EPA ENFORCEMENT ACCOUNTS RECEIVABLE CONTROL NUMBER FORM FOR ADMINISTRATIVE ACTIONS

This form was originated by Wanda I. Santiago for John Krallman (Name of Case Attorney) 5/17/12 (Date)

in the ORC (RAA) (Office & Mail Code) at 918-1113 (Phone number)

Case Docket Number CWA-01-2010-0040

Site-specific Superfund (SF) Acct. Number _____

✓ This is an original debt ____ This is a modification

Name and address of Person and/or Company/Municipality making the payment:

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

Total Dollar Amount of Receivable $ 46,403 Due Date: 6/14/12

SEP due? Yes _____ No ✓ Date Due _____

Installment Method (if applicable)

INSTALLMENTS OF:

1ST $ _____ on _____

2nd $ _____ on _____

3rd $ _____ on _____

4th $ _____ on _____

5th $ _____ on _____

For RHC Tracking Purposes:

Copy of Check Received by RHC _____ Notice Sent to Finance _____

TO BE FILLED OUT BY LOCAL FINANCIAL MANAGEMENT OFFICE:

IFMS Accounts Receivable Control Number _____

If you have any questions call: _____ _____
in the Financial Management Office Phone Number

IN THE MATTER OF:	
MUNCE'S SUPERIOR PETROLUM PRODUCTS INC. 620 Main Street Gorham, New Hampshire 03581	**Docket No. CWA-01-2010-0040**
Respondent.	

INITIAL DECISION AND DEFAULT ORDER

This is a civil administrative proceeding instituted under the Clean Water Act, 33 U.S.C. §§ 1251 to 1387 ("CWA"), the Federal Oil Pollution Prevention Regulations set forth at 40 C.F.R. Part 112 ("Part 112") promulgated under the authority of § 311(j) of the CWA, and 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.

The proceeding was initiated by an Administrative Complaint and Notice of Opportunity to Request a Hearing ("Complaint") filed by the Complainant, United States Environmental Protection Agency, Region 1 ("Complainant" or "EPA") against Munce's Superior Petroleum Products, Inc. ("MSPPI") and Munce's Superior, Inc. ("MSI") (collectively, "Respondent") on July 21, 2010. In its Complaint, EPA alleged that MSI violated certain provisions of the CWA and implementing regulations by failing to reply to an information request as required by § 308 of the CWA. EPA also alleged that MSI and MSPPI violated certain provisions of the CWA and implementing regulations by failing to fully implement a Spill Prevention, Control, and Countermeasure ("SPCC") plan at certain properties as required under § 311(j) of the CWA and implementing

regulations, and by failing to prepare and implement a SPCC plan at other properties as required under § 311(j) of the CWA and implementing regulations.

In the currently pending Motion for Default Order ("Motion for Default"), the Complainant alleges that MSI and MSPPI are in default for failure to file an Answer to the Complaint and requests that a penalty of FORTY SIX THOUSAND FOUR HUNDRED AND THREE DOLLARS ($46,403)[1] be assessed.

After reviewing the Complainant's Motion for Default, Acting Presiding Officer Jill Metcalf issued an Order to Clarify and Supplement the Record ("Clarification Order") on December 15, 2011. The Clarification Order sought to clarify three issues: whether MSI had been properly served and the relationship, if any, between MSPPI and MSI; whether the State of New Hampshire had been properly notified; and clarification of the Complainant's penalty calculations.

On January 27, 2012, in response to the Clarification Order, counsel for MSPPI submitted a Suggestion of Bankruptcy and Response to Order to Clarify and Supplement the Record ("MSPPI Response"). In the MSPPI Response, MSPPI claimed that because of the currently pending bankruptcy proceeding in the Bankruptcy Court of New Hampshire concerning MSPPI and four related entities, the Bankruptcy Court had jurisdiction to determine the amount of any civil penalty. MSPPI claimed that in addition, this proceeding must be stayed in accordance with the automatic stay provision of 11 U.S.C. § 362. MSPPI also clarified that MSPPI is a corporation registered under the laws of New Hampshire and often does business as (d/b/a) MSI; these are not two

[1] This is the amount requested in the Complainant's Conclusion. The Complainant's Response also requests $46,403. In part I, "Standard for Default Order," however, the Complainant requests $46,400. I assume that the $46,400 value is a typo, and that the Complainant is seeking a total penalty of $46,403.

separate entities. The MSPPI Response did not, however, contain an Answer to the Complaint.

On February 23, 2012, the Complainant submitted a Response to Presiding Officer's Order to Clarify and Supplement the Record ("Complainant's Response"). The Complainant's Response alleged that MSI and MSPPI are the same company. The Complainant's Response also provided evidence that the State of New Hampshire was consulted regarding the current proceeding, as discussed below in the Consultation with the State section. In addition, the Complainant's Response clarified the penalty calculations within the Motion for Default, as discussed below in the Determination of CWA Penalty Section. Finally, the Complainant's Response argued that the bankruptcy proceeding does not require a stay of this proceeding and that the scope of the automatic stay provision can be determined in this proceeding because the bankruptcy court has original but not exclusive jurisdiction. I will address the arguments regarding the currently pending bankruptcy proceeding—whether the Bankruptcy Court of New Hampshire has jurisdiction to determine the amount of any penalty and whether that pending case requires this proceeding to be stayed—in the Bankruptcy Conclusions of Law section below.

Based on the MSPPI Response and the Complainant's Response, I have concluded that MSI and MSPPI are the same company. Accordingly, references to MSI within the Complaint, Motion for Default, and the Record will be treated as a references to MSPPI. In addition, because MSPPI was properly served, there is no need for proof that MSI was properly served with the Complaint and Motion for Default independent of MSPPI as was requested in the Clarification Order.

Based upon the record in this matter and the following Bankruptcy Conclusions of Law, CWA Findings of Fact and Conclusions of Law, and Determination of CWA Penalty, the Complainant's Motion for Default Order is hereby GRANTED. MSPPI is hereby found in default and held liable for the SPCC violations alleged by the Complainant.

BACKGROUND

This is a proceeding under §§ 308 and 311 of the CWA, and the Federal Oil Pollution Prevention Regulations set forth at 40 C.F.R. Part 112, initiated by the issuance of a Complaint on June 21, 2010 against MSPPI. The Complaint alleges violations of the CWA for failure to respond to an information request (§ 308) and for failure to comply with the Oil Pollution Prevention Regulations by failing to fully prepare or fully implement SPCC plans in accordance with 40 C.F.R. § 112.7 and § 311(j) of the CWA.

The Complaint explicitly stated on page 17, in section V, titled *Opportunity to Request a Hearing*, that:

> Respondent may, pursuant to section 311(b)(6) of the Act and 40 C.F.R. § 22.15(c), request a hearing on the proposed penalty assessment in their Answer to this Complaint. The procedures for any such hearing and for all proceedings in this action are set out in 40 C.F.R. part 22, two copies of which is enclosed with this Complaint.

The Complaint also states on page 17 that:

> Default constitutes an admission of all facts alleged in this Complaint and a waiver of the right to a hearing on such factual allegations. In order to avoid default in this matter, Respondent must within 30 days after receipt of this Complaint either: (1) settle this matter with the Complainant; or (2) file an original and one copy of a written Answer to this Complaint[.]

Under 40 C.F.R § 22.15(a) of the Consolidated Rules, an Answer is due within thirty days after service of the Complaint. Under 40 C.F.R. 22.17(a), a party may default by failing to file a timely Answer to a Complaint. This "constitutes, for purposes of the

pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. 22.17(a). Therefore, if a Respondent was properly served, the facts alleged by the Complainant are admitted against that Respondent.

Additionally, in order to be able to assess a penalty against a Respondent pursuant to § 309, the Complainant must demonstrate it has met certain preconditions. Both the CWA and the Consolidated Rules require that EPA consult with the state in which the violation occurred *prior* to assessing any administrative penalty. Section 309(g), 33 U.S.C. § 1319(g), 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 echo this requirement in the specific provisions governing § 309 administrative penalties: "Complainant shall notify the State Agency within 30 days following proof of service of the complaint on respondent[2] or in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days *before* the issuance of an order assessing a civil penalty." 40 C.F.R. § 22.38(b) (emphasis added).[3] While this precondition has not been the subject of much debate in litigation, it has been referenced before[4] and the

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[2] This 30 day time frame is the same time frame within which the Respondent has to respond to the Complaint. *See* 40 C.F.R. § 22.15(a). Therefore, the earliest that a default could be entered and a penalty assessed would be 31 days following service.

[3] The preamble to this section of the Consolidated Rules confirms that consultation with the state must be undertaken prior to the assessment of a penalty. 55 FR 23838, 23839 (June 12, 1990) ("Under section 309(g), the Administrator also must consult with the State in which the violation occurs *before* assessing the penalty." (emphasis added)).

[4] *See In re Service Oil, Inc.*, Initial Decision, Docket No. CWA-08-2005-0010 (Aug. 3, 2007), *available at* http://www.epa.gov/oalj/orders/service-oil-id-080307.pdf; *In Re Borough of Ridgway, Pennsylvania*, Order on Motions for Summary Determination and Accelerated Recommended Decision, Docket Nos. CWA-III-127, CWA-III-141 (June 29, 1995), *available at* http://dchqdomino1.dcicc.epa.gov:9876/OA/RHC/EPAAdmin.nsf/RJO%20Archive/6BD14C1B379955538525766A0051AA88/$File/ATTKA0D8.pdf; *In re Industrial Elevator Maintenance Company, Inc.*, Decision and Final Order of the Regional Administrator, Docket No. CWA-III-137 (Feb. 28, 1996), *available at*

requirement is clear: prior to the assessment of an administrative penalty, EPA must consult with the state in which the violation occurred. As is evident from *In Re Borough of Ridgway, Pennsylvania*, this requirement is not burdensome. Simply soliciting the state's input is sufficient for the Complainant to be able to claim that it "consulted" with the state. Docket Nos. CWA-III-127, CWA-III-141 (June 29, 1995).

The Clarification Order sought input on both the evidence of proper service and the evidence that the State of New Hampshire had been consulted.

BANKRUPTCY CONCLUSIONS OF LAW

In the MSPPI Response, MSPPI argues that the Bankruptcy Court of New Hampshire is the proper forum to litigate the amount of EPA's claim against MSPPI and that the automatic stay provision of 11 U.S.C. § 362 requires a stay of this proceeding. In the Complainant's Response, the Complainant argues that only the collection of an administrative penalty is barred by the automatic stay and that the entry of an administrative penalty need not be stayed.

MSPPI cites no authority for the proposition that by filing a proof of claim, EPA no longer has authority to determine the amount of an administrative penalty to be assessed against MSPPI. In fact, the Bankruptcy Court of New Hampshire has already ruled that the State is allowed to proceed in a parallel *judicial* proceeding to assess a civil penalty against MSPPI. Complainant's Response at 5; *In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011). There is simply no evidence to suggest that the Bankruptcy Court is the only, proper, or even

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http://dchqdomino1.dcicc.epa.gov:9876/OA/RHC/EPAAdmin.nsf/RJO%20Archive/7FA33199FC2C00CD8525766A0051AABB/$File/indus-elevat-rpt.pdf; *In re Antoinette Bozievich Buxton Shrewsbury Township, York County, Pennsylvania*, Decision and Order of the Regional Administrator, Docket No. CWA-III-089 (June 13, 1995), *available at* http://dchqdomino1.dcicc.epa.gov:9876/OA/RHC/EPAAdmin.nsf/RJO%20Archive/A3A31B2B4D9AC51C8525766A0051AA76/$File/ATTF3TAO.pdf.

appropriate forum to determine the amount of any *administrative* penalty assessed against MSPPI.

MSPPI also cites no authority other than a general reference to 11 U.S.C. § 362 in support of its argument that the automatic stay provision applies to this proceeding. Conversely, the Complainant cites several authorities in support of its argument that only the collection of a penalty is stayed and that the assessment can proceed. Among these authorities is the Bankruptcy Court of New Hampshire itself which, in response to a motion seeking clarification on the scope of the automatic stay, held that the stay did not apply to the State of New Hampshire's suit seeking "the entry of orders and judgments for injunctive relief and the *assessment* of civil penalties against [MSPPI]." Complainant's Response at 5; *In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011). The authority to *enter* a judgment against a bankruptcy petitioner is well established and is based on congressional intent. *See In re Commerce Oil Co.*, 847 F.2d 291, 291–95 (6th Cir. 1988). The continuation of this proceeding will not undermine the bankruptcy system because enforcement of an assessed penalty must be conducted through the Bankruptcy Court of New Hampshire. *See* Complainant's Response at 5 n.3. I therefore conclude that the bankruptcy proceedings involving MSPPI do not prevent the entry of a default judgment against MSPPI.

CWA FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 112.3 and based upon the entire Record, I make the following findings:

Service of the Complaint

1. The Complaint was sent by certified mail, return receipt requested, to Harold Munce, President of MSPPI, on June 21, 2010. A representative of MSPPI signed for the Complaint on June 23, 2010. Service was complete as to MSPPI as of June 23, 2010. To date, Respondent has not settled the matter, filed a written Answer, or requested a hearing in this matter, and the thirty day period for doing so has lapsed. On July 12, 2011, Complainant filed a Motion for Default Order. This Motion for Default was mailed to MSPPI by certified mail, return receipt requested. To date, MSPPI has not filed an Answer to the Complaint.

2. I therefore find that MSPPI is in DEFAULT. Therefore, all of the facts alleged by the Complainant shall be deemed admitted against MSPPI.

Section 308 and 311 Information Request Letter

3. On January 4, 2010, EPA issued a letter pursuant to §§ 308(a) and 311(m) of the CWA ("the § 308 letter"). The § 308 letter was sent[5] certified mail, return receipt requested to Mr. Robert Munce of MSPPI. A representative of MSPPI signed the return receipt on January 7, 2010. Therefore, MSPPI's response to the § 308 letter was due to EPA no later than February 9, 2010. MSPPI failed to respond to the § 308 letter by February 9, 2010, and made no request to extend the 30 day time period.

4. On April 7, 2010, EPA sent a certified mail, return receipt requested, letter to MSPPI advising that a reply to the § 308 letter was mandatory, instructed MSPPI to reply, and informed MSPPI that failure to reply could result in an enforcement action against it and an assessment of civil penalties. A representative of MSPPI signed the

[5] The letter informed MSPPI that it was not in compliance with the Oil Pollution Prevention Regulations because, *inter alia*, it did not have an adequate SPCC plan for the 443, 615, and 619 Main Street facilities and had failed to prepare a plan for the 620/624 Main Street facility. The letter required MSPPI to submit revised SPCC plans for 443, 615, and 619 Main Street facilities and prepare an initial SPCC plan for the 620/624 Main Street facility.

return receipt for the certified letter on April 10, 2010. To date, MSPPI has not replied to either the § 308 letter or the April 10, 2010 letter.

5. Based on the facts outlined above, I find that MSPPI failed to respond to EPA's information request issued under § 308 of the CWA, 33 U.S.C. § 1318. Accordingly, I conclude that MSPPI violated § 308 of the CWA.

Violations of the Oil Pollution Prevention Regulations

6. MSPPI is a "person" as defined in § 311(A)(7) of the CWA and 40 C.F.R. § 112.2, in that MSPPI is a corporation organized under the laws of New Hampshire with its headquarters located at 620 Main Street, Gorham, New Hampshire.

7. MSPPI is an "owner or operator" of a facility within the meaning of § 311(a)(6) of the CWA and 40 C.F.R. § 112.2 in that it has owned and operated four bulk oil storage and distribution facilities located at 443, 615, 619, and 620/624 Main Street, Gorham, New Hampshire.

8. MSPPI's facilities are "non-transportation-related" facilities as defined by the "Memorandum of Understanding between the Secretary of Transportation and the Administrator of the Environmental Protection Agency," initially published in 36 Fed. Reg. 24,080 (Dec. 18, 1971) incorporated by reference by 40 C.F.R. § 112.2 and set forth in 40 C.F.R. Part 112, app. A(1). In addition, MSPPI's facilities are "onshore facility[ies]" within the meaning of § 311(a)(10) of the CWA and 40 C.F.R. § 112.2, engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil (as defined by § 311(a)(1) of the CWA and 40 C.F.R. § 112.2) or oil products at its facility as set forth in 40 C.F.R. § 112.1.

9. MSPPI's facilities could reasonably be expected, due to their location and topography, to discharge oil in harmful quantities (as defined by 40 C.F.R. Part 110) into

or on navigable waters of the United States (as defined by § 502(7) of the CWA and 40 C.F.R. § 112.2), or its adjoining shorelines. The 443 Main Street facility is located approximately 500 feet from the Androscoggin River with a downward sloping path to storm drains that empty into the river. The 615 Main Street facility is located approximately 500 feet from the Androscoggin River with a downward sloping path to storm drains that empty into the river. The 619 Main Street facility is located approximately 250 feet from the Androscoggin River with a downward sloping path to the river. The 620 and 624 Main Street facility is located approximately 50 feet from the Androscoggin River with a downward sloping path to the river. The Androscoggin River flows into the Merrymeeting Bay, which empties into the Lower Kennebec River and eventually into the Atlantic Ocean. The Androscoggin River, the Merrymeeting Bay, the Lower Kennebec River and the Atlantic Ocean are all "navigable waters" as defined in § 502(7) of the CWA and 40 C.F.R. § 110.1, and are therefore subject to jurisdiction of § 311 of the CWA.

10. On November 20, 2009, EPA conducted an SPCC compliance inspection at the facilities. During the inspection, the EPA inspector noted several deficiencies.

11. The SPCC plan for 443 Main Street, dated July 25, 2000, was outdated and failed to reflect the current conditions at the facility. The plan had not been properly certified by a Professional Engineer ("PE") and had not been fully implemented due to a failure to routinely inspect the oil storage containers and failure to maintain training and inspection records.

12. The SPCC plan for 615 Main Street, dated September 16, 1998 and amended December 12, 2001, was outdated and failed to reflect the current conditions at that facility. The plan had not been properly certified by a PE and had not been fully

implemented due to a lack of adequate impermeable containment for the tank enclosure and rack area, a lack of fencing around the tank and rack area, and a failure to maintain training and inspection records.

13. The SPCC plan for 619 Main Street, dated December 9, 2001, was outdated and failed to reflect the current conditions at that facility. The plan had not been properly certified by a PE and had not been fully implemented due to a lack of adequate secondary containment, inadequate security on the loading/unloading hoses, and a failure to maintain training and inspection records.

14. MSPPI has not prepared an SPCC plan for the 620/624 Main Street facility.

15. Based on the facts outlined above, I find that the each of the facilities of MSPPI are subject to the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112, and that MSPPI lacked a fully prepared or implemented SPCC plan for the 443, 615, 619, and 620/624 Main Street facilities. The Complaint alleges at least five continuous years of violations prior to the filing of the Complaint at the 443, 615, and 619 Main Street facilities, for a total of 1,826 violations per facility. The Complaint alleges that the 620/624 Main Street facility has been violating the Oil Pollution Prevention Regulations since at least November, 20, 2009, which totals at least 225 violations. Based on the applicable statute of limitation, I conclude that MSPPI has been in violation of § 311(j) of the CWA and 40 C.F.R. § 112.3 for at least five years at the 443, 615, and 619 Main Street facilities. I also conclude that MSPPI has been in violation of § 311(j) of the CWA and 40 C.F.R. § 112.3 for at least 225 days at the 620/624 Main Street facility.

Consultation with the State

16. MSPPI and all of MSPPI's facilities are located wholly within the jurisdiction of the State of New Hampshire and all violations at issue in the Complaint occurred wholly within the State of New Hampshire's jurisdiction.

17. A representative of the State of New Hampshire was included on the initial correspondence between the Complainant and MSPPI. Mr. Robert Daniels of the New Hampshire Department of Environmental Services was copied on both the original January 4, 2010 § 308 Letter and the subsequent letter demanding a response. Ex. 3, p. 5; Canzano Affidavit Attachment 1, p. 2.

18. In the Complaint and Motion for Default, the Complainant did not allege or provide proof that either Mr. Robert Daniels or any other representative from the New Hampshire Department of Environmental Services or any other office or department of the State of New Hampshire was copied or consulted with regard to the issuance of an administrative penalty. *See* Ex. 2, p. 2 (not copying anyone from New Hampshire on the issuance of the Complaint); *Complainant's Motion for Default*, p. 2 (not copying anyone from New Hampshire on the Motion for Default Order).

19. In response to the Clarification Order, the Complainant filed an email and electronically submitted letter. The email and letter were dated June 21, 2010, the same date as the Complaint was filed, and were copied to Mr. Robert Daniels as well as other representatives from the Coast Guard and the New Hampshire Department of Environmental Services. The letter informed the recipients of the initiation of an administrative penalty action against MSPPI, and invited them to contact the Complainant with any questions.

20. Based on the facts outlined above, I find that the Complainant has conducted the necessary consultation with the State of New Hampshire as required by 33 U.S.C. § 1319(g)(1) and 40 C.F.R. § 22.38(b). While the Complainant's letter did not specifically invite comment upon the issuance of an administrative penalty, it did provide the State with an "opportunity" to consult with the Complainant. As was noted previously and in the Clarification Order, this is sufficient to meet the obligations of 33 U.S.C. § 1319(g)(1) and 40 C.F.R. § 22.38(b). *Supra*; Clarification Order at 3 n.1. I therefore find that the prerequisites for assessing a penalty under 33 U.S.C. § 1319(g)(1) for MSPPI's failure to respond to the information request issued under § 308 of the CWA have been met.

DETERMINATION OF CWA PENALTY

Violation of Section 308 of the CWA

As set forth above, the failure to reply to the CWA § 308 information request subjects the Respondent to penalties under § 309(g) of that statute. Federal regulations set both a daily maximum penalty and total maximum penalty for a § 308 violation. Specifically, 40 C.F.R. § 19.4, in modification of and conjunction with § 309(g)(2)(B) of the CWA, authorizes the assessment of a civil administrative penalty at a maximum of $16,000 per day for each day of the § 308 violation up to a maximum of $177,500.[6] Each day Respondent failed to reply to EPA's § 308 request constitutes a separate day of violation. When assessing a penalty for a violation of § 308, the "nature, circumstances, extent and gravity of the violation or violations" shall be accounted for. See 33 U.S.C. § 1319(g)(3). Additionally, the violator's "ability to pay, any prior history of such

[6] Violations occurring prior to January 12, 2009, are subject to different daily and total maximum penalties.

violations, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require" must be taken into account.

The response to EPA's § 308 letter was due on February 9, 2010. As of the date EPA filed the Complaint, June 21, 2010, EPA had not received a response. Therefore, Respondent has failed to comply with the requirements of § 308 of the CWA for 132 days. Cooperation by the regulated community in response to EPA's requests for information is critical to the agency's ability to effectively enforce the Act. *In re Rofer Plating Company*, No. CWA-2-I-91-1112, 1993 WL 426034 (ALJ Sept. 16, 1993). I find a penalty of $13,200 proposed by the Complainant for Respondent's non-compliance with § 308 to be warranted. This amounts to $100 per day of violation, well below the statutory maximum of $16,000 per violation, but significant enough for the seriousness of this violation.

I further find that no downward adjustments should be made to the penalty based on compliance history, good faith efforts to comply, or for the payment of penalties previously assessed for the same violations. I also find that there should be no increases to the penalty based on a prior history of violations by Respondent. Finally, in the absence of probative information from Respondent on the impact of the penalty on its business, I will make no adjustments to the penalty under this factor.

Violations of Section 311(j) of the CWA

As set forth above, the various violations of the requirements of the Oil Pollution Prevention Regulations subject the Respondent to penalties under § 311(j) of the CWA. Federal regulations at 40 C.F.R. §19.4, in modification of and in conjunction with § 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), authorize the assessment of a civil administrative penalty at a maximum of $11,000 per day for each day before

January 12, 2009, up to an aggregate maximum of $157,500, and a maximum of $16,000 per day for each day after January 12, 2009, up to an aggregate maximum of $177,500.

A civil penalty for a § 311(j) violation is based on the following statutory factors: (1) the seriousness of the violation or violations; (2) the degree of culpability involved; (3) the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; (4) any history of prior violations; (5) any other penalty for the same incident; (6) the economic impact of the penalty on the violator; (7) any other matters as justice may require; and (8) any economic benefit to the violator resulting from the violation. CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8). EPA's guidance on calculating CWA penalties, the Civil Penalty Policy for the CWA ("Penalty Policy"), is based on these statutory factors.

(1) Seriousness of the Violation or Violations

According to the Penalty Policy, the seriousness of a violation can be evaluated through an examination of the amount of storage capacity at a facility, the presence or absence of secondary containment and other spill prevention measures, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation.

The SPCC plan for each facility was either outdated or missing, undermining its ability to respond to any spill that occurs. In addition, secondary containment at the 615 and 619 Main Street facilities was inadequate. Inadequate secondary containment combined with an incomplete and noncompliant SPCC plan constitutes major noncompliance under the Penalty Policy. However, because both of these facilities did

have some secondary containment, a reduction to minor is warranted.[7] Because the violations at the 443 and 620/624 Main Street facilities were planning and recordkeeping violations, their potential impact, while serious, is less significant. I conclude that the Complainant properly concluded that these should be characterized as minor noncompliance. I conclude that Respondent's noncompliance at its facilities justifies the following base penalty:

443 Main Street Facility: $500
615 Main Street Facility: $2000
619 Main Street Facility: $2000
620/624 Main Street Facility: $2000

The sensitivity of the environment around the facility is a relevant factor in determining the seriousness of the violations. Sensitivity can be characterized by considering the potential environmental impact from a worst case discharge at the facility. Without adequate secondary containment, a worst case discharge at the facilities would likely have a significant effect on a sensitive ecosystem and on wildlife in the Androscoggin River. Spilled oil from the facilities could make its way into the Androscoggin River, either by storm drain or overland, potentially impacting native ecosystems. However, this worst case scenario spill would be unlikely to impact drinking water supplies, and so I conclude, based on the potential harm likely to be caused by a worst case discharge, that a spill from the facilities would likely have a moderate environmental impact. Therefore, I conclude that an upward adjustment to the base penalty of 10% is appropriate, increasing the penalty to:

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[7] In the Complainant's Motion for Default, the violation at the 615 and 619 Main Street Facilities were listed as "moderate," which would suggest a base penalty between $6000 and $15,000. In the Complainant's Response, the Complainant clarified that it intended these violations to be classified as minor, not moderate. The suggested $2000 base penalty would therefore be appropriate. Because the classification as minor instead of moderate is not "clearly inconsistent" with the record, I find it appropriate. 40 C.F.R. § 22.17(c).

443 Main Street Facility: $550
615 Main Street Facility: $2200
619 Main Street Facility: $2200
620/624 Main Street Facility: $2200

The Penalty Policy recommends that for each month of noncompliance, 0.5% be added to the penalty. The statute of limitations limits the maximum period of liability to five years. Complainant, accordingly, seeks liability for a period of sixty months at all of the facilities except the 620/624 Main Street facility, for which the Complainant seeks an adjustment based on seven months of noncompliance. Relying on the guidance provided by the Penalty Policy and considering the period of liability sought by EPA, I conclude that the following upward adjustment of the penalty is appropriate:

443 Main Street Facility: $715
615 Main Street Facility: $2860
619 Main Street Facility: $2860
620/624 Main Street Facility: $2277[8]

(2) Degree of Culpability Involved

The culpability of Respondent is based on the degree to which it should have been able to prevent the violation, considering its level of sophistication and the amount of information and regulatory explanation to which it has been exposed. The Respondent is engaged in the oil delivery business and should be expected to have a high degree of sophistication concerning the storage and distribution requirements for oil, including the § 311(j) requirements. The Respondent was aware that an SPCC plan was necessary as evidenced by its preparation of, albeit incomplete, plans for several of its properties.

[8] The Complainant proposes this increase based on seven months of noncompliance at the 620/624 Main Street facility, *Motion for Default* at 23, which would amount to a 3.5% and result in penalty of $2277. However, the Complainant also notes this as a 4% increase, *Motion for Default* at 24, which would result in a penalty of $2288. Because the seven months of noncompliance—and therefore a 3.5% increase—is supported by the record, and its intended use is confirmed in the Complainant's Response, I will disregard the notation concerning the 4% increase.

Finally, the Respondent was given specific notice of its noncompliance in November and December of 2009 and has not taken steps to remedy the violations. Comparing Respondent's level of culpability with the Penalty Policy, I conclude that a 75% increase requested is justified:

443 Main Street Facility: $1251
615 Main Street Facility: $5005
619 Main Street Facility: $5005
620/624 Main Street Facility: $3985

(3) Nature, Extent, and Degree of Success of Any Efforts to Minimize or Mitigate

The record reveals no attempts by the Respondent to come into compliance with the SPCC regulations. Therefore, I conclude that a downward adjustment for such a reason would be inappropriate.

(4) History of Prior Violations

The record reveals that inspections on August 30, 2007 and October 10, 2007 by the New Hampshire Department of Environmental Services discovered noncompliance with State oil storage rules at the 620/624 Main Street facility. Adjusting the penalty for this facility by 50% on the basis of Respondent's history of violations is therefore justified:

443 Main Street Facility: $1251
615 Main Street Facility: $5005
619 Main Street Facility: $5005
620/624 Main Street Facility: $5977[9]

(5) Other Penalties for the Same Violation

The record does not reveal any indication that the Respondent has paid a penalty to the United States or the State of New Hampshire based on these violations. In the Complainant's Response, mention is made of the State of New Hampshire proceeding

[9] The Motion for Default erroneously stated this value as $5997. *See* Complainant's Response at 3. With the Complainant's clarification and because this appears to be a simple typo, I will use the $5977 value.

against MSPPI for violations of, *inter alia*, the State's spill prevention regulations. However, there is no evidence that the State has even *assessed* any penalties at the present time. Absent proof of payment by MSPPI for these violations, adjustment under this factor is inappropriate. I therefore conclude that there should be no downward adjustment for other penalties for the same violation.

(6) Economic Impact of the Penalty on the Violator

The information necessary to accurately determine the penalty's economic impact on Respondent lies almost exclusively within the control of Respondent. Respondent, however, provided no economic information to EPA. Consequently, the record reveals nothing as to Respondent's inability to pay. I conclude, therefore, that the proposed penalty should not be reduced or limited on account of Respondent's inability to pay.

(7) Other Matters as Justice May Require

Respondent's violation spanned a five year period, and justice requires that the penalty assessed be adjusted for inflation. In accordance with EPA guidance, the penalty was increased by 10% for those violations occurring on or after January 31, 1997 through March 15, 2004, increased by 17.23% for those violations occurring between March 15, 2004 and January 12, 2009, and increased 28.75% for those violations occurring after January 12, 2009. *See* Granta Nakayama, *Amendments to EPA's Civil Penalty Policy to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule* (Dec. 29, 2008). All of the violations at the 620/624 Main Street facility occurred after January 12, 2009, and therefore only the higher 28.75% inflation adjustment factor is used. For the other facilities, the portion of the violations occurring prior to January 12, 2009 are subject to the inflationary factor of 17.23%, while those occurring after January 12, 2009 are subject to the inflationary factor of 28.75%. This leads to a weighted aggregate

inflationary factor of 20.54% for these facilities. I find that the use of these inflationary factors is proper and results in the following penalty:

443 Main Street Facility: $1508
615 Main Street Facility: $6033
619 Main Street Facility: $6033
620/624 Main Street Facility: $7696

(8) Economic Benefit to the Violator

EPA used a computer model to calculate Respondent's economic benefit from delaying and avoiding expenditures associated with regulatory compliance. In its calculations, the computer model considers capital investments, one-time non-depreciable expenditures, and any annual recurring costs avoided through non-compliance. Also, the model accounts for the State tax rates associated with the non-compliance period. Relying on its computer model, EPA estimates that Respondent realized economic benefit through its noncompliance. Accordingly, I conclude that the penalty should be increased to account for the economic benefit realized by the Respondent:

443 Main Street Facility: $1,495
615 Main Street Facility: $6,983
619 Main Street Facility: $1315
620/624 Main Street Facility: $2140

By adding the economic benefit adjustment to the adjusted penalty, the total penalty for Respondent's § 311(j) violations is as follows:

443 Main Street Facility: $3003
615 Main Street Facility: $13016
619 Main Street Facility: $7348
620/624 Main Street Facility: $9836

In all, the appropriate penalty for Respondent's CWA § 311(j) violations totals $33,203.

Conclusion

After weighing the nature, circumstances, extent, and gravity of the violations, history of similar violations, degree of culpability, and without provision by the Respondent of information concerning either its ability to pay or ability to continue to do business, it appears that a total penalty of $46,403 is appropriate. The aforesaid statutory factors provide clear support for the conclusion that a $13,200 penalty for Respondent's violation of § 308 is appropriate. Upon clarification by the Complainant, the statutory factors provide clear support for the conclusion that a $33,203 penalty for Respondent's violations of § 311(j) is also appropriate. The Consolidated Rules of Practice provide that upon issuing a default order "[t]he 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 statute authorizing the proceeding]." 40 C.F.R. § 22.17(c). I therefore, assess a total penalty of $46,403. In assessing this penalty, I find the rationale for its calculation, as set forth in the Complaint and in the Complainant's Motion for Default—which provide the factual, legal, and policy bases for the calculated penalty—as well as the Complainant's Response—which clarified some aspects of the penalty calculations—particularly persuasive. I incorporate the rationale contained in these filings by reference in this Order.

DEFAULT ORDER

I conclude that Respondent is in default for failing to answer the Complaint and that Respondent violated § 308 of the CWA, 33 U.S.C. § 1318. I also conclude that Respondent violated the Oil Pollution Prevention Regulations set forth at 40 C.F.R. Part 112, promulgated under the authority of § 311(j) of the CWA, 33 U.S.C. § 1321(j).

Accordingly, I hereby order the assessment of a civil administrative penalty in the amount of $46,403 against Respondent Munce's Superior Petroleum Products, Inc. (MSPPI).

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, a Default Order and Initial Decision is hereby ISSUED and Respondent is ordered to comply with all terms of this Order.

Full payment of the $46,403 penalty shall be made no later than 30 days from the date on which this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Of this amount, $13,200 shall represent payment for Respondent's violations of § 308 of the CWA, and $33,203 shall represent payment for Respondent's violations of § 311(j) of the CWA. For the § 308 penalty payment amount of $13,200, Respondent shall make payment by cashier's or certified check, payable to "Environmental Protection Agency," and referencing the title and docket number of the action ("In the Matter of Munce's Superior Petroleum Products, CWA-01-2010-0040"). For the § 311(j) penalty payment amount of $33,203, Respondent shall make payment by cashier's or certified check, payable to "Environmental Protection Agency," and referencing the title and docket number of the action ("In the Matter of Munce's Superior Petroleum Products, CWA-01-2010-0040") and specifically noting "Oil Spill Liability Trust Fund-311." Both checks shall be mailed to the address below:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter must accompany the check. The transmittal letter must identify the subject case, the EPA docket number, and Respondent's name and address.

If the Respondent fails to pay the penalty within the period outlined above, interest on the penalty may be assessed. *See* 31 U.S.C. §3717; 40 C.F.R. §13.11.

A copy of the payment shall be mailed to:

Regional Hearing Clerk
U.S. EPA
Region 1 (Mail Code RAA)
One Congress Street, Suite 1100
Boston MA 02114-2023

This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties unless (1) a party moves to reopen the hearing, (2) a party appeals the initial decision to the Environmental Appeals Board, (3) a party moves to set aside the default order, or (4) the Environmental Appeals Board chooses to review the initial decision *sua sponte*.

IT IS SO ORDERED.

Dated: May 17, 2012

LeAnn Jensen
Acting Presiding Officer