Rules.<sup>1</sup>

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<sup>1</sup> I would note that this requirement is not stringent. The State must only be given an “opportunity” to consult; it need not actually consult with the Complainant. *See In Re Borough of Ridgway, Pennsylvania*,

The third point of clarification concerns the calculation of the requested administrative penalty contained in the Complainant's present Motion. In a similar vein to the first point above, the Motion is unclear in distinguishing MSI and MSPPI. The argument section of the Motion, like the Complaint, does claim that only MSI is liable for a violation of the Clean Water Act by failing to respond to the § 308 information request. However, in the penalty calculation section, the Motion simply uses the term "Respondent" or "Respondents" in requesting the assessment of an administrative penalty for this violation. Because the Complaint does not allege, and the record does not support the contention that MSPPI was issued a § 308 information request, MSPPI would not appear to be liable for this portion of the calculated penalty. The Motion and Complaint similarly do not divide the liability for any other penalty between MSI and MSPPI. Obviously if these two entities are one in the same, there is no need to divide the penalty. However, as noted above, the current record is unclear on this point. The Complainant is therefore ordered to supplement the record with the relationship between MSI and MSPPI; and if these are not the same company, clarify its penalty calculation to take into account the individual liability and relative fault of the two parties.

The final point of clarification regards the various penalty calculations contained within the Complainant's Motion. Under the Consolidated Rules, the "relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). Therefore, under normal circumstances, unless the proposed penalty were grossly

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Order on Motions for Summary Determination and Accelerated Recommended Decision, Docket Nos. CWA-III-127, CWA-III-141, p. 5-6 (June 29, 1995), *available at* [http://dchqdomino1.dcicc.epa.gov:9876/OA/RHC/EPAAAdmin.nsf/RJO%20Archive/6BD14C1B379955538525766A0051AA88/\\$File/ATTKA0D8.pdf](http://dchqdomino1.dcicc.epa.gov:9876/OA/RHC/EPAAAdmin.nsf/RJO%20Archive/6BD14C1B379955538525766A0051AA88/$File/ATTKA0D8.pdf)

disproportionate to the violation or was in excess of statutory limits, I would be bound by the proposed penalty. However, given the other issues requiring clarification in the Complainant's Motion, I invite the Complainant at this time to clarify its methodology and calculations based on the following observations. First, it appears that, based on EPA's *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*, the base penalty chosen by the Complainant is incorrect. For the 615 and 619 Main Street Facilities, the Complainant asks that the penalty base be that of a moderate violation. Both of these Facilities have the capacity to store between 40,001 and 200,000 gallons according to the Complaint and Motion, which corresponds with a penalty base between \$6,000 and \$15,000, not the \$2,000 base proposed. *Motion* at 11, 22. Second, in adjusting the penalty for the 620/624 Main Street Facility based on duration of the violation, the text and the calculation ask for a 3.5% increase based on seven months of noncompliance, but a 4% increase is also noted, likely due to a typographical error. *See Motion* at 23–24. Third, in adjusting the penalty based on previous violations at the 620/624 Main Street Facility, the Complainant asks for an increase of 50%, which would correspond to \$5,977 or \$5,978, not \$5,997, again likely due to a typographical error. *Motion* at 24–25. Finally, the Complainant proposes that, according to EPA's inflation adjustment policy, the penalty be adjusted by 17.23% for inflation. *Motion* at 25–26. However, it appears that the values after this proposed adjustment are due instead to an increase of between 20.54–28.76%.<sup>2</sup> Because I am ordering the Complainant to supplement the record on other points, I invite the Complainant to take the opportunity to

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<sup>2</sup> 443 Main Street:  $(1508-1251)/1251 * 100 = 20.54\%$  increase  
615 & 619 Main Street:  $(6033-5005)/5005 * 100 = 20.54\%$  increase  
620/624 Main Street (no typo):  $(7696-5977)/5977 = 28.76\%$  increase  
620/624 Main Street (w/ typo):  $(7696-5997)/5997 = 28.33\%$  increase

supplement their Motion in order to clarify the methodology and calculations of the proposed penalty.

As stated above, prior to the issuance of a default order and the assessment of a penalty, the record must provide assurance that the Respondent was properly served with the Complaint and that the State of New Hampshire was notified and given an opportunity to consult. It is also necessary for the Complainant to clarify the amount and against whom it requests that an administrative penalty be assessed. Therefore, based upon the record in this matter, and in light of the considerations set forth herein, the undersigned issues the following **ORDER**.

**IT IS ORDERED:**

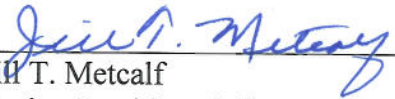
**The Complainant is hereby directed to supplement the record to address the relationship between Munce's Superior, Inc. and Munce's Superior Petroleum Products, Inc. and provide proof that Munce's Superior, Inc. was properly served with the Complaint.**

**The Complainant is further directed to supplement the record to address the statutory precondition that the State of New Hampshire be notified and provided an opportunity to consult prior to the issuance of an administrative penalty.**

**Finally, the Complainant is directed to clarify its Motion to specify the amount of administrative penalties it seeks against each of the Respondents, individually, or provide proof that the two entities are the same company. The Complainant is invited at this time to clarify the methodology of its calculations to address any of the issues noted in this Order.**

**Both parties may file and serve information and documentation in compliance with this Order no later than January 31, 2012.**

Dated: December 15, 2011

  
\_\_\_\_\_  
Jill T. Metcalf  
Acting Presiding Officer

**Certificate of Service**

I hereby certify that the **ORDER TO CLARIFY AND SUPPLEMENT THE RECORD** by Acting Regional Judicial Officer Jill T. Metcalf in the matter of **Munce's Superior Petroleum Products, Inc. and Munce's Superior, Inc., Docket No. CWA-01-2010-0040**, was served on the parties as indicated.

**Certified Mail**

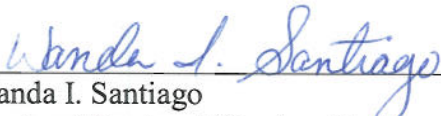
Munces's Superior Petroleum Products, Inc.  
620 Main Street  
Gorham, NH 03581

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**Hand Delivered**

Tonia Bandrowicz  
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Dated: December 15, 2011

  
Wanda I. Santiago  
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