



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1  
5 Post Office Square, Suite 100  
Boston, MA 02109-3912

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February 23, 2012

Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 1  
5 Post Office Square, Suite 100  
Boston, MA 02109-3912

BY HAND

Re: In the Matter of Munce's Superior Petroleum Products, Inc. and Munce's Superior, Inc.  
Docket No. CWA-01-2010-0040

Dear Ms. Santiago:

Enclosed for filing in the above-referenced case is the original and one copy of *Complainant's Response To Presiding Officer's Order To Clarify And Supplement The Record* and *Complainant's Response To Respondents' Suggestion Of Bankruptcy And Response To The Order To Clarify And Supplement The Record*.

Sincerely,

Tonia Bandrowicz  
Senior Enforcement Counsel

Enclosure

cc:

LeAnn Jensen, Acting Regional Judicial Officer  
Robert J. Keach, Esq.  
Jessica A. Lewis, Esq.

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ENVIRONMENTAL PROTECTION AGENCY  
REGION I

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Docket No. CWA-01-2010-0040

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. )

**RESPONSE TO PRESIDING OFFICER'S ORDER TO CLARIFY  
AND SUPPLEMENT THE RECORD**

**AND RESPONSE TO RESPONDENTS' SUGGESTION OF BANKRUPTCY AND  
RESPONSE TO THE ORDER TO CLARIFY AND SUPPLEMENT THE RECORD**

Complainant, the United States Environmental Protection Agency, Region 1 ("EPA"), submits this response to both the Presiding Officer's December 15, 2012 *Order to Clarify and Supplement the Record* (the "Order"), as modified by the Presiding Officer's January 31, 2012 *Order*, and Respondent's January 27, 2012 *Suggestion of Bankruptcy And Response To Order To Clarify And Supplement The Record* ("Respondent's Suggestion").

In the Order, the Presiding Officer first requests clarification on the relationship between the two companies, Munce's Superior Inc. ("MSI") and Munce's Superior Petroleum Products, Inc. ("MSPPT"), both cited as Respondents in the Complaint, to ensure that both entities were

properly served. During the bankruptcy proceeding, it became apparent that MSI was not a registered corporation, as recently confirmed in ¶ 6 of *Respondents' Suggestion*, which states: “there is no entity by the name of Munce’s Superior, Inc. [Munce’s Superior Petroleum Products, Inc.], a corporation registered under the laws of the State of New Hampshire, often uses Munce’s Superior, Inc. as a d/b/a. It is not a separate entity.” Therefore, the legal entity that owns and operates the facilities in question, MSPPI, and its President, Mr. Harold Munce,<sup>1</sup> have been provided service, as the correspondence and return receipt filed in this action show. See *Complainant’s Motion*, p. 8, and Exhibit 2.

Second, the Presiding Officer requests Complainant to supplement the record to offer proof that the State of New Hampshire was notified and given an opportunity to consult on the penalty action. While the administrative penalty counts in the Complaint initiated under Section 311(b)(6)(A) of the Clean Water Act (the “Act”), 33 U.S.C. § 1321(b)(6)(A), do not require consultation with the affected state prior to the assessment of an administrative penalty, such consultation is required for the one count in the Complaint concerning the respondent’s failure to respond to the information request issued under Section 308 of the Act, 33 U.S.C. § 1318, as that count is brought under Section 309(g) of the Act, 33 U.S.C. § 1319(g). EPA did notify the State of New Hampshire, as well as the U.S. Coast Guard, of the issuance of the Complaint. See attached June 21, 2010 Email Message and attached letter from the undersigned to Robert Daniel, New Hampshire Department of Environmental Protection. Subsequently, the undersigned had email correspondence with a Senior Assistant Attorney General for the New Hampshire Department of Justice regarding EPA’s penalty action.

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<sup>1</sup> Harold Munce is also known as Butch Munce.

Thirdly, the Presiding Officer has requested clarification on EPA's penalty calculation. While the amount EPA seeks, \$ 46,403, remains the same, Complainant notes the following corrections to the calculation outlined in its *Default Motion*:

- In choosing a base penalty for the 615 and 619 Main Street Facilities, Complainant intended to base the penalty on a "minor" violation (not a "moderate" violation as stated in the *Default Motion*). Accordingly, the \$2,000 amount used by Complainant in its calculation is correct as it falls within the matrix range for a "minor" violation for a facility having an oil storage capacity between 40,001 and 200,000 gallons;
- In adjusting the penalty for the 620/624 Main Street Facility based on the duration of the violation factor, Complainant used a factor of 3.5%, not the 4.0% which is erroneously noted in the *Default Motion*;
- Likewise, the *Default Motion* erroneously states \$5,997 as the total after a 50% increase for the prior violation factor when it should state \$5,977;
- Finally, while the *Default Motion* notes that the penalty is adjusted by a 17.23% inflation factor, the actual calculation uses two inflation factors, one for the period prior to January 12, 2009 (i.e., 17.23%), but a higher factor for the period after January 12, 2009 (i.e., 28.75%). This is consistent with EPA's December 29, 2008 *Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule*. See chart on p. 5. As the period of violation for the 620/624 Main Street Facility began on November 20, 2009 (the date of EPA's inspection) only the higher factor of 28.75 % was used in calculating the inflation factor for that facility. For the other facilities, two

inflation factors were used: For the period from June 21, 2005 to January 12, 2009, Complainant used the 17.23% inflation factor, but for the period after January 12, 2010, up until the Complaint was filed on June 21, 2010, the higher inflation factor of 28.75% was used. This explains why, for all these facilities, there was an average increase of 20.54% (as noted in the footnote on p. 5 of the *Order*). It also explains why, for the 620/624 Main Street Facility, there was a 28.76%<sup>2</sup> increase for the inflation factor (after correcting for the typo noted above).

In *Respondent's Suggestion*, Respondent, MSPPI, argues that the Presiding Officer no longer has jurisdiction to hear a claim for penalties because of its bankruptcy, or that this action must be stayed pending resolution of the bankruptcy proceeding. ¶ 4-5. Both contentions are incorrect. EPA recognizes that Section 362 of the Bankruptcy Code, sometimes referred to as the "automatic stay," prohibits the filing of certain actions against a debtor. However, this administrative action is exempted from the automatic stay by Section 362(b)(4) of the Bankruptcy Code, which exempts "an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power, including the enforcement of a judgment other than a money judgment." 11 U.S.C. § 362(b)(4). EPA's enforcement of environmental laws enacted to protect public health and safety is a classic exercise of police and regulatory authority. Thus, an action seeking civil penalties for violations of environmental laws qualifies under the police or regulatory exception to the automatic stay, and EPA can pursue such actions to determine the amount of such penalties, in any appropriate forum, including this administrative proceeding. *See In re Commerce Oil Co.*, 847 F.2d 291, 295-95 (6th Cir. 1988);

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<sup>2</sup> The 1% increase from the inflation factor of 28.75% to the factor calculated is presumed to be because of rounding.

*United States v. LTV Steel Co., Inc.*, 269 B.R. 576, 582 (W.D. Pa. 2001) (“Section 362(b)(4) only limits the government’s police regulatory power to *enforce* a money judgment outside of the bankruptcy. The government’s power to seek *entry* of a civil penalty judgment for violations of the environmental laws is not precluded.”).<sup>3</sup>

Indeed, the United States Bankruptcy Court for the District of New Hampshire, which is presiding over Respondent's bankruptcy case, recently issued a ruling, in that very case, which fully supports EPA’s position. Prior to the filing of Respondent's bankruptcy petition, the State of New Hampshire had brought an action in state court against MSPPI for civil penalties and injunctive relief for, *inter alia*, violations of New Hampshire’s spill prevention regulations. On the State’s motion seeking clarification of the scope of the automatic stay, the bankruptcy court ruled that the State's action could proceed in state court and that only the enforcement of any money judgment would be reserved for the bankruptcy court:

The State may proceed with the Superior Court Case in the Superior Court for Coos County, Docket No. 2010 cv-00121, against the Debtors and the automatic stay does not apply to the State’s requests in that matter for the entry of orders and judgments for injunctive relief and the assessment of civil penalties against the Debtors. The State may also proceed to enforce any judgment or orders entered in the Superior Court Case against the Debtors, other than a money judgment against the Debtors, specifically including, but not limited to, the enforcement of money judgments for civil penalties or monetary sanctions.

*In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011), Ex. 1, hereto.

Finally, this tribunal may determine the applicability of the automatic stay. *See In re Gandy*, 327 B.R. 769, 800-01 (Bankr. S.D. Tex. 2005) (bankruptcy court does not have exclusive jurisdiction to determine applicability of "police and regulatory" exception to automatic stay);

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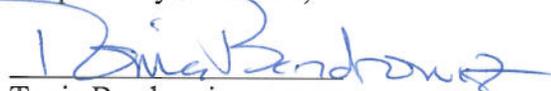
<sup>3</sup> Once EPA obtains a judgment from this tribunal setting forth the amount of the penalty, it will only seek to collect the judgment by filing an appropriate claim or application in the bankruptcy proceeding.

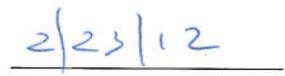
28 U.S.C. §1334 (Congress conferred upon the district courts “original and exclusive jurisdiction of all cases under title 11,” but conferred “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” (emphasis added).<sup>4</sup> Likewise, this tribunal has the jurisdiction to determine whether the "police and regulatory" exception to the automatic stay is applicable. *In Re Neman*, TSCA Appeal No. 93-3, U.S. EPA, Environmental Appeals Board, 5 E.A.D. 450, 454, footnote 1, August 26, 1994 (administrative tribunal finding automatic stay inapplicable); *In Re Standard Tank Cleaning Corp.*, RCRA (3008) Appeal No. 91-2, U.S. EPA, Chief Judicial Officer, 3 E.A.D. 642, 645-646, July 19, 1991 (id.).

In sum, this action can proceed, despite Respondent's bankruptcy, and this tribunal has jurisdiction to make that determination.

For the reasons set forth in Complainant's *Default Motion*, as clarified and supplemented herein, Complainant requests that the Regional Judicial Officer issue an order finding the Respondent, MSPPI (which does business as MSI), in default and liable for violations under section 308 of the CWA, 33 U.S.C. § 1318, and the Oil Pollution Prevention regulations at 40 C.F.R. Part 112, promulgated under section 311(j) of the CWA, 33 U.S.C. § 1321(j), and assessing an administrative penalty in the amount of \$ 46,403.

Respectfully submitted,

  
Tonia Bandrowicz  
Sr. Enforcement Counsel  
U.S. EPA, Region 1

  
Dated

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<sup>4</sup> The district courts have referred their bankruptcy jurisdiction to the bankruptcy courts. *See* 28 U.S.C. §157.