BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

RECEIVED
JUN 18 2012
EPA ORC WS
Office of Regional Hearing Clerk

In re:

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

Appellant.

EPA Region 1
EPA Docket No.:
CWA-01-2010-0040

NOTICE OF APPEAL

Appellant Munce's Superior Petroleum Products, Inc. (the "Appellant") files this Notice of Appeal of the Initial Decision and Default Order (the "Default Order") entered on May 17, 2012 by Regional Judicial Officer LeeAnn Jensen (the "RJO") in EPA Region 1 Administrative Proceeding No. CWA-01-2010-0040 (the "Administrative Proceeding"). The Default Order assesses civil penalties against the Appellant for certain violations of the Federal Oil Pollution Prevention Regulations set forth at 40 C.F.R. Part 112, including the failure of the Appellant to respond to a request for information and to fully implement Spill Prevention, Control and Countermeasure plans. The Appellant appeals the Default Order to the extent it: (1) fixes the amount of a claim by the EPA for civil penalties even though such claim is subject to the claims adjudication process established in the Appellant's bankruptcy case currently pending before the United State Bankruptcy Court for the District of New Hampshire; and (2) violates the automatic stay by ordering the Appellant to pay the assessed penalty within thirty (30) days of the date on which the Default Order becomes final.

Dated: June 15, 2012

APPELLANT MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.

By its attorneys,

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

Certificate of Service

I hereby certify that the Notice of Appeal by Munce's Superior Petroleum Products, Inc. appealing an initial decision and order in the EPA Region 1 Administrative Proceeding No. CWA-01-2010-0040 (the "Administrative Proceeding"), was served on the parties as indicated.

Federal Express

Clerk of the Board
United States Environmental Protection Agency
Suite 600, 1341 G Street, N.W.
Washington, D.C. 20005

Federal Express

Wanda I. Santiago
Paralegal/Regional Hearing Clerk
U.S. EPA Region 1 (Mail Code ORA)
5 Post Office Square, Suite 100
Boston, MA 02109

Federal Express

LeeAnn Jensen
Acting Presiding Officer
U.S. EPA Region 1 (Mail Code ORA)
5 Post Office Square, Suite 100
Boston, MA 02109

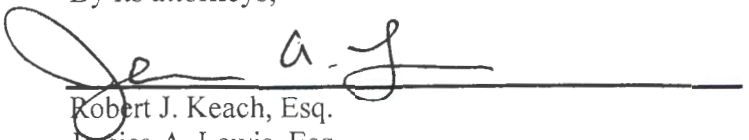
Federal Express

Tonia Bandrowicz, Esq.
Senior Enforcement Counsel
Office of Environmental Stewardship
U.S. Environmental Protection Agency – Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Dated: June 15, 2012

APPELLANT MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.

By its attorneys,



Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
THE ENVIRONMENTAL APPEALS BOARD
WASHINGTON, D.C.

RECEIVED
JUN 18 2012
EPA ORC
Office of Regional Hearing Clerk

EPA Region 1 No. CWA-01-2010-0040

In the Matter of:

MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.
620 Main Street
Gorham, New Hampshire 03581,
Appellant

APPELLANT'S OPENING BRIEF

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

Attorneys for the Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF APPELLATE JURISDICTION

The Environmental Appeals Board of the United States Environmental Protection Agency (the "Board") has appellate jurisdiction over this matter pursuant to 40 C.F.R. § 22.30. This appeal arises out of the Initial Decision and Default Order (the "Default Order") issued by the Acting Presiding Officer for Region 1 (the "APO") assessing civil penalties against Munce's Superior Petroleum Products, Inc. (the "Appellant") for failure to respond to an information request (the "308 Letter") and to fully implement Spill Prevention, Control and Countermeasure ("SPCC") plans at four locations (collectively, the "Subject Properties"): 443 Main Street, Gorham, New Hampshire ("443 Main"), 615 Main Street, Gorham, New Hampshire ("615 Main"), 619 Main Street, Gorham, New Hampshire ("619 Main") and 620/624 Main Street, Gorham, New Hampshire ("620/624 Main"). Pursuant to 40 C.F.R. § 22.30(a), the Appellant timely filed a notice of appeal of the Default Order on June 18, 2012.

STATEMENT OF ISSUES

1. Whether the APO erred in fixing the amount of the Environmental Protection Agency's (the "EPA") claim against the Appellant where the EPA had previously submitted that claim to the claims adjudication process in the Appellant's pending chapter 11 bankruptcy case?

2. Whether the APO violated the automatic stay by ordering the Appellant to pay the assessed penalty within thirty (30) days of the date on which the Default Order becomes final, notwithstanding the Appellant's pending chapter 11 bankruptcy case?

STATEMENT OF THE CASE

This appeal arises out of the Default Order assessing civil penalties against the Appellant in the amount of $46,403 for failure to respond to a 308 Letter and to fully implement SPCC

plans at the Subject Properties, notwithstanding the Appellant's pending chapter 11 bankruptcy case.

The Office of Environmental Stewardship (the "OES") filed its Administrative Complaint and Notice of Opportunity to Request a Hearing on or about June 21, 2010 (the "Complaint"). The Complaint alleged that the Appellant had failed to: (1) update and implement SPCC plans at 443 Main, 615 Main and 619 Main; and (2) prepare an SPCC plan at 620/624 Main. The certificate of service attached to the Complaint states that a copy of the Complaint was served by certified mail, return receipt requested, on Harold Munce ("Mr. Munce") in his capacity as President of the Appellant.

On March 16, 2011, the Appellant and four affiliated entities filed voluntary petitions for relief under chapter 11 of 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"). Those jointly administered bankruptcy cases are currently pending in the United States Bankruptcy Court for the District of New Hampshire (the "Bankruptcy Court") under the caption, *In re Munce's Superior Petroleum Products, Inc.*, Docket No. 11-10975 (the "Bankruptcy Case").

On July 12, 2011, the OES filed a motion (the "Default Motion") seeking entry of an order finding the Appellant in default for failure to answer the Complaint. In the Default Motion, counsel for the OES stated that the "EPA is aware that the Respondents have filed a petition for relief under chapter 11 of the Bankruptcy Code." *See* Default Motion at 6. Although counsel was aware of the existence of the Bankruptcy Case, the certificate of service accompanying the Default Motion states that a copy of that document was served only on Mr. Munce. No effort was made to serve the Default Motion on the Appellant's counsel of record in the Bankruptcy Case.

On or about September 9, 2011, the EPA filed a proof of claim in the Appellant's Bankruptcy Case, alleging civil penalties in an unspecified amount for the violations set forth in the Complaint. The September 9, 2011 proof of claim was the first notice Appellant's bankruptcy counsel received of a dispute between the EPA and the Appellant. The EPA subsequently amended its proof of claim on October 18, 2011 and again on October 20, 2011.

On September 21, 2011, the Debtors filed a motion seeking approval of bid procedures pursuant to which the Debtors intended to auction several assets belonging to the Appellant and its affiliated debtors. Those assets included the Subject Properties. The bid procedures were approved and an auction was held on October 17, 2011. CMRK, Inc. ("CMRK") emerged as the successful bidder for numerous assets, including 443 Main. The proposed sale was approved by the Bankruptcy Court on October 20, 2011 and the sale of 443 Main closed on February 2, 2012.

On December 15, 2011, the APO issued an Order to Clarify and Supplement the Record (the "Clarification Order"). The Appellant responded by filing a Suggestion of Bankruptcy and Response to Order to Clarify and Supplement the Record (the "Suggestion of Bankruptcy") in which the Appellant argued that the administrative proceeding was stayed by the automatic stay established in section 362(a) of the Bankruptcy Code (the "automatic stay") and, further, that the EPA had, by filing the proof of claim, submitted itself to the jurisdiction of the Bankruptcy Court for the purpose of adjudicating that claim.

The OES responded to the Suggestion of Bankruptcy by arguing that the administrative proceeding falls within the police and regulatory powers exception to the automatic stay under section 362(b)(4) of the Bankruptcy Code.

The APO entered the Default Order on May 17, 2012, finding, *inter alia*, that the automatic stay did not preclude the EPA from assessing civil penalties against the Appellant. In

so ruling, the APO relied heavily on an order entered by the Bankruptcy Court determining that the automatic stay did not stay a state court action brought by the New Hampshire Department of Environmental Services (the "NHDES") seeking injunctive relief for ongoing violations and civil penalties stemming from the Appellant's contempt of a state court order (the "NHDES").

The Default Order continued on to assess penalties against the Appellant with respect to all four of the Subject Properties, including 443 Main. As the Default Order acknowledges, the EPA must take into account a violator's ability to pay any penalties to be assessed under 33 U.S.C. § 1319(g)(3) for violations of section 308 of the Clean Water Act. Although the Appellant filed the Suggestion of Bankruptcy, the APO held that, "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." Default Order at 14.

The Default Order also recognizes that, among the factors to be considered in assessing a penalty for a violation of section 311(j) of the Clean Water Act, the EPA must examine "the economic impact of the penalty on the violator" and "any other matters as justice may require." Default Order at 15. In her analysis, the APO stated that:

> 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.

Default Order at 19. The APO never considered the Appellant's status as a debtor-in-possession in its analysis of either the economic impact on the violator or any other matters justice may require.

Finally, after assessing a penalty of $46,403, the Default Order directs the Appellant to pay the penalty in full no later than thirty (30) days from the date on which the Default Order

becomes a final order. Under the terms of the Default Order, failure to make such payment will result in accruing interest.

ARGUMENT

1. The Bankruptcy Court is the proper forum for fixing the amount of the EPA's claim.

The EPA's administrative proceeding does not fall within the police and regulatory power exception of section 362(b)(4) of the Bankruptcy Code and is therefore stayed. Although actions arising out of the government's authority under the Clean Water Act and similar legislation *may* fall outside the scope of the automatic stay, not *all* of those actions enjoy the protection of the police and regulatory power exception. If the primary purpose of a governmental action is to protect the government's pecuniary interest rather than to promote public safety and welfare, such action is not excepted from the automatic stay. *See* Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 866 (4th Cir. 2001); Martin v. Safety Elec. Constr., Co., 151 B.R. 637, 639 (D. Conn. 1993); In re Chateaugay Corp., 115 B.R. 28, 31 (Bankr. S.D.N.Y. 1988).

> In short, state and local governmental units cannot, merely by invoking the nominal exercise of their police or regulatory powers, circumvent the prophylaxis afforded to debtors and creditors alike by federal bankruptcy law. When a nonfederal sovereign acts for a pecuniary purpose, its initiatives must be automatically stayed, notwithstanding the (narrow) exception found at 11 U.S.C. § 362(b)(4).

In re Hoffman, 65 B.R. 985, 988 (D.R.I. 1986).

In the case at bar, the only objective that could be achieved by assessing a penalty against the Appellant, is to advance the EPA's pecuniary interest. The Appellant's failure to maintain and implement current SPCC plans is largely due to its insolvency. Prior to filing the Bankruptcy Case, the Appellant did not have sufficient cash flow to pay the engineers necessary to update the SPCC plans, or the make the structural repairs necessary to implement those plans. After the Appellant filed the Bankruptcy Case, the Appellant's use of cash was subject to cash

collateral orders which did not allow for the use of cash for the purpose of addressing environmental compliance issues.

Even if the underlying administrative action is not stayed by section 362 of the Bankruptcy Code, however, the Bankruptcy Court remains the proper venue for fixing the value of the EPA's claim. As part of its Bankruptcy Case, the Appellant was required to file schedules and a statement of financial affairs which detailed all of the Appellant's assets and liabilities as of the date the Bankruptcy Case commenced. Subsequent filings in that case, including monthly operating reports, cash collateral motions and sale motion, all provide a clear picture of the Appellant's current cash flow status, as well as its projected cash flow. Those documents, along with the plan of reorganization the Appellant will be filing in the next few weeks, also indicate if and how the Appellant intends to use the Subject Properties going forward. One of those properties, 443 Main, has already been sold in connection with the Bankruptcy Case.

Under the applicable statutes governing the assessment of penalties for violations of sections 308 and 311 of the Clean Water Act, all of this information must be considered by the authority fixing the EPA's claim for such violations. The APO claims that this information "lies almost exclusively within the control of Respondent" but, in fact, the APO is the *only* party without this information.[1] The EPA has played an active role in the Appellant's bankruptcy case—filing a proof of claim, negotiating favorable language into key orders and commenting upon the sale process—and has access to all of the publicly filed documents referenced above. While the APO lacks any personal knowledge regarding the Appellant's finances and operations, both the Bankruptcy Court and the EPA's enforcement attorneys are intimately familiar with this information.

[1] The APO's statement that the Appellant did not provide any probative information regarding the potential impact of the penalty on its business is inexplicable in light of the fact that the Appellant filed a suggestion of bankruptcy which should have clearly indicated to the APO that extenuating circumstances exist in this case.

The APO's reliance on the NHDES Order for the proposition that an EPA administrative action is the proper venue for fixing the value of the EPA's claim is misplaced. The civil penalties at issue in the NHDES Order were actually penalties for contempt of a State Court Order, the calculation of which was not governed by statutes requiring the assessing authority to consider the potential economic impact of the penalty on the Appellant or other extenuating circumstances, such as the Appellant's inability to mitigate the violations due to cash flow issues.

The EPA has submitted itself to the Bankruptcy Court's jurisdiction by filing a proof of claim. The amount of that claim should be fixed in the claims adjudication process currently pending in that forum.

2. *The Default Order plainly violates the automatic stay to the extent it orders the Appellant to pay the assessed penalty within thirty days of the date on which the order becomes final.*

Even if the APO did not err in assessing the penalty established in the Default Order, she plainly violated the automatic stay by directing the Appellant to pay that penalty. The penalty is for conduct which occurred *before* the Appellant filed its chapter 11 petition under the Bankruptcy Code and, therefore, the penalty arose prepetition. *See* Poule v. Bd. of Contractors of the State of Cal. (In re Poule), 91 B.R. 83, 87 (9th Cir. 1988). "Because the debtor's assets are in the possession and control of the bankruptcy court, and because the assets constitute a fund out of which all creditors are entitled to share, a governmental unit's enforcement of a money judgment would give it preferential treatment to the detriment of all other creditors." *See* Hunt v. Commodity Futures Trading Comm'n (In re Hunt), 93 B.R. 484, 489-90 (Bankr. N.D. Tex. 1988) (*citing* H.R.Rep. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6299).

For that reason, courts have uniformly held that, although the police and regulatory exception to the automatic stay permits, in some cases, actions or proceedings by governmental

units for the purpose of assessing fines and penalties, it does not permit the collection of those fines and penalties. *See, e.g.,* Commonwealth of Massachusetts v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 263 B.R. 99, 107 (9th Cir. BAP 2001) (section 362(b)(4) "permits a governmental unit to 'commence or continue any police or regulatory action, including one seeking a money judgment, but it may enforce only those judgments and orders that do not require payment or authorize the government to exercise control over property of the estate'") (*quoting*, 3 COLLIER ON BANKRUPTCY § 362.05[5][b] at 362-59 to 362-60 (15th ed. 2001); In re Basinger, 2002 WL 33939736 at *9 (Bankr. Idaho Jan. 31, 2002) ("while § 362(b)(4) allows the Enforcement Action here to proceed through and including entry of a judgment establishing liability, that same section makes clear that the exception from stay does not extend to the collection upon or enforcement of a money judgment"); In re Pincombe, 256 B.R. 774, 781 (Bankr. N.D. Ill. 2000) ("[i]f an action falls within the scope of the exception, § 362(b)(4) permits entry of a money judgment, so long as the proceedings do not go beyond that point"); In re Lenz Oil Service, Inc., 65 B.R. 292, 294 (Bankr. N.D. Ill. 1986) ("the stay is operative where the state attempts to enforce a money judgment"); Hunt, 93 B.R. at 491 (the automatic stay "prevent[s] a governmental unit from enforcing a money judgment").

Accordingly, even if the Default Order stands with respect to the assessed penalty, that portion of the order directing the Appellant to pay the penalty is *void ab initio* as it violates the automatic stay.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that the Board enter an order: (1) overturning as void that portion of the Default Order assessing a penalty against the Appellant;

or, in the alternative, (2) overturning as void that portion of the Default Order directing the Appellant to pay the penalty.

Dated: June 15, 2012

MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.

By its Attorneys,

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

Attorneys for the Appellants

Certificate of Service

I hereby certify that the Appellant's Opening Brief by Munce's Superior Petroleum Products, Inc. appealing an initial decision and order in the EPA Region 1 Administrative Proceeding No. CWA-01-2010-0040 (the "Administrative Proceeding"), was served on the parties as indicated.

Federal Express

Clerk of the Board
United States Environmental Protection Agency
Suite 600, 1341 G Street, N.W.
Washington, D.C. 20005

Federal Express

Wanda I. Santiago
Paralegal/Regional Hearing Clerk
U.S. EPA Region 1 (Mail Code ORA)
5 Post Office Square, Suite 100
Boston, MA 02109

Federal Express

LeeAnn Jensen
Acting Presiding Officer
U.S. EPA Region 1 (Mail Code ORA)
5 Post Office Square, Suite 100
Boston, MA 02109

Federal Express

Tonia Bandrowicz, Esq.
Senior Enforcement Counsel
Office of Environmental Stewardship
U.S. Environmental Protection Agency – Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Dated: June 15, 2012

APPELLANT MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.

By its attorneys,

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
THE ENVIRONMENTAL APPEALS BOARD
WASHINGTON, D.C.

RECEIVED
JUN 18 2012
EPA ORC
Office of Regional Hearing Clerk

EPA Region 1 No. CWA-01-2010-0040

In the Matter of:

MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.
620 Main Street
Gorham, New Hampshire 03581,
Appellant

DOCUMENTS REFERENCED IN APPELLANT'S OPENING BRIEF

1.	Administrative Complaint and Notice of Opportunity to Request a Hearing	06/17/2010
2.	Complainant's Motion for Default	07/12/2011
3.	Order to Clarify and Supplement the Record	12/15/2011
4.	Suggestion of Bankruptcy and Response to Order to Clarify and Supplement the Record	01/27/2012
5.	Request for Extension to Respond to Presiding Officer's December 15, 2011 Order to Clarify and Supplement the Record	01/30/2012
6.	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	02/23/2012
7.	Initial Decision and Default Order	05/17/2012

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

JUN 2 1 2010

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 action, please find the original and one copy of an Administrative Complaint and Opportunity to Request a Hearing.

Thank you for your attention to this matter.

Sincerely,

Tonia Bandrowicz
Senior Enforcement Counsel

Enclosure

cc: Harold Munce,
Munce's Superior Petroleum Products, Inc.

Robert Munce,
Munce's Superior, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

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.	**ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING** Proceeding to Assess Class II Civil Penalty Under Clean Water Act Sections 308 and 311 for Reporting and SPCC Violations Docket No. CWA-01-2010-0040

I. STATUTORY AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the U.S. Environmental Protection Agency ("EPA") by sections 309(g)(1) and 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1319(g)(1) and 1321(b)(6)(B)(ii), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, codified at 40 C.F.R. part 22 ("Part 22"). "Complainant" is the Director of the Office of Environmental Stewardship, EPA, Region 1.

2. Pursuant to sections 309(g)(1) and 311(b)(6)(B)(ii) of the Act, and in accordance with Part 22, Complainant hereby provides notice of its proposal to assess a civil penalty against Munce's Superior, Inc. ("Munce's Superior") and Munce's Superior Petroleum Products, Inc. ("Munce's Superior Petroleum Products") (collectively "Respondents") for the failure to comply

with the Oil Pollution Prevention regulations set forth at 40 C.F.R. part 112, promulgated under the authority of section 311(j) of the Act, 33 U.S.C. § 1321(j), and other provisions of the Act, 33 U.S.C. §§ 1251 et seq. In addition, pursuant to sections 309(g)(1) and 311(b)(6)(B)(ii) of the Act, and in accordance with Part 22, Complainant hereby provides notice of its proposal to assess a civil penalty against Munce's Superior for failure to respond to a request for information by EPA, in violation of section 308 of the Act, 33 U.S.C. § 1318. This Complaint also provides notice of Respondents' opportunity to file an Answer to this Complaint and to request a hearing on the proposed penalty.

3. Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), provides that the President, delegated to EPA, shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore and offshore facilities, and to contain such discharges . . ."

4. Under the authority of section 311(j)(1) of the Act, the Oil Pollution Prevention regulations, at 40 C.F.R. part 112, establish procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products that, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in 40 C.F.R. part 110) to navigable waters of the United States or adjoining shorelines. 40 C.F.R. § 112.1(b).

5. Under 40 C.F.R. § 112.3(a), the owner or operator of a regulated onshore facility

must prepare a Spill Prevention Control and Countermeasure ("SPCC") Plan in writing and in accordance with 40 C.F.R. § 112.7, and any other applicable sections of part 112. If the facility became operational prior to August 16, 2002, the owner or operator must maintain its SPCC plan.

II. GENERAL ALLEGATIONS

6. Munce's Superior is a company organized under the laws of New Hampshire with its headquarters located at 620 Main Street, Gorham, New Hampshire, and, therefore, is a "person" within the meaning of section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

7. Munce's Superior Petroleum Products is a company organized under the laws of New Hampshire with its headquarters also located at 620 Main Street, Gorham, New Hampshire, and, therefore, is a "person" within the meaning of section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

8. Respondents are the "owners or operators" within the meaning of section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of four bulk oil storage and distribution facilities located at 443, 615, 619, and 620 and 624 Main Street, Gorham, New Hampshire (the "Facilities").

9. Respondents store "oil" or oil products at the Facilities within the meaning of section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1) and 40 C.F.R. § 112.2.

10. The Facilities are "onshore facilities" within the meaning of section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

11. The Facilities are "non-transportation-related" facilities within the meaning of Appendix A of 40 C.F.R. § 112.

12. The facility at 443 Main Street ("443 Main Facility") is located approximately 500 feet from the Androscoggin River. There is a downward sloping path from the 443 Main Facility that travels overland to a storm drain that empties into the Androscoggin River. Due to the location of the 443 Main Facility with respect to the storm drain that empties into the Androscoggin River and the topography of the area, the 443 Main Facility could reasonably be expected to discharge oil into the Androscoggin River and downstream bodies of water.

13. The facility at 615 Main Street ("615 Main Facility") is located approximately 500 feet from the Androscoggin River. There is a downward sloping path from the 615 Main Facility that travels overland to storm drains that empty into the Androscoggin River. Due to the location of the 615 Main Facility with respect to the storm drains that empty into the Androscoggin River and the topography of the area, the 615 Main Facility could reasonably be expected to discharge oil into the Androscoggin River and downstream bodies of water.

14. The facility at 619 Main Street ("619 Main Facility") is located approximately 250 feet from the Androscoggin River. There is a downward sloping path from the 619 Main Facility that travels overland to the Androscoggin River. Due to the location of the 619 Main Facility with respect to the Androscoggin River and the topography of the area, the 619 Main Facility could reasonably be expected to discharge oil into the Androscoggin River and downstream bodies of water.

15. The facility at 620 and 624 Main Street ("620 and 624 Main Facility") is located

approximately 50 feet from the Androscoggin River. There is a downward sloping path from the 620 and 624 Main Facility that travels overland to the Androscoggin River. Due to the location of the 620 and 624 Main Facility with respect to the Androscoggin River and the topography of the area, the 620 and 624 Main Facility could reasonably be expected to discharge oil into the Androscoggin River and downstream bodies of water.

16. The Androscoggin River flows into the Merrymeeting Bay in Maine, which flows into the Lower Kennebec River and ultimately into the Atlantic Ocean.

17. The Androscoggin River, the Merrymeeting Bay, the Lower Kennebec River and the Atlantic Ocean are "navigable waters" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1, and are, therefore, subject to the jurisdiction of section 311 of the Act, 33 U.S.C. § 1321.

18. Based on a July 25, 2000 SPCC plan prepared for it, the 443 Main Facility had one 15,000 gallon aboveground diesel fuel storage tank, subjecting it to the requirements of the Oil Pollution Prevention regulations, at 40 C.F.R. part 112 since at least July 25, 2000.

19. Based on a September 16, 1998 SPCC plan prepared for it, the 615 Main Facility had one 20,000 gallon aboveground diesel fuel storage tank, one 20,000 gallon aboveground kerosene storage tank, three 20,000 gallon aboveground #2 heating oil tanks and one 12,000 gallon aboveground red diesel fuel tank. Therefore, as of at least that date, the 615 Main Facility had an aggregate aboveground storage capacity of approximately 112,000 gallons, subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least September 16, 1998.

20. Based on a December 9, 2001 SPCC plan prepared for it, the 619 Main Facility had two 8,000 gallon aboveground motor oil tanks, one 6,000 gallon aboveground motor oil tank, one 6,000 gallon aboveground hydraulic oil tank, three 4,000 gallon aboveground motor oil tanks, one 4,000 gallon aboveground hydraulic oil tank, three 2,000 gallon aboveground motor oil tanks and two 2,000 gallon aboveground hydraulic oil tanks. Therefore, as of at least that date, the 619 Main Facility had an aggregate aboveground storage capacity of approximately 54,000 gallons, subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least December 9, 2001.

21. As of at least November 20, 2009, the 620 and 624 Main Facility had a multitude of 55-gallon drums of oil. As of at least that date, the 620 and 624 Main Facility had an aggregate aboveground storage capacity of approximately 10,500 gallons, subjecting it to the requirements of the Oil pollution Prevention regulations at 40 C.F.R. part 112.

22. Based on the allegations in the above paragraphs, Respondents are the owners or operators of non-transportation-related facilities engaged in storing, distributing, using, and consuming oil or oil products that could reasonably be expected to discharge oil in harmful quantities to navigable waters of the United States, and are, therefore, subject to the Oil Pollution Prevention regulations at 40 C.F.R. part 112.

23. On November 20, 2009, a representative of EPA conducted an SPCC inspection of the Facilities. Based on the information provided at that time, the inspector determined that the 443 Main Facility had an SPCC Plan, dated July 25, 2000, which was outdated and failed to reflect the current conditions at the 443 Main Facility.

24. In addition, the EPA inspector found that the SPCC Plan for the 443 Main Facility was insufficient because, amongst other things, the Professional Engineer ("PE") failed to adequately certify the SPCC plan.

25. Additionally, the EPA inspector found that the SPCC Plan for the 443 Main Facility had not been fully implemented, including, but not limited to, failure to routinely inspect the oil storage containers and failure to maintain training and inspection records.

26. The EPA inspector also determined that the 615 Main Facility had an SPCC plan, dated September 16, 1998 and amended December 12, 2001, which was outdated and failed to reflect the current conditions at the 615 Main Facility.

27. In addition, the EPA inspector found that the SPCC Plan for the 615 Main Facility was insufficient because, amongst other things, the PE failed to adequately certify the SPCC plan and the 615 Main Facility's management failed to approve the December 12, 2001 amendment.

28. Additionally, the EPA inspector found that the SPCC Plan for the 615 Main Facility had not been fully implemented, including, but not limited to, inadequately impermeable containment for both the tank enclosure and the rack area, lack of fencing around both the tank enclosure and the rack area and failure to maintain training and inspection records.

29. The EPA inspector also determined that the 619 Main Facility had an SPCC plan, dated December 9, 2001, which was outdated and failed to reflect the current conditions at the 619 Main Facility.

30. In addition, the EPA inspector found that the SPCC Plan for the 619 Main Facility was insufficient because, amongst other things, the PE failed to adequately certify the SPCC plan

and the 619 Main Facility's management failed to approve the SPCC Plan.

31. Additionally, the EPA inspector found that the SPCC Plan for the 619 Main Facility had not been fully implemented, including, but not limited to, inadequate secondary containment, inadequate security on loading/unloading hoses and failure to maintain training and inspection records.

32. The EPA inspector additionally determined that the Respondents had failed to prepare an SPCC plan for the 620 and 624 Main Facility.

33. Pursuant to sections 308(a) and 311(m) of the Act, 33 U.S.C. §§ 1318(a) and 1321(m), on January 4, 2010, EPA issued an information request to Munce's Superior (the "308 Letter"), informing Munce's Superior that it did not have adequate and fully implemented SPCC plans for the 443, 615 and 619 Main Facilities as required by the Oil Pollution Prevention Regulations, and that Munce's Superior was required to submit a copy of a revised SPCC plan for those Facilities. The 308 Letter also informed Munce's Superior that the 620 and 624 Main Facility did not have an SPCC plan as required by the Oil Pollution Prevention Regulations, and that Munce's Superior was required to submit a copy of a new SPCC plan for that Facility. Finally, the 308 Letter informed Munce's Superior that if it could not be fully compliant within 30 days of Munce's Superior's receipt of the letter, it must submit a detailed schedule including a list of the issues to be fixed and the dates when the fixes will be completed and the facility would be fully compliant.

34. EPA's 308 Letter was sent certified mail and received and signed for by Munce's Superior's representative on January 7, 2010. Therefore, a response to the 308 Letter was due to

EPA no later than February 9, 2010.

35. An EPA representative telephoned the Munce's Superior several times regarding the 308 Letter. As of this date, Munce's Superior has not submitted a response to the 308 Letter, nor has its owner returned phone messages EPA left with the company.

III. VIOLATIONS

Count I: Failure to Respond to a Request for Information under Section 308 of the CWA

36. Paragraphs 1 through 35 are incorporated by reference as if fully set forth herein.

37. Munce's Superior failed to respond to or otherwise provide the information requested by the 308 Letter within thirty (30) days of receipt, in violation of section 308 of the Act, 33 U.S.C. § 1318, or any time thereafter.

38. By failing to respond to the 308 Letter, Munce's Superior violated section 308 of the Act, 33 U.S.C. § 1318, at least through the date of this Complaint.

39. Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties for violations of section 308 of the Act, 33 U.S.C. § 1318.

40. Pursuant to section 309(g)(2)(B) of the Act and 40 C.F.R. § 19.4, Munce's Superior is liable for civil penalties up to $16,000 per day for each day during which the violation continues, up to a maximum of $177,500.

Count II: Failure to Maintain and Implement an SPCC Plan at the 443 Main Facility in Violation of 40 C.F.R. § 112.3(a)

41. Paragraphs 1 through 40 are incorporated by reference as if fully set forth herein.

42. Forty C.F.R. § 112.3 requires that the owner or operator of an SPCC regulated

facility prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and other requirements of 40 C.F.R. Part 112, including the requirement to have the plan periodically reviewed and updated (40 C.F.R. § 112.5(b)), and available on-site for EPA review (40 C.F.R. § 112.3(e)).

43. Forty C.F.R. 112.3(a)(1) requires the owner or operator of a SPCC regulated facility that was in operation on or before August 16, 2002, to implement and maintain its Plan.

44. Respondents prepared an SPCC plan for the 443 Main Facility dated July 25, 2000 but failed to fully implement the plan, particularly regarding inspection and inspection records, as required by 40 C.F.R. §§ 112.7 and 112.8.

45. Respondents failed to adequately certify, amongst other things, that the 443 Main SPCC plan was prepared in accordance with good engineering practices.

46. Respondents failed to periodically update and review the 443 Main SPCC plan as required by 40 C.F.R. § 112.5(b).

47. Respondents failed to maintain a copy of the 443 Main SPCC plan on-site as required by 40 C.F.R. § 112.3(e).

48. Respondents failed to keep records of inspection, testing, and training at the 443 Main Facility as required by 40 C.F.R. §§ 112.7(e) and (f).

49. Based on the November 20, 2009 inspection of the 443 Main Facility, EPA determined that the Respondents have failed to adequately provide for measures which would prevent the discharge of oil from reaching waters of the United States and to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8.

50. Respondents' failure to maintain the SPCC plan for its 443 Main Facility, including their failure to fully implement the SPCC plan, in accordance with the requirements of 40 C.F.R. §§ 112.3, 112.5, 112.7 and 112.8, as described above, violated 40 C.F.R. § 112.3(a), and section 311(j) of the Act, 33 U.S.C. § 1321(j). Respondents have violated at least one of these requirements for each day for at least the past five years, for a total of 1,826 days of violation.[1]

51. Pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties of up to $11,000 per day for each day during which the violation continues, up to a maximum of $157,500 for the period of March 15, 2004 through January 12, 2009, and $16,000 per day up to a maximum of $177,500 after January 12, 2009.

Count *III*: Failure to Maintain and Implement an SPCC Plan at the 615 Main Facility in Violation of 40 C.F.R. § 112.3(a)

52. Paragraphs 1 through 51 are incorporated by reference as if fully set forth herein.

53. Respondents prepared an SPCC plan for the 615 Main Facility dated September 16, 1998 and updated December 12, 2001, but failed to fully implement the plan, particularly regarding adequate secondary containment, as required by 40 C.F.R. §§ 112.7 and 112.8.

54. Respondents failed to periodically update and review the 615 Main SPCC plan as required by 40 C.F.R. § 112.5(b).

---

[1] EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

55. The 615 Main Facility lacked sufficiently impervious secondary containment for aboveground bulk storage and the loading rack such that discharged oil would be contained within the bermed area, as required by 40 C.F.R. §§ 112.7(c) and 112.8(c)(2).

56. The aboveground bulk storage at the 615 Main Facility does not have adequate security measures implemented as required by 40 C.F.R. § 112.7(g).

57. Respondents failed to keep records of inspection, testing, and training at the 615 Main Facility as required by 40 C.F.R. §§ 112.7(e) and (f).

58. Based on the November 20, 2009 inspection, EPA determined that the Respondents have failed to adequately provide for measures which would prevent the discharge of oil from reaching waters of the United States and to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8 at the 615 Main Facility.

59. Respondents' failure to maintain the SPCC plan for the 615 Main Facility, including their failure to fully implement the SPCC plan, in accordance with the requirements of 40 C.F.R. §§ 112.3, 112.5, 112.7 and 112.8, as described above, violated 40 C.F.R. § 112.3(a), and section 311(j) of the Act, 33 U.S.C. § 1321(j). Respondents have violated at least one of these requirements for each day for at least the past five years, for a total of 1,826 days of violation.[2]

60. Pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(j), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties of up to $11,000 per day for each day during

---

[2]EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations

which the violation continues, up to a maximum of $157,500 for the period of March 15, 2004 through January 12, 2009 and $16,000 per day up to a maximum of $177,500 after January 12, 2009.

Count IV: Failure to Maintain and Implement an SPCC Plan at the 619 Main Facility in Violation of 40 C.F.R. § 112.3(a)

61. Paragraphs 1 through 60 are incorporated by reference as if fully set forth herein.

62. Respondents prepared an SPCC plan for the 619 Main Facility dated December 9, 2001 but failed to fully implement the plan as required by 40 C.F.R. §§ 112.7 and 112.8.

63. Respondents failed to adequately certify, amongst other things, that the PE who prepared the 619 Main SPCC plan was familiar with the requirements of 40 C.F.R. § 112, that he had visited and examined the 619 Main Facility and that the 619 Main SPCC plan was prepared in accordance with good engineering practices.

64. Respondents have failed to obtain management approval of the 619 Main SPCC plan at a level of authority to commit the necessary resources to fully implement the plan as required by 40 C.F.R. § 112.3.

65. The loading/unloading of oil hoses at the 619 Main Facility have not been locked when not in service as required by 40 C.F.R. § 112.7(g).

66. Respondents failed to periodically update and review the 619 Main SPCC plan as required by 40 C.F.R. § 112.5(b).

---

found at 28 U.S.C. § 2462.

67. Respondents failed to maintain a copy of the 619 Main SPCC plan on-site and failed to provide the EPA inspector with a copy of the 619 Main SPCC plan for on-site review as required by 40 C.F.R. § 112.3(e).

68. Respondents failed to keep records of inspection, testing, and training at the 619 Main Facility as required by 40 C.F.R. §§ 112.7(c) and (f).

69. The 619 Main Facility lacked sufficiently impervious secondary containment for some of its aboveground bulk storage such that discharged oil would be contained within the bermed area, as required by 40 C.F.R. §§ 112.7(c) and 112.8(c)(2).

70. Based on the November 20, 2009 inspection, EPA determined that the Respondents have failed to adequately provide for measures which would prevent the discharge of oil from reaching waters of the United States and to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8.

71. Respondents' failure to maintain the SPCC plan for its 619 Main Facility, including their failure to fully implement the SPCC plan, in accordance with the requirements of 40 C.F.R. §§ 112.3, 112.5, 112.7 and 112.8, as described above, violated 40 C.F.R. § 112.3(a), and section 311(j) of the Act, 33 U.S.C. § 1321(j). Respondents have violated at least one of these requirements for each day for at least the past five years, for a total of 1,826 days of violation.[3]

72. Pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(j), and 40 C.F.R.

[3]EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

§ 19.4, Respondents are liable for civil penalties of up to $11,000 per day for each day during which the violation continues, up to a maximum of $157,500 for the period of March 15, 2004 through January 12, 2009 and $16,000 per day up to a maximum of $177,500 after January 12, 2009.

Count V: Failure to Prepare an SPCC Plan for the 620 and 625 Main Facility in Violation of 40 C.F.R. § 112.3

73. Paragraphs 1 through 72 are incorporated by reference as if fully set forth herein.

74. Respondents have failed to prepare an SPCC plan for the 620 and 624 Main Facility in violation of 40 C.F.R. § 112.3 and section 311(j) of the Act, 33 U.S.C. § 1321(j). Respondent have violated this requirements for each day at least since the EPA inspected the 620 and 624 Main Facility on November 20, 2009.

75. Pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(j), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties of up to $11,000 per day for each day during which the violation continues, up to a maximum of $157,500 for the period of March 15, 2004 through January 12, 2009 and $16,000 per day up to a maximum of $177,500 after January 12, 2009.

IV. PROPOSED PENALTY

76. Based on the forgoing Findings of Violation, and pursuant to the authority of sections 309(g) and 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §§ 1319(g) and 1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4, and sections 309(g)(3) and 311(b)(8) of the Act, 33 U.S.C. §§ 1319(g)(3) and

1321(b)(8), the Complainant proposes that a Final Order assessing administrative penalties be issued against Respondents in an amount not to exceed $11,000 per day for each day during which its violations continued, up to a maximum of $157,500, for violations occurring between March 15, 2004 and January 12, 2009, and $16,000 per day for each day during which violations continued, up to a maximum of $177,500, for violations occurring after January 12, 2009. In accordance with section 309(g)(3), for the violation of section 308 of the Act, the Complainant proposes that the penalty be assessed after taking into account the nature, circumstances, extent and gravity of the violation, the violator's ability to pay, prior history of violations, degree of culpability, economic benefit resulting from the violation and any other matters as justice may require. In accordance with 311(b)(8) of the Act, for the violation of section 311(j), the Complainant proposes that the penalty be assessed after taking into account the seriousness of the violations, the economic benefit to the violator, if any, resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

77. Munce's Superior's violation of the information gathering provisions of section 308 of the Act alleged above represents a significant violation because, unless requested information is provided by the regulated community, the Agency cannot operate an effective oil pollution prevention program.

78. Respondents' violation of the Oil Pollution Prevention regulations alleged above represent significant violations of the Act because either failure to prepare or failure to fully maintain and implement an adequate SPCC plan both leave a facility unprepared to deal with an oil spill or to prevent the spill from having potentially serious environmental consequences.

V. OPPORTUNITY TO REQUEST HEARING

79. Respondents 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.

80. 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, Respondents must within 30 days after receipt of this Complaint either: (1) settle this matter with the Complainant; or (2) file both an original and one copy of a written Answer to this Complaint to:

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

81. Respondents are also required to provide a contemporaneous copy of any Answer to Complainant's counsel, who is authorized to receive service on behalf of EPA pursuant to 40 C.F.R. § 22.5(c)(4), at the following address:

Tonia Bandrowicz, Senior Enforcement Counsel
Office of Environmental Stewardship
U.S. Environmental Protection Agency – Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

82. Pursuant to 40 C.F.R. § 22.15, the Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondents have knowledge. If the Answer asserts no knowledge of a particular factual allegation, the allegation shall be deemed denied. Otherwise, the failures to admit, deny, or explain any material factual allegation contained in this Complaint constitutes an admission of the allegation. The Answer shall also state the circumstances or arguments for any defense Respondents wish to assert, challenges to any factual allegation in the Complaint, and any basis Respondents may have to oppose the Complainant's proposed penalty.

83. Following receipt of the Answer, a Presiding Officer will be assigned. The Presiding Officer will notify the parties of his or her assignment, and shall notify the parties of the time and place of further proceedings in the case.

VI. PUBLIC NOTICE

84. Pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Act, 33 U.S.C. §§ 1319(g) and 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on this proposed issuance of a Final Order assessing administrative penalties against Respondents. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under sections 309(g)(4) and 311(b)(6)(C) of the Act to be heard and present evidence at the hearing.

Date: 06/17/10

Susan Studlien

Susan Studlien
Director, Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region 1

In the Matter of Munce's Superior Petroleum Products, Inc.,
and Munce's Superior, Inc.
CWA-01-2010-0040

CERTIFICATE OF SERVICE

I certify that the foregoing Compliant was transmitted to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA - Region I
5 Post Office Square, Suite 100
Mail Code:
Boston, MA 02109-3912

Copy by certified mail,
return receipt requested:

Harold Munce, President
Munce's Superior Petroleum Products, Inc.
620 Main St.
Gorham, NH 03581

Dated: 6/21/10

Tonia Bandrowicz
U.S. EPA - Region I
One Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023
Phone: (617) 918-1734
Fax: (617) 918-0734

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

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

COMPLAINANT'S MOTION FOR DEFAULT

Complainant, the United States Environmental Protection Agency, Region 1, ("EPA"), moves pursuant to 40 C.F.R. §§ 22.16 and 22.17 for the issuance of an order finding that Respondents Munce's Superior Petroleum Products, Inc. and Munce's Superior, Inc. ("Respondents") are in default in this matter, finding that Respondents violated sections 308 and 311 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1321, and the federal Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112, and assessing a penalty of $ 46,400.

A Memorandum in Support of Complainant's Motion for Default is attached.

Respectfully submitted,

Tonia Bandrowicz
Sr. Enforcement Counsel
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-2912
(617) 918-1734
(617) 918-0734 (f)
bandrowicz.toni@epa.gov

7/12/11
Dated

In the Matter of Munce's Superior Petroleum Products, Inc.,
and Munce's Superior, Inc.
CWA-01-2010-0040

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Default was transmitted to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy hand-delivered:

Jill Metcalf,
Regional Judicial Officer
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy by certified mail,
return receipt requested:

Harold Munce, President
Munce's Superior Petroleum Products, Inc.
620 Main St.
Gorham, NH 03581

7/12/11
Dated

Tonia Bandrowicz
Sr. Enforcement Counsel
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-2912
(617) 918-1734
(617) 918-0734 (f)
bandrowicz.toni@epa.gov

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

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

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

Clean Water Act:

Other:

INTRODUCTION

Complainant, the United States Environmental Protection Agency, Region 1, ("EPA"), moves pursuant to 40 C.F.R. §§ 22.16 and 22.17 for the issuance of an order finding that Munce's Superior Petroleum Products, Inc. and Munce's Superior, Inc. ("Respondents") are in default in this matter, finding that Respondents violated sections 308 and 311 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1321, and the federal Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112, and assessing a penalty of $46,400.

EPA is aware that the Respondents have filed a petition for relief under Chapter 11 of the Bankruptcy Code. EPA also recognizes that Section 362 of the Bankruptcy Code prohibits the filing of certain claims against a debtor, which is sometimes referred to as the "automatic stay." However, EPA believes that 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 and regulatory power..." 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. See *Penn Terra Ltd. v. Dept. of Envt'l Resources,* 733 F.2d 267 (3d Cir. 1984). 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 an action to determine the amount of penalty. See *In re Commerce Oil Co.*, 847 F.2d 291, 295-95 (6th Cir. 1988); *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."). Thus, EPA seeks only to establish the amount of the civil penalty in this action against Munces. EPA will seek to collect any such penalty amount in the bankruptcy proceeding using the appropriate means.

ARGUMENT

I. Standard for Default Order

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Part 22") provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint. 40 C.F.R. § 22.17. *In re Haydel*, No. VI-99-1618, 2000 WL 436240, at*6 (EPA Region VI April 5, 2000).

In order to find liability when a Respondent is in default, the Complainant must, as a preliminary matter, prove that the Respondent was properly served a copy of the Complaint. *Id.* at 3, 8. Complainant must also show that it has pled a prima facie case in its complaint, but not have to submit evidence proving a prima facie case. Id. At 7-8. Section 22.17(a) does not contemplate submitting evidence when a Respondent is in default since it provides that the Respondent's default constitutes an admission of all facts alleged in the complaint. If the complainant alleged a prima facie case in its complaint, admission of all facts in the complaint would result in the respondent's liability. Therefore, there would be no need to submit evidence to prove a prima facie case on liability for a default order. *Id.* at 7-8.

As to the issue of the penalty, 40 C.F.R. § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. A conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty calculations is insufficient. These legal and factual grounds

are necessary in order for the Presiding Officer to set forth its reasons for adopting the proposed penalty. *Id.* at 7-8.

As of the date of the filing of this Motion, Respondents have not filed an Answer to EPA's Complaint, filed on June 21, 2010 (the "Complaint"), or settled this matter with EPA. For this reason, and because Complainant has, as set forth below, shown that the Respondent was properly served and that a prima facie case has been pled in the Complaint, Respondents should be found in default under 40 C.F.R. § 22.17 and sections 309(g) and 311(b) of the CWA. Based on the factual and legal grounds set forth below, a penalty of $46,400 should be assessed against Respondents for their violations of sections 308 and 311 of the CWA, 33 U.S.C. §§ 1318 and 1321(j).

II. Respondent was Properly Served

The record demonstrates that the Respondents were properly served. EPA's Complaint alleges that Respondents failed to comply with sections 308 and 311 of the CWA, 33 U.S.C. §§ 1318 and 1321. A copy of the Complaint is attached as Exhibit 1 ("Ex -1"). Respondents received the Complaint by certified mail, return receipt requested. A copy of the return receipt, signed by a representative of Respondents on June 23, 2010, is attached as "Ex-2." Accordingly, service was complete on June 23, 2010. 40 C.F.R. § 22.7(c).

With the aforesaid service, Respondents were informed, consistent with 40 C.F.R. § 22.15, that they had thirty days from the date they received the Complaint to: (1) settle this matter with the Complainant or (2) file both an original and one copy of a written Answer to the Complaint with the Regional Hearing Clerk. Ex-1. Thirty days passed without the Respondents settling the matter or answering the Complaint, thereby subjecting Respondents to default under 40 C.F.R. § 22.17. To date, EPA has not received an answer to the Complaint.

III. Respondents' Actions Violated CWA Sections 308 and 311(j)

In addition to demonstrating proper service, Complainant must show that the Complaint establishes a prima facie case of liability against a respondent before a default order may be issued. *Haydel*, 2000 WL 436240, at*5. As noted, this prima facie case, however, need only be established by a preponderance of the evidence through the facts pled in the complaint; the submission of evidence is not necessary. *Id.* at 7-8. As discussed in greater detail below, the factual allegations outlined in the Complaint satisfy this burden and establish, by a preponderance of the evidence, that Respondents violated sections 308 and 311(j) of the CWA.

Section 311(b)(3) prohibits the discharge of threshold amounts of oil or hazardous substances to navigable waters of the United States. 33 U.S.C. § 1321(b)(3). To reduce the likelihood of an oil spill, the Oil Pollution Prevention regulations issued under section 311(j) of the CWA, published at 40 C.F.R. Part 112, require facilities that store oil over certain threshold amounts (1,320 gallons aboveground or 42,000 gallons buried oil storage) to prepare Spill Prevention Control and Countermeasure ("SPCC") plans and to adopt certain measures to keep releases from reaching navigable waters or their adjoining shorelines.

Under 40 C.F.R. § 112.3, the owner or operator of an onshore facility that became operational prior to August 16, 2002, and that has discharged or, due to its location, could reasonably be expected to discharge, oil in harmful quantities[1] into or upon the navigable waters of the United States shall have prepared and maintained an SPCC plan. This SPCC plan must be prepared in accordance with 40 C.F.R. § 112.7 and any other applicable sections of 40 C.F.R. Part 112. These requirements apply to "owners" or "operators" of "non-transportation-related,"

[1] Harmful quantities, under 40 C.F.R. § 110.3, is defined as any oil discharge that violates water quality standards or causes film or sheen upon or discoloration on the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

"onshore facilities" engaged in "drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming" "oil or oil products" that, due to their location, could "reasonably be expected to discharge" oil in "harmful quantities," as defined in 40 C.F.R. Part 110, to "navigable waters of the U.S. or adjoining shorelines." 40 C.F.R. § 112.3. The Complaint filed in this case alleges that each of the requisite jurisdictional elements is met, subjecting Respondents to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.

A. Jurisdicational Allegations

The Complaint alleges that both Munce's Superior and Munce's Superior Petroleum Products are companies incorporated under the laws of New Hampshire with their headquarters located at 620 Main Street, Gorham, New Hampshire, and, therefore, are "persons" within the meaning of section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2. Ex-1, ¶¶ 6 and 7. It is also alleged that the Respondents are the "owners or operators" under section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of bulk oil storage and distribution facilities located at 443, 615, 619, 620/624 Main Street, Gorham, New Hampshire (the "Facilities"), Ex-1, ¶ 8, and that the Facilities are "onshore facilities" within the meaning of section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2, as they are facilities "of any kind located in, on, or under any land within the United States, other than submerged lands." Ex-1, ¶10. All the Facilities are also alleged to be "non-transportation-related" facilities within the meaning of Appendix A of 40 C.F.R. § 112. Ex-1, ¶ 11.

The Complaint further alleges that Respondents stored "oil" at the Facilities within the meaning of section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1) and 40 C.F.R. § 112.2, Ex-1, ¶ 9, as specified below:

a. Based on information contained in a July 25, 2000 SPCC plan, the Complaint alleges that the 443 Main Facility had one 15,000 gallon aboveground diesel fuel storage tank since at least July 25, 2000 (the date of the SPCC Plan), thereby subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least that date. Ex-1, ¶ 18.

b. Based on the information contained in a September 16, 1998 SPCC plan, the Complaint alleges that the 615 Main Facility had one 20,000 gallon aboveground diesel fuel storage tank, one 20,000 gallon aboveground kerosene storage tank, three aboveground tanks holding 20,000 gallons of #2 heating oil, and one 12,000 gallon aboveground red diesel fuel tank since at least September 16, 1998 (the date of the SPCC plan), thereby subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least that date. Ex-1, ¶ 19.

c. Based on the information contained in a December 9, 2001 SPCC plan, the Complaint alleges that the 619 Main Street Facility had two 8,000 gallon aboveground motor oil tanks, one 6,000 gallon aboveground motor oil tank, one 6,000 gallon aboveground hydraulic oil tank, three 4,000 gallon aboveground motor oil tanks, one 4,000 gallon aboveground hydraulic oil tank, three 2,000 gallon aboveground motor oil tanks and two 2,000 gallon aboveground hydraulic oil tanks since at least December 9, 2001 (the date of the SPCC plan), thereby subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least that date. Ex-1, ¶ 20.

d. The Complainant also alleges that the 620/624 Main Street Facility had a multitude of 55-gallon drums of oil and an aggregate aboveground storage capacity of approximately 10,500 gallons, thereby subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. part 112 since at least the date of the EPA inspection on November 25, 2009. Ex-1, ¶ 21.

The Complaint further alleges that the 620/624 Main Street Facility is located within approximately 100 feet of the Androscoggen River while all the other Facilities are all located within approximately 500 feet of the Androscoggin River, and that there are downward sloping overland pathways from each of the Facilities to either the Androscoggin River directly or a storm drains that empties into the Androscoggin River. Ex-1, ¶¶ 12-15. The Androscoggin River flows into the Merrymeeting Bay in Maine, which flows into the Lower Kennebec River and ultimately into the Atlantic Ocean. Each being navigable-in-fact, the Androscoggin River, the Merrymeeting Bay, the Lower Kennebec River and the Atlantic Ocean are "navigable waters" as defined in section 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1,

and are, therefore, subject to the jurisdiction of section 311 of the CWA, 33 U.S.C. § 1321. Ex-1, ¶¶ 16 and 17. Due to the proximity of the Facilities to the Androscoggin River and storm drains that empty into the Androscoggin River, as well as the topography of the area, the Facilities could reasonably be expected to discharge oil into the Androscoggin River and downstream bodies of water. Ex-1, ¶¶ 12-15.

B. Failure to Maintain and Implement an SPCC Plan at the 443 Main Street Facility in Violation of 40 C.F.R. part 112 and Section 311(j)

Forty C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and other requirements of 40 C.F.R. part 112, including the requirement to have the plan periodically reviewed and updated, 40 C.F.R. § 112.5(b), and available on-site for EPA review, 40 C.F.R. § 112.3(e). Forty C.F.R. 112.3(a)(1) requires the owner or operator of a SPCC-regulated facility that was in operation on or before August 16, 2002, to maintain its SPCC Plan. Ex-1, ¶¶ 5, 42, and 43.

On November 20, 2009, a representative of EPA conducted an SPCC inspection of the 443 Main Street Facility. Based on the information provided at that time, the Complaint alleges that the 443 Main Street Facility had an SPCC Plan, dated July 25, 2000, which was not fully implemented as required by 40 C.F.R. §§ 112.7 and 112.8. Ex-1, ¶ 44. It further alleges that the plan was not certified by a Professional Engineer ("PE"), as required by 40 C.F.R. § 112.3(d), and not periodically updated and reviewed as required by 40 C.F.R. § 112.5(b). Ex-1, ¶¶ 45 and 46. The Complaint also alleges that Respondents failed to maintain a copy of the plan on-site as required by 40 C.F.R. § 112.3(e), and failed to keep records of inspection, testing, and training at the 443 Main Street Facility as required by 40 C.F.R. §§ 112.7(e) and (f). Ex-1, ¶¶ 42 - 48. As a result, the Complaint alleges that the Respondents had not adequately provided for measures

which would prevent the discharge of oil from reaching waters of the United States by failing to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8. Ex-1, ¶ 49.

The Complaint further alleges that the Respondents' failure to maintain and fully implement the SPCC Plan for the 443 Main Street Facility violated 40 C.F.R. § 112.3(a), and section 311(j) of the CWA, 33 U.S.C. § 1321(j). Ex-1, ¶ 50. It further alleges that the Respondents have violated at least one of these requirements each day for at least the past five years, for a total of 1,826 days of violation.[2] Ex-1, ¶ 50.

C. Failure to Maintain and Implement an SPCC Plan at the 615 Main Street Facility in Violation of 40 C.F.R. Part 112 and Section 311(j)

Based on EPA's November 20, 2009 inspection of Respondents' 615 Main Street Facility, the Complaint alleges that the Facility's SPCC Plan, dated September 16, 1998, and amended December 12, 2001, was insufficient because, amongst other things, the Respondents had not periodically updated and reviewed the SPCC Plan as required by 40 C.F.R. § 112.5(b), and the SPCC Plan, as drafted, was not fully implemented, particularly regarding adequate secondary containment as required by 40 C.F.R. §§ 112.7 and 112.8 (for instance, the Facility lacked sufficiently impervious secondary containment for aboveground bulk storage and the loading rack so that discharged oil could be contained within the bermed area, as required by 40 C.F.R. §§ 112.7(c) and 112.8(c)(2), and the aboveground bulk storage did not have adequate security measures implemented as required by 40 C.F.R. § 112.7(g)). Ex-1, ¶¶ 53 -56. In addition, the Complaint alleges that the Respondents had failed to keep records of inspection, testing, and training at the Facility as required by 40 C.F.R. §§ 112.7(e) and (f). Ex-1, ¶ 57.

[2]EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

As a result, the Complaint alleges that the Respondents had not adequately provided for measures which would prevent the discharge of oil from reaching waters of the United States by failing to implement specific requirements listed in 40 C.F.R. §§ 112.7 and 112.8 at the 615 Street Main Facility. Ex-1, ¶ 58.

The Complaint further alleges that the Respondents' failure to maintain and fully implement the SPCC plan for the 615 Main Street Facility violated 40 C.F.R. § 112.3(a), and section 311(j) of the CWA, 33 U.S.C. § 1321(j), and that the Respondents have violated at least one of these requirements each day for at least the past five years, for a total of 1,826 days of violation.[3] Ex-1, ¶ 53.

D. Failure to Maintain and Implement an SPCC Plan at the 619 Main Street Facility in Violation of 40 C.F.R. Part 112 and Section 311(j)

Based on a December 22, 2009 EPA inspection, the Complaint also alleged that the 619 Main Street Facility had an SPCC plan, dated December 9, 2001, that was not adequately certified, in accordance with 40 C.F.R. § 112.3(d), and management had failed to approve the December 12, 2001 amendment to the SPCC Plan, in accordance with 40 C.F.R. § 112.7. Ex-1, ¶¶ 63 and 64. The Complaint further alleges that the Respondents had failed to maintain a copy of the SPCC Plan on-site and provide the EPA inspector with a copy of the SPCC Plan for on-site review, as required by 40 C.F.R. § 112.3(e). Ex-1, ¶ 67.

The Complaint also alleged that the SPCC Plan had not been fully implemented in that there was, among other things, inadequate secondary containment, inadequate security on loading/unloading hoses, and incomplete training and inspection records, as required by 40 C.F.R. §§ 112.7(c) and (g), and 112.8(c)(2). Ex-1, ¶¶ 68 and 69. In particular, the Facility

[3]EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

lacked sufficiently impervious secondary containment for some of its aboveground bulk storage tanks so that discharged oil would be contained within the bermed area, as required by 40 C.F.R. §§ 112.7(c) and 112.8(c)(2). Ex-1, ¶ 68.

As a result, the Complaint alleges that the Respondents had failed to maintain and fully implement an SPCC plan for their 619 Main Street Facility in accordance with the requirements of 40 C.F.R. §§ 112.3, 112.5, 112.7 and 112.8, or to adequately provide for measures which would prevent the discharge of oil from reaching waters of the United States. Ex-1, ¶¶ 70 and 71. The Complaint further alleges that the Respondents' failure to maintain and fully implement the SPCC plan for the 619 Main Street Facility violated 40 C.F.R. § 112.3(a), and section 311(j) of the CWA, 33 U.S.C. § 1321(j). Ex-1, ¶ 71. Respondents have violated at least one of these requirements for each day for at least the past five years, for a total of 1,826 days of violation.[4] Ex-1, ¶ 71.

E. Failure to Maintain and Implement an SPCC Plan at the 620/624 Main Street Facility in Violation of 40 C.F.R. Part 112 and Section 311(j)

Based on a November 25, 2009 EPA inspection, the Complaint alleges that the Respondents had failed to prepare an SPCC plan at all for the 620/624 Main Street Facility in violation of 40 C.F.R. § 112.3 and section 311(j) of the CWA, 33 U.S.C. § 1321(j), Ex-1, ¶ 74, and that Respondent was in violation for each day since at least November 25, 2009, the date EPA inspected the Facility.

[4]EPA is not pursuing penalties for violations of 40 C.F.R. part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

F. Failure of Respondent to Respond to a Request for Information Issued Under Section 308

Pursuant to EPA's statutory authority in Section 308(a) of the CWA, 33 U.S.C. § 1318(a), EPA may require the owner or operator of any point source[5] to establish and maintain certain records and provide information as is reasonably required to carry out the objectives of the CWA. In addition, pursuant to the parallel provision in Section 311(m) of the CWA, 33 U.S.C. § 1321(m), EPA can request from the owner or operator of a facility to which Section 311 applies, any information as necessary to carry out the objectives of that section.

The Complaint alleges that pursuant to CWA sections 308(a) and 311(m) of the CWA, on January 4, 2010, EPA issued an information request to Munce's Superior (herein referred to as the "308 Letter," attached as "Ex.-3"), informing the company that, based on its November 20 and December 22, 2009 inspections, EPA determined that the company did not have adequate and fully implemented SPCC plans for the 443, 615 and 619 Main Facilities as required by the Oil Pollution Prevention Regulations, and that Munce's Superior was required to submit to EPA a copy of a revised SPCC plan for those Facilities. Ex-1, ¶ 33; Ex-3. The 308 Letter also informed Munce's Superior that, based on its November 25, 2009 inspection, EPA had determined that the 620/624 Main Street Facility[6] did not have an SPCC plan as required by the Oil Pollution Prevention Regulations, and that Munce's Superior was required to submit a copy of a new SPCC plan for that Facility. Ex-1, ¶ 33; Ex-3. The 308 Letter also informed Munce's Superior that if it could not be fully compliant within 30 days of receipt of the letter, it must

[5] Under the CWA, the term "point source means any discernable, confined, and discrete conveyance, including but not limited to any... *container*... from which pollutants are or may be discharged" (emphasis added). Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Oil storage tanks and drums fall within the category of "containers" from which oil, which is a "pollutant," may be discharged.

[6] Although the properties have two separate street addresses, EPA is treating this as one facility.

submit a detailed schedule including a list of the issues to be fixed and the dates when the fixes will be completed and the facility would be fully compliant. Ex-1, ¶ 33; Ex-3.

The Complaint further alleges that the 308 Letter was sent to Munce's Superior, by certified mail and received and signed for by a representative of Munce's Superior's on January 7, 2010 (a copy of the return receipt card is attached as "Ex-4"). Ex-1, ¶ 34; Ex-4. Therefore, a response to the 308 Letter was due to EPA no later than February 9, 2010. Ex-1, ¶ 34. EPA never received a response from Respondents. Ex-1, ¶35.

The Complaint also alleges that an EPA representative telephoned the company regarding the 308 Letter. Ex-1, ¶ 35. In a follow-up letter to the company dated April 7, 2010, EPA notified Respondent of its failure to respond to the 308 Letter and reiterated that compliance with the requirements of the 308 Letter is mandatory and failure to do so subjects the company to possible penalties. Affidavit of Joseph Canzano (hereinafter "Canzano Affidavit"), ¶ 5 and Attachment 1. Despite the phone call and April 7, 2010 follow-up letter, the company has yet to provide the information requested in the 308 letter. Ex-1, ¶ 37; Canzano Affidavit, ¶ 5. By failing to respond to the 308 Letter, Respondent violated sections 308 and 311(m) of the CWA, 33 U.S.C. §§ 1318 and 1321(m). Ex-1, ¶ 38.

Because the Complaint establishes a prima facie case showing that the Respondents are subject to the CWA, and that they failed to either prepare or update or fully implement SPCC plan for the Facilities that fulfilled the requirements of 40 C.F.R. § 112.7, the Respondents should be found in default pursuant to 40 C.F.R. §§ 22.16 and 22.17 for violations of sections 308 and 311 of the CWA, 33 U.S.C. §§ 1318 and 1321. In addition, Respondent Munce's Superior, which received and failed to respond to the 308 Letter, should be found in default pursuant to 40 C.F.R. §§ 22.16 and 22.17 for violations of sections 308 of the CWA,. 33 U.S.C.

§ 1318.[7]

III. A Penalty of $46,400 Should Be Assessed

Complainant requests the imposition of a $13,200 penalty for Respondents' violations of section 308 of the CWA and of $33,200 for Respondents' violations of sections 311(j) of the CWA. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed penalty amount is appropriate in light of the statutory penalty assessment criteria

Sections 309(g)(2)(B) and 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §§ 1319(g)(2)(B) and 1321(b)(6)(B)(ii), as adjusted for inflation by 40 C.F.R. § 19.4, authorize the assessment of a civil administrative penalty up to $ 11,000 per day for each day that a violation of section 308 or 311(j) of the CWA continues, up to a maximum penalty of $157,500, for the period after March 15, 2004 through January 12, 2009, and a civil administrative penalty up to $ 16,000 per day for each day that a violation of section 308 or 311(j) of the CWA continues, up to a maximum penalty of $ 177,500 for the period after January 12, 2009.

A. Assessing Penalties for Violation of Section 308

In assessing a penalty under section 309(g)(3) of the CWA for a violation of section 308 of the CWA, the "nature, circumstances, extent and gravity of the violations, or violations" is taken into account, as well as, the violators "ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justices may require."[8] The $ 13,200 penalty proposed by EPA in this motion

[7] EPA's Complaint only cites a violation of section 308 of the CWA as the statute only provides for administrative penalties for violations of that section, not section 311(m) of the CWA.

[8] There is no EPA penalty policy for determining the amount of the penalty to be pled in a complaint alleging violations of Section 308 of the Act; rather, EPA has a March 1, 1995 settlement policy, entitled *Interim Clean Water Act Settlement Penalty Policy,* which is designed for EPA use only, in order to determine the minimum

for this violation is supported under the statutory penalty criteria by the facts alleged in the Complaint and prior case law.

The response to EPA's 308 Letter was due on February 9, 2010. Ex-1, ¶ 34. As of the date EPA filed the Complaint, December 26, 2007, EPA had not received a response despite follow-up contact by EPA; therefore, Respondent had, as of the date of the Complaint, failed to comply with the requirements of section 308 of the CWA for a total of 132 days.[9] Ex-1, ¶¶ 4, 5, 34, 35, and 37.

Cooperation by the regulated community in responding to EPA's requests for information is critical to the Agency's ability to effectively enforce the CWA. *In re Rofor Plating Company, Inc.*, No. CWA-2-I-91-1112, 1993 WL 426034, at 1-3, p. 1. The failure to comply with information request letters has been held to be a "grave violation of the Act" warranting a substantial penalty. *In re John Simon, Steve Harman and Evalena Fox d/b/a She Rentals*, No. CWA-III-156, 1997 WL 1098076, at 4-6, p. 5. Significant penalties have been imposed by the federal and administrative courts for the failure to respond to a section 308 information request. *See, U.S. v. Davis and Davis Construction,* No. 2:00-cv-00995 (D. Utah filed Dec. 6, 2004) (penalty of $125/day or total penalty of $12,250); *In re John Simon* (total penalty of $8,500); and *In re Rofor Plating* (total penalty of $30,000) (copies attached). EPA proposes in this case a total civil penalty of $ 13,200 which amounts to a little more than $7 per day for 5 years (or 1825 days) of violation. This penalty is appropriate under the facts of the case, and the "nature, circumstances, and gravity of the violations" factor identified at section 309(g)(3) of the CWA,

---

penalty for which the Agency would be willing to settle a case. Calculations performed under the policy are confidential.

[9] In fact, as of the date of this motion, EPA has not received a response to the 308 Letter.

33 U.S.C. § 1319(g)(3), as well as being consistent with previous cases assessing penalties for non-reporting.

EPA proposes that no adjustments be made based on the factors concerning good faith efforts to comply as Respondents have yet to submit a response or make any effort to justify their failure. Ex-1, ¶¶ 4, 5, 34, 35, and 37. EPA also does not propose any adjustment be made for the payment of penalties previously assessed for the same violations. Canzano Affidavit, ¶ 8. In addition, EPA has no record of a prior history of Section 308 violations by Respondent and, therefore, did not increase the penalty under this factor. Canzano Affidavit, ¶ 6.

Finally, Respondents have not documented a claim of adverse economic impact on Respondent's business. Review of a Dun & Bradstreet report for the company obtained by EPA, Canzano Affidavit, ¶ 7, and Attachment 2, shows that the company has been leasing equipment and making payments on time, indicating an ability to pay a penalty. Absent probative information from Respondent on the impact of the penalty on its business, EPA proposes that a penalty of $ 13,200 is appropriate for the section 308 violation.

B. Assessing Penalties for the Failure to Adequately Maintain/Fully Implement SPCC Plans for the Facilities

Section 311(b)(6) of CWA, 33 U.S.C. § 1321(b)(6) authorizes civil administrative penalties for violations of the Oil Pollution Prevention regulations promulgated under section 311(j) of the CWA and published at 40 C.F.R. Part 112. A penalty for SPCC plan violations is based on a consideration of the statutory factors found in section 311(b)(8) of the CWA:

> the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

In determining an appropriate penalty in this case, EPA proposed utilizing the methodology in EPA's August 1998 *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the CWA*("Penalty Policy"), attached as "Ex-5."[10] In light of the facts alleged in the Complaint and additional facts supplied by affidavit, as further described below, Complainant proposes a $ 33,200 penalty for Respondents' violations of section 311(j) of the CWA.

1. Gravity of Violations

Consistent with the statutory factors, and utilizing the Penalty Policy methodology, EPA proposes that the gravity component of the penalty be calculated by evaluating four factors: (a) the seriousness of the violation; (b) the culpability of the Respondent; (c) the mitigation efforts of the Respondents; and (d) the history of the Respondent's prior violations. Ex-5 at 6-11, 14-15.

(a) Gravity: Seriousness of the Violation

The seriousness of a section 311(j) violation depends, in part, on the risk posed to the environment. Ex-5 at 7. Risk can encompass the extent of the violation, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation. Ex-5 at 7. Under the Penalty Policy, the violation can fall within one of three categories: minor noncompliance, moderate noncompliance, and major noncompliance. Ex-5 at 7-8.

The Penalty Policy first assesses the seriousness of a violation based on the storage capacity and the degree of non-compliance. Ex-5 at 7-8. The Complaint alleges that, as of the November 20 and 25, and December 22, 2009 EPA inspections, the Respondents' Facilities had a total aboveground storage tank capacity of 176,000 gallons, broken down as follows:

443 Main Street Facility: 15,550 gallons;
615 Main Street Facility: 62,000 gallons;

[10] While the penalty policy for section 311 of the CWA is also termed a "settlement policy," the methodology it employs can be used to support a penalty at hearing.

619 Main Street Facility: 55,650 gallons; and
620/624 Main Street Facility: 11,305 gallons.
Ex-1, ¶¶ 18-21.

The Complaint alleges that Respondents' facilities, in some cases, lacked secondary containment or adequate secondary containment. Ex-1, ¶¶ 28, 31. The purpose of secondary containment is to ensure that if a spill occurs, the secondary containment can act as storage for the overflowed oil so as to prevent the oil from reaching navigable waters. As noted, all of the facilities are within approximately 500 feet of the Androscoggin River and there are downward sloping overland pathways from the Facilities directly to the Androscoggin River, or to a storm drain that empties into the Androscoggin River, Ex-1, ¶¶ 12-15. Additional SPCC plan deficiencies were observed at all of the facilities, as alleged in the Complaint, Ex-1, ¶¶ 23-31, including a total lack of a SPCC plan for the 620/624 Main Street Facility. Ex-1, ¶ 32. These deficiencies undermine Respondents' ability to prevent or respond to oil spills; however, because the 615 and 619 Main Street Facilities had some secondary containment, EPA proposes that the "seriousness" of the violations be characterized as "moderate," not "major," under the methodology of the Penalty Policy. Moreover, because the 443 and 620/624 Main Street Facilities had secondary containment on most of their tanks, EPA proposes that the seriousness at those facilities be characterized as "minor." Utilizing the Penalty Policy matrix, Ex-5 at 7, the penalty for each facility, based on either a "minor" or "moderate" characterization, is as follows:

443 Main Street Facility: $ 500 (15,550 gal. capacity/minor);
615 Main Street Facility: $ 2000 (62,000 gal. capacity/moderate);
619 Main Street Facility: $ 2000; (55,650 gal. capacity/moderate); and
620/624 Main Street Facility: $ 2000 (11,305 gal. capacity/minor).

The Penalty Policy also provides for an Environmental Impact Adjustment, Ex-5 at 8. The potential impact falls into one of the three categories under the Penalty Policy: Major,

Moderate, or Minor impact. Ex-5 at 9. A discharge likely to significantly affect human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife, is considered a discharge of major impact warranting an upward adjustment of the base penalty by 25% - 50%. 6-4 at 9. A discharge likely to significantly affect navigable waters (other than a drinking water supply), adjoining shorelines, or vegetation (other than a sensitive ecosystem) is considered a discharge of moderate impact warranting an upward adjustment of the base penalty by up to 25%. Ex-5 at 9. A discharge that falls into neither the major or moderate category is deemed a discharge of minor impact warranting no adjustment. Ex-5 at 9. In this case, as the discharge is unlikely to affect human health or drinking water, but may have significant effect on the Androscoggin River, a navigable waterway, EPA proposes that a "moderate" category be selected for each facility, and a 10% increase, which raised the penalty calculations as follows:

443 Main Street Facility: $ 550;
615 Main Street Facility: $ 2,200;
619 Main Street Facility: $ 2,200; and
620/624 Main Street Facility: $ 2,200.

In addition to considering the potential environmental impact, the Penalty Policy considers the duration of Respondents' violations when calculating the proposed penalty. Ex-5 at 9. EPA proposes limiting the duration of the violation to the federal five-year statute of limitations, or sixty months, for all but the 620/624 Main Street Facility, for which EPA proposes limiting the duration to seven months (from the date of the EPA inspection to filing of the Complaint). For each month of violation, EPA proposes that one half of one percent be added to the penalty amount, as proposed by the Penalty Policy. This results in penalty adjustments as follows:

443 Main Street Facility: $ 715 (30%);
615 Main Street Facility: $ 2860 (30%);

619 Main Street Facility: $ 2860 (30%); and
620/ 624 Main Street Facility: $ 2277 (4%).

(b) Gravity: Culpability of the Respondent

To determine culpability, the Penalty Policy considers the degree to which the Respondents should have been able to prevent the violation, considering its level of sophistication, amount of available information, and any history of regulatory staff explaining to Respondent its legal obligations or notifying Respondent of its compliance requirements. Ex-5 As companies engaged in the oil delivery business, the Respondents should be considered to have a high level of sophistication with respect to oil distribution and storage requirements and should be very familiar with the procedures and duties associated with this business, including the federal Oil Pollution Prevention Regulations, 40 C.F.R. Part 112, first promulgated in 1973.

Moreover, in this case, Respondents were given specific notice of noncompliance with the SPCC regulations by EPA during the November and December, 2009 inspections, and during follow-up correspondence. Despite this notice, Respondents still have not come into compliance with the SPCC requirements or fixed the deficiencies noted in EPA's Inspection Reports or the June 21, 2010 Administrative Complaint. Ex.-1, ¶¶ 35. Respondents' continued lack of compliance with the SPCC regulations, combined with their knowledge of the oil storage and distribution business, suggests that Respondents are highly culpable and that the penalty should be increased accordingly. The Penalty Policy suggests a maximum increase of 75% for culpability and EPA proposes adjusting the penalty for each facility by that percentage, resulting in penalty adjustments as follows:

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

(c) Gravity: Mitigation Efforts of the Respondent

Under the Penalty Policy, also considered is the "nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge." Though a violation of SPCC regulations increases the threat of a discharge rather than actually causing a discharge, this factor can be taken into account by considering how quickly the violator comes into compliance, thereby mitigating the threat of a discharge. Ex-5 at 10. If Respondents had come into compliance before being notified of its violation by regulatory staff orally or in writing, the Penalty Policy allows for an adjustment of up to 25%. Ex-5 at 10. Since Respondents did not come into compliance with the SPCC regulations, even after being notified, EPA proposes no mitigation of the penalty under this factor.

(d) Gravity: History of the Respondent's Prior Violations.

Under the Penalty Policy, the penalty can be adjusted upward if the Respondent has a relevant history of violations within the past five years. Ex-5 at 10-11. Based on an August, 30, and October 10, 2007 inspection by the New Hampshire Department of Environmental Services, the 620/624 Main Street Facility was found to be in noncompliance with state oil storage rules that mirror certain of the EPA Oil Pollution Prevention regulations. For this reason, EPA proposes increasing the penalty for this Facility by 50%, to a $5,997. Canzano Affidavit, ¶ 6. [11]

(e) Inflation Adjustment

Applying EPA's September 21, 2004 *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule*, the penalty should be increased by 17.23% for all post March 15, 2004 violations, resulting in upward adjustments as follows:

[11] As EPA had no information of historic noncompliance at the other Facilities for either SPCC-related, or non-response to information requests, EPA proposes no adjustments under this factor for these other Facilities.

443 Main Street Facility: $ 1,508;
615 Main Street Facility: $ 6,033;
619 Main Street Facility: $ 6,033; and
620/624 Main Street Facility: $ 7,696.

2. Adjustments to Gravity

There are three factors to consider when making adjustments to gravity under the Penalty Policy: Other penalties for the same incident, other matters as justice may require, and the economic impact of the penalty on the violator. Ex-5. Based on information available to EPA, the Respondents have not paid a penalty for the same incident and, therefore, EPA recommends not adjusting the penalty under this factor. There are also no other facts known to EPA that warrant an adjustment to the penalty for other matters as justice may require. Canzano Affidavit, ¶ 8. EPA also has no information which suggests that economic impact on the Respondent should reduce the amount of the proposed settlement. Canzano Affidavit, ¶ 7, Attachment 2. Therefore, the total gravity penalties for each facility:

443 Main Street Facility: $ 1,508;
615 Main Street Facility: $ 6,033;
619 Main Street Facility: $ 6,033; and
620/624 Main Street Facility: $ 7,696.

3. Economic Benefit

Section 311(g)(8) of the CWA also considers the "economic benefit to the operator, if any, resulting from the violation." Economic benefit can accrue to a violator by "delaying necessary pollution control expenditures, avoiding necessary pollution control expenditures, and/or obtaining an illegal competitive advantage." *Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases*, 70 Fed. Reg. 50,326 (August 26, 2005). The fundamental goal of recapturing of economic benefits is to prevent a violator from profiting from its own wrongdoing. *U.S. v. Mun. Auth. of Union Township*, 150 F.3d 259, 264

(3d Cir. 1998). In other words, "[c]ourts use economic benefit analysis to level the economic playing field and prevent violators from gaining an unfair competitive advantage" over competitors who make the necessary expenditures for environmental compliance. *U.S. v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 348 (E.D.Va.1997).

EPA uses the BEN (short for benefit) computer model to calculate a violator's economic benefit from delaying or avoiding pollution control expenditures. BEN calculates economic benefit after considering capital investments, one-time non-depreciable expenditures, and annual recurring costs avoided through non-compliance. Respondents benefited monetarily since they did not finalize or implement their draft SPCC plans or provide sufficient secondary containment for the aboveground storage at the Facilities. The economic benefit to Respondents is estimated based upon delayed costs associated with fully implementing the draft SPCC plan and the avoided costs associated with inspection and record keeping. Applying the BEN model to Respondents' case, EPA estimates the cost of compliance at each facility as follows:

443 Main Street Facility: $ 1,495;
615 Main Street Facility: $ 6,983;
619 Main Street Facility: $ 1,315; and
620/624 Main Street Facility: $ 2,140.

Canzano Affidavit ¶ 9, Attachment 3.

EPA therefore proposes increasing the penalties as follows:

443 Main Street Facility: $ 3,003;
615 Main Street Facility: $ 13,016;
619 Main Street Facility: $ 7,348; and
620/624 Main Street Facility: $ 9,836.

Resulting in a total penalty for the section 311(j) violations of **$33,203.**

CONCLUSION

Based on the foregoing facts and law, Complainant requests that the Regional Judicial Officer issue an order finding the Respondents 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). Based on the facts of the case as alleged in the Complaint and by affidavit, the penalty factors identified in the statute, and previous cases assessing penalties, EPA further requests that a penalty be assessed in the amount of $ 46,403 for Respondents' violations of sections 308 and 311 of the CWA.

Respectfully submitted,

_____ _____

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

Dated

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

RECEIVED
2011 DEC 15 A 10:28
EPA ORC
OFFICE OF
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.[1]

[1] 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

---

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/EPAAdmin.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%.[2] Because I am ordering the Complainant to supplement the record on other points, I invite the Complainant to take the opportunity to

[2] 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

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

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)

SUGGESTION OF BANKRUPTCY AND RESPONSE TO ORDER TO CLARIFY AND SUPPLEMENT THE RECORD

Munce's Superior Petroleum Products, Inc. ("MSPP"), a respondent in the above-captioned adminstrative proceeding, by and through its undersigned bankruptcy counsel, files this Suggestion of Bankruptcy and Response to Order to Clarify and Supplement the Record.

1. MSPP and four affiliated entities filed chapter 11 bankruptcy petitions on March 16, 2011. A copy of MSPP's petition is attached hereto as **Exhibit A**. To date, MSPP's bankruptcy proceeding is still pending.

2. Undersigned counsel was not made aware of this adversary proceeding until September of 2011, and did not become aware of the Order to Clarify and Supplement the Record until some time after it was issued. All of the documents and pleadings in this administrative proceeding have been served directly on MSPP.

3. On or about September 9, 2011, the United States Environmental Protection Agency (the "EPA") filed a proof of claim in MSPP's bankruptcy case, alleging civil penalties in

an unspecified amount for the violations set forth in the complaint initiating this adversary proceeding. That proof of claim was subsequently amended on October 18, 2011 and again on October 20, 2011. A copy of the proof of claim is attached hereto as **Exhibit B**.

4. By filing a proof of claim, the EPA has submitted itself to the jursidiction of the United States Bankruptcy Court of New Hampshire (the "Bankruptcy Court") and, accordingly, the amount of its claim should be adjudicated in that Court. Even apart from the jurisdictional issue, the Debtors take the position that this adversary proceeding must be stayed in accordance with 11 U.S.C. § 362.

5. In light of the foregoing, MSPP respectfully requests that the EPA stay this administrative proceeding and allow the parties to litigation the amount of the EPA's claim in the Bankruptcy Court, which is the proper forum.

6. Finally, in response to this Court's order seeking clarification of the record, there is no entity by the name of Munce's Superior, Inc. MSPP, a coporation 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.

Dated: January 27, 2012

Respectfully submitted,

MUNCE'S SUPERIOR PETROLEUM PRODUCTS, INC.

By its attorneys,

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street, P. O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
rkeach@bernsteinshur.com
jlewis@bernsteinshur.com

In the Matter of: Munce's Superior Petroleum Products, Inc.

Docket Number: CWA-01-2010-0040

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NOTICE OF APPEARANCE in the Matter of Munce's Superior Petroleum Products, Inc., CWA-01-2010-0040, were sent to the following persons in the manner indicated:

Original and one copy by Federal Express:	Wanda Santiago, Regional Hearing Clerk U.S. EPA – Region 1 5 Post Office Square, Suite 100 Boston, MA 02109-3912
Copy by Federal Express:	Tonia Bandrowicz, Senior Enforcement Counsel Office of Environmental Stewardship U.S. Environmental Protection Agency – Region 1 5 Post Office Square, Suite 100 Boston, MA 02109-3912
Dated: January 27, 2012	*Attorneys for Munce's Superior Petroleum Products, Inc.*

_____

Jessica A. Lewis, Esq.
Robert J. Keach, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Streeet
P.O. Box 9729
Portland, ME 04104-5029

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

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

REQUEST FOR EXTENSION TO RESPOND TO PRESIDING OFFICER'S DECEMBER 15, 2011 ORDER TO CLARIFY AND SUPPLEMENT THE RECORD

Complainant, the United States Environmental Protection Agency ("EPA"), moves pursuant to 40 C.F.R. §§ 22.16 and 22.17 for a 30 day extension to respond to the Presiding Officer's December 15, 2011 *Order to Clarify and Supplement the Record.* Although the *Order* was issued by the Presiding Officer on December 15, 2011, Complainant did not receive a copy until January 26, 2012 and, therefore, needs additional time in which to provide the information requested in the *Order.*

Respectfully submitted,

Tonia Bandrowicz

1/30/12
Dated

Tonia Bandrowicz
Counsel for Complainant
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912
Phone: (617) 918-1734
Fax: (617) 918-0734

In the Matter of Munce's Superior Petroleum Products, Inc.,
and Munce's Superior, Inc.
CWA-01-2010-0040

CERTIFICATE OF SERVICE

I certify that the foregoing Request for an Extension was transmitted to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA - Region I
5 Post Office Square, Suite 100
Mail Code:
Boston, MA 02109-3912

Copy by certified mail,
return receipt requested:

Harold Munce, President
Munce's Superior Petroleum Products, Inc.
620 Main St.
Gorham, NH 03581

Dated: 1/30/12

Tonia Bandrowicz
U.S. EPA - Region I
5 Post Office Square
Suite 100
Boston, MA 02109-3912
Phone: (617) 918-1734
Fax: (617) 918-0734

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

January 30, 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:

Complainant received this afternoon, after filing its *Request for an Extension to Respond to Presiding Officer's December 15, 2011 Order to Clarify and Supplement the Record* with the Presiding Officer and Harold Munce, President of Munce's Superior Petroleum Products, Inc. (MSPPI), a copy of a Notice of Appearance by Robert J. Keach, Esq., and Jessica A. Lewis, Esq., counsel representing MSPPI in its bankruptcy proceeding. Complainant is therefore sending a copy of the *Request for an Extension* to Attorneys Keach and Lewis this afternoon.

Sincerely,

Tonia Bandrowicz
Senior Enforcement Counsel

Enclosure

cc: Robert J. Keach, Esq.

In the Matter of Munce's Superior Petroleum Products, Inc.,
and Munce's Superior, Inc.
CWA-01-2010-0040

CERTIFICATE OF SERVICE

I certify that the foregoing letter and Request for Extension was sent to the following persons:

Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA - Region I
5 Post Office Square, Suite 100
Mail Code:
Boston, MA 02109-3912

Copy by certified mail,
return receipt requested:

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Swayer & Nelson, P.A.
100 Middle Street, P.O. Bosx 9729
Portland, Maine 04104-5029

Dated: 1/30/12

Tonia Bandrowicz
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

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

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

AND RESPONSE TO RESPONDENTS' SUGGESTION OF BANKRUPCY 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. ("MSPPI"), 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,[1] 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 Compliant. 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.

[1] 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% [2] 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);

[2] 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.").[3]

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);

[3] 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).[4] 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

2/23/12
Dated

[4] The district courts have referred their bankruptcy jurisdiction to the bankruptcy courts. *See* 28 U.S.C. §157.

In the Matter of Munce's Superior Petroleum Products, Inc.,
and Munce's Superior, Inc.
CWA-01-2010-0040

CERTIFICATE OF SERVICE

I certify that the foregoing *Complainant's Response To Presiding Officer's Order To Clarify And Supplement The Record* and *Complainant's Response To Respondents' Suggestion Of Bankrupcy And Response To The Order To Clarify And Supplement The Record* was sent to the following persons:

Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy hand-delivered:

LeAnn Jensen,
Acting Regional Judicial Officier
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy by certified mail,
return receipt requested:

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Swayer & Nelson, P.A.
100 Middle Street, P.O. Bosx 9729
Portland, Maine 04104-5029

Dated: 2/23/12

Tonia Bandrowicz
U.S. EPA - Region I
5 Post Office Square, Suite 100
Boston, MA 02109-3912

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

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 Bankrupcy 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.

EPA ENFORCEMENT ACCOUNTS RECEIVABLE CONTROL NUMBER FORM FOR ADMINISTRATIVE ACTIONS

This form was originated by Wanda I. Santiago for Tonia Bardrowicz (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

RECEIVED
MAY 17 2012
EPA ORC
Office of Regional Hearing Clerk

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

---

[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

---

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:

---

[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

Certificate of Service

I hereby certify that the **Initial Decision and Default Order** by Regional Judicial Officer LeAnn Jensen in the matter of **Munce's Superior Petrolum Products Inc. , Docket No. CWA-01-2010-0040**, was served on the parties as indicated.

UPS

Robert J. Keach, Esq.
Jessica A. Lewis, Esq.
Bernstein Shur Sawyer & Nelson, P.A.
100 Middle Street , P.O. Box 9729
Portland, ME 04104-5029

E-mail

Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005

UPS

Cynthia Giles
Assistant Administrator or Enforcement and Compliance Assurance
US EPA
Ariel Rios Building
1200 Pennsylvania Ave. N.W.
Mail Code 2201A room 3204
Washington, DC 20460

Hand Delivered

Tonia Bandrowicz
Enforcement Counsel
U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Dated: May 17, 2012

Wanda I. Santiago
Paralegal/Regional Hearing Clerk
U.S. EPA Region 1
5 Post Office Square, Suite 100 (ORA 18-1)
Boston, MA 02109