

COOS, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

State of New Hampshire  
Department of Environmental Services

vs.

Munce's Superior Petroleum Products, Inc.  
Harold P. Munce

No. 214-2010-EQ-121

ORDER

The State of New Hampshire Department of Environmental Services ("DES") has brought a motion for assessment of penalties against respondents Harold P. Munce and Munce's Superior Petroleum Products, Inc. ("respondents"). A hearing was held on April 10, 2012. The State appeared through counsel accompanied by representatives from the Department of Environmental Services. The defendant Munce's Superior Petroleum Products, Inc. was represented by Attorney Roy W. Tillsey, Jr. The defendant Harold P. Munce was represented by Attorney Thomas McCue. The matter proceeded by offers of proof.

This matter commenced with an action brought by DES for civil penalties and preliminary and permanent injunction relief pursuant to RSA 146-A. Following a hearing held on August 23, 2010, the parties submitted an order for preliminary injunction which was approved by the Court on August 23, 2010 (index #5).

On January 5, 2011, DES moved for an order of contempt for failure to comply with the preliminary injunction. The Court held a hearing on March 7, 2011, and issued an order on September 19, 2011, granting the State's contempt motion. In its order, the

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Court found that the respondents had failed to comply with the preliminary injunction; that the respondents were to take all of its tanks in facilities 1, 2 and 3 out of service forthwith until such time and the respondents demonstrate full compliance with the terms of the preliminary injunction. The Court ordered that the respondents shall comply within 10 days from the date of the order, failing which, a monetary fine in the amount of \$1,000.00 per day would be assessed for each day of non-compliance. The Court also awarded DES reasonable attorney's fees and costs.

DES' present motion for assessment of penalties dated February 17, 2012, alleges that there are continued violations of the Court's previous orders, and seeks an assessment of fines and penalties and costs. DES' request for imposition of penalties includes assessments for each of the three facilities involved in this litigation at the rate of \$1,000.00 per day per facility.

The respondents deny that the State is entitled to penalties, costs and fees and argue that they are in compliance with all of the prior court orders.

DES, in its memorandum of law in support of its motion for assessment of costs, details the deficiencies in connection with each of the three facilities which are the subject of this litigation (Par. 9(A) 9(B) 9(C)).

Facility 1 contains outdoor tanks for diesel, kerosene and #2 heating oil. DES' offer of proof in connection with these tanks is that they were never closed as ordered by the Court on September 19, 2011, they contain product, they were not clean, they were not capped and plugged, and that they were not registered as closed, all as required by DES regulations. In addition, the eight indoor tanks for lube oil remain out

of compliance and in service. They have not been emptied, cleaned, capped or plugged, or registered as closed. In addition, DES, through its offer of proof, indicated that an inspection done on August 3, 2011, showed significant evidence of overfilling and spills in the area of these tanks. In addition to those issues the respondents have installed new indoor tanks for lube oil. DES asserts these tanks are not in compliance; they are not registered and have no secondary containment.

In response, the respondents argue that all work required at facility 1 has been completed. The Court finds this response not credible. The evidence supports a finding that the respondents have failed to submit appropriate documentation to assure compliance. The Court finds that DES' offer of proof supports its request for an order of assessment and costs with respect to facility 1.

Facility 2 involves a 3,000 gallon tank for racing fuel. DES argues this tank remains out of compliance and in service. DES asserts that the tank has not been emptied, cleaned, capped and plugged, or registered as closed.

The respondents assert that facility 2 was never part of the preliminary injunction and therefore it is not subject to any sort of penalties or assessments. The Court finds this response consistent with the respondents overall response to DES' attempts to bring the respondents facilities into compliance. If the Court were to adopt the respondents' position with respect to facility 2 it would be required to isolate facility 2 as a standalone problem and find that DES' regulatory process somehow does not apply to facility 2. The response from the respondents in connection with this facility 2 tank is, in the Court's view, emblematic of the overall response the respondents have provided

in connection with the State's enforcement actions.

Facility 3 contains a 15,000 gallon diesel tank which was sold, according to the respondents, on February 3, 2012. DES asserts that through the period of the respondents' ownership the tank remained out of compliance and in service. It had not been emptied, cleaned, capped or plugged, or registered as closed. The respondents assert that the tank was out of service up until the point at which it was sold.

The Court finds the testimony of DES to be credible and the testimony of the respondents, through offers of proof, not credible. The Court adopts the evidence submitted by DES and finds that DES is entitled to an award of penalties, assessment and costs.

**Computation of Penalty:**

The Court, in its order of September 19, 2011, directed that the earlier orders be complied with within 10 days from the date of the Court's order, failing which the respondents shall be assessed a monetary fine in the amount of \$1,000.00 per day for each day of continued noncompliance. In addition, DES was awarded reasonable attorney's fees and costs. DES' request for monetary penalty seeks a fine of \$1,000.00 per day for each of the three facilities. DES acknowledges that under their proposed assessment of penalties facility 3 would not be subject to penalties on or after January 30, 2012.

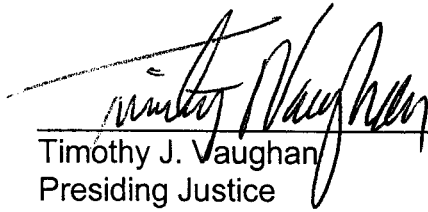
It was not the Court's intention to separately assess penalties on each of the facilities for non-compliance. The respondents' responsibility is to comply with the State regulations with respect to the operation of its business. The Court finds, after review

of the pleadings and offers of proof, that the respondents are not in compliance with the State regulations. The Court further finds that the respondents have not complied with the Court's order of September 19, 2011. Accordingly, the Court assesses monetary penalties of \$1,000 a day commencing October 4, 2011 through April 12, 2012 and continuing each day thereafter until compliance is achieved. Accordingly, the Court imposes penalties of \$192,000.00 through April 12, 2012.

In addition, the Court awards attorney's fees and costs in the amount of \$2,219.70.

SO ORDERED.

Dated: April 12, 2012



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Timothy J. Vaughan  
Presiding Justice