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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

May 17, 2001

RE: MV99002893
[REDACTED]
[REDACTED]
[REDACTED],
[REDACTED]
[REDACTED]
\$215,600.00

Dear [REDACTED]:

The Hearing Officer, Coast Guard Pacific Area, Alameda, CA, has forwarded the file in Civil Penalty Case MV99002893, which includes your appeal on behalf of the owners of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$215,600.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC § 491	Construction of a bridge over a navigable water of the United States without prior approval or deviation of previously approved plans.	\$107,800.00
33 USC § 525(b)	Failure to comply with the conditions of the permit authorizing construction of or alteration to a bridge crossing navigable waters.	\$ 107,800.00

The record shows that the violations commenced on April 1, 1999 (at a rate of \$1,100 per day, per violation), the date of the final Coast Guard deadline for the bridge owner to both bring the bridge into compliance with its permit and to submit proposals for plans to remove the bridge from the [REDACTED], near Nashville, Tennessee.

The record shows that on August 14, 1998, the "downstream protection cell for the bridge was struck by the M/V [REDACTED]." As a consequence of the allision, "portions of the cell were

. . .submerged below the water surface.” From that point forward, the bridge was deemed to be out of compliance with its permit. The bridge owners were, therefore, required to immediately repair the bridge (the downstream protection cell, in particular) and bring it back into compliance. On August 18, 1998, in an entirely separate matter, the [REDACTED] ([REDACTED]) was ordered to remove the bridge from the [REDACTED] due to “non-use as a bridge.” Thus, repairs to the bridge were required immediately to alleviate the hazard to navigation caused by the damaged protection cell that remained submerged in the water while the Coast Guard awaited receipt of specific plans to remove the bridge.

On appeal, you have contested the Hearing Officer’s finding in relation to 33 USC § 491 and seem to assert that the bridge is in the process of being rectified to comply with its permit. You have asserted that the damage caused by the M/V [REDACTED], (particularly the fallen protection cell), is not a hindrance to navigation and that it does not represent a deviation from the bridge’s plans. To that end, you have stated that “the Authority will show that the U.S. Army Corps of Engineers has, through a hydro graph sounding, determined that the debris from the down stream landing pier is either below project grade or if not, that there is sufficient water above the debris so that it is not a problem of navigation.” You have also contested the Hearing Officer’s decision regarding the removal of the bridge through the application of 33 CFR §525(b). While you have not contended that a violation of the statute did not occur, you have, nonetheless, failed to comply with the Commandant’s order to remove the bridge because you seem to believe that the bridge can, after repairs, again be used as a mechanism to cross navigable waters. You emphasized this point when you stated that the new rail operator “is in the process of making repairs to the bridge approach in preparation for restoring the use of the bridge for river crossings.” Your appeal is denied for the reasons described below.

The violation of 33 USC § 491 had its origins when, on August 14, 1998, the M/V [REDACTED] allided with the downstream protection cell of the bridge. At that time, portions of the cell were torn loose and became submerged below the water surface. In the Coast Guard’s notice to you dated August 19, 1998, you were clearly informed that the bridge was out of compliance with its permit. At that point, your responsibilities were clearly outlined. You were “required to **immediately** repair any damage from the allision to bring the bridge back into compliance with its permit and **immediately** remove the broken parts of the downstream cell from the river and notify. . .[the Coast Guard]. . . of your plans to reconstruct the cell.” Such notice was required to be received by the Coast Guard by September 1, 1998, and later extended by 10 days upon your request. On October 15, 1998, the Coast Guard informed you that the failure to remove the broken parts of the cell from the river could result in a violation of Title 33, United States Code and the assessment of a civil penalty of up to \$1,100 per day for each day the condition existed. At that point, the Coast Guard stated that “[t]his letter serves to provide you one last opportunity to effect removal of the broken parts of the cell and to provide us with your repair plan.” The record shows that you called the Coast Guard regarding that notice, at which time you indicated that the [REDACTED] had engaged an engineering firm to see about removing the debris from the river. You noted that the firm would not have their recommendations available until after the Coast Guard’s deadline had passed. The Coast Guard granted a further extension until November 6, 1998. After further correspondence, the record indicates that, on May 13, 1999, the Coast Guard informed you that all requests for time extension with respect to the action to remove and repair the cell had expired on April 1, 1999.

On July 29, 1999, the Coast Guard charged you with a violation of 33 USC § 491 and assessed a penalty for 98 days of non-compliance, at a rate of \$1,100.00 per day. On August 30, 1999, you requested a hearing regarding the assessment of the penalty. I have noticed that your request for a hearing contains an incorrect assessment of the applicable law. The record shows that you incorrectly characterized the two violations. Essentially, your response to the charge for violation of 33 USC §491 should have been your response to the charge for violation of 33 USC § 525(b), and vice versa. This mischaracterization was harmless error on your part, as your response was still interpreted correctly by the Hearing Officer. I will, however, address your contentions as if they were made correctly.

Your response to the violations appears to allege that there was not a violation of 33 USC § 491 because the debris did not actually present a hazard to navigation. You stated that “the U.S. Army Corps of Engineers has, through a hydro graph sounding, determined that the debris from the down stream landing pier is either below project grade or if not, that there is sufficient water above the debris so that it is not a problem of navigation.” 33 USC § 491 clearly states, in relevant part, that “when the plans for any bridge. . .have been approved. . .it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received. . .approval.” When the M/V [REDACTED] struck the [REDACTED] and knocked portions of the downstream protection cell into the waters surrounding the bridge, not only was a hazard to navigation created but also, the bridge lost compliance with its permit. 33 USC § 491 does not, for the purposes of enforcement, require that the lack of compliance create a hazardous condition. For a violation to occur, there need only be non-compliance with the permit. I am convinced that a violation of 33 USC § 491 occurred in this case. To that end, I am not persuaded by your claim that the U.S. Army Corps of Engineers had determined that the bridge’s situation did not create a problem to navigation. You asserted that the Corps of Engineers came to such a conclusion, but offered no proof of the same. A blind assertion of fact cannot be deemed to be conclusive when there is an absence of proof in the record. I also find that the severity of the fines imposed is likewise appropriate under the given circumstances. The Coast Guard was more than generous in their treatment of you. Requests for time extension were granted and every effort was made to afford you the most latitude in handling this situation. Although the Coast Guard was within its responsibility to require immediate action with respect to the fixing of the bridge’s cell, ample time was afforded to allow you to attempt to make plans and begin an effective action to rectify the dangerous situation. The record clearly shows that no such attempts were made. Although you continually asserted that plans would be provided as to both the fixing of the broken cell and the removal of the pieces from the river, the record shows that no such plans were ever provided. The Coast Guard was correct in finding that the damaged cell and its resultant broken pieces represented a hazard to navigation which should, with the utmost urgency, have been corrected. You have provided no evidence to show that you were not in violation of 33 USC § 491 and, therefore, the violation stands.

I will now address your contentions concerning the alleged violation of 33 USC § 525(b). The record indicates that the [REDACTED] has been in a state of chronic disrepair since before June 4, 1997. The record also shows that, as a result of the fact that “little or no freight has been transported across the bridge in several years” and the fact that the “[REDACTED] lacks the financial resources to place the railroad north of the [REDACTED] back in service,” on August

18, 1998, Vice Admiral J.C. Card ordered the [REDACTED] to “remove the [REDACTED] from the [REDACTED].” On October 22, 1998, you requested a time extension so that you could better assess the financial position of the railroad while considering various “options for the railroad.” A period of 60 had previously been allotted for the [REDACTED] to provide its plan to remove the bridge. That time period expired on October, 30, 1998. The Coast Guard’s letter dated October 26, 1998 noted that:

[they]...have provided the [REDACTED] ample opportunities to return the bridge to use as a rail crossing, but all we received were assurances of improvements that would resume rail traffic across the bridge. No permanent improvements were made, regular rail traffic did not resume, track and trestle repairs were not made and the bridge continued to be a hazard to navigation. Our responsibility is to provide for the safety of navigation; our solution is to have the structure removed to eliminate the navigational hazard.

On December 7, 1998, you requested additional time to handle the removal of the bridge. At that point, an extension through February 15, 1999 was granted. On May 13, 1999, the Coast Guard determined that no action had been taken to alleviate the violation of 33 USC § 525(b) and that civil penalties would be assessed in due course. In response to the penalties imposed, you asserted “that the rail operator, [REDACTED], is in the process of making repairs to the bridge approach in preparation for restoring the use of the bridge for river crossings.” At the hearing held on April 4, 2000, it was agreed that a detailed plan of a timeline to comply with the “Order to Remove” the bridge would be provided to the Coast Guard within 90 days of the hearing date. In your letter dated June 28, 2000, you acknowledged that the “90 day grace period” would expire on July 4, 2000. At that point, however, you advised that the [REDACTED] expected to close a new contract with a new operator on July 5, 2000 and that you would advise the Coast Guard as soon as news became available. At the same time, you enclosed a copy of the [REDACTED]’s audit report dated June 30, 1999. That report stated as follows:

Since [REDACTED] did not calculate and record amounts due to the Operator of the railroad, and since we are not able to apply alternative auditing procedures to satisfy ourselves as to the fair valuation of the amount due to the Operator, and since we were unable to obtain an attorney’s letter from the attorney for [REDACTED], the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the financial statements referred to above [those as of the year ended June 30, 1999].

I find that the report merely increased concerns about the financial stability of the railroad and was unhelpful in assessing the financial position of the [REDACTED].

On appeal, you further asserted that the “[REDACTED] does now indeed have a new operator and a positive plan for rehabilitation and renewed use of the [REDACTED] pending the probable construction of a new bridge.” This assertion is not supported by any facts in the record and cannot be accepted. Federal and state courts have repeatedly upheld the basic principle that a bridge erected under, and in accordance with a properly issued permit, can in the course of time become an unreasonable obstruction and the owner of the bridge can, therefore, be required to

alter or replace that bridge so as to remove the interference with water-bourn traffic. See, e.g. Monongahela Bridge Co. v. United States, 216 U.S. 177, 189, 193-194, 30 S.Ct. 356, 54 L.Ed. 435 (1910); Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed 523 (1907). The courts likewise note that permission to erect a bridge does not give an indefinite right to maintain it under changed conditions and that the United States may revoke the right to maintain a bridge when it becomes an unreasonable obstruction to navigation under those changed circumstances. United States v. New York Central Railroad Co., 252 F.Supp. 508 (1965). When you were found to be in violation of 33 USC § 525(b), you were charged with the duty to provide a viable plan for the removal of the bridge. The record clearly shows that you did not provide any information suggesting that you would, at any point, remove the bridge. Instead, you continued to attempt to delay the removal and appeared to be searching for a way to successfully keep the bridge intact. The Coast Guard has provided you ample time to make a showing that you were dealing with the removal of the bridge. They granted you extension after extension and repeatedly attempted to work with you in dealing with this problem. However well-intentioned your efforts may have been, you failed to show any substantive effort to rectify the problem. I see no evidence in mitigation and can only conclude that you failed to make any reasonable effort to comply with the statute. For the aforementioned reasons, your appeal of the penalty levied upon you in accordance with 33 USC § 525(b) is hereby denied.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that the [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of \$115,600.00, the maximum permitted by statute to be appropriate in light of the seriousness of the violations.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$215,600.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Should you believe that you are financially unable to pay these penalties, you may request establishment of a payment plan. Requests for relief should be directed to the Chief, Claims Branch, Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California 94501-5100.

Sincerely,

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DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center