

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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16460
February 02, 2009

[REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

RE: Case No. 2556792
[REDACTED]
[REDACTED]
\$500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2556792 which includes your appeal on behalf of [REDACTED], as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$2,000.00 penalty against [REDACTED] under the authority of the Federal Water Pollution Control Act (FWPCA), as amended by the Oil Pollution Act of 1990, 33 USC 1321(b)(6)(A). The penalty assessed was based on the Hearing Officer's finding that, in violation of 33 USC 1321(b)(3), oil, in a quantity that may be harmful, was discharged from the [REDACTED] into San Diego Harbor on December 17, 2005.

It is the mandate of Congress, as expressed through the Federal Water Pollution Control Act (FWPCA), that there shall be no discharges of oil or hazardous materials into or upon the navigable waters of the United States. The Act provides that a Class I administrative penalty of not more than \$10,000.00 may be assessed against the owner, operator, or person in charge of any vessel or facility from which oil is discharged in prohibited quantities. The penalty was increased to \$11,000.00 by the Coast Guard's Civil Money Penalties Inflation Adjustments Final Rule effective May 7, 1997. It is not necessary to find intent or negligence, as the law prohibits any discharge of oil or hazardous material that may be harmful. Under the statute, the President has the authority to determine what amount of a particular released material is hazardous.

On appeal, although you do not deny that the violation occurred, you seek mitigation of the \$2,000.00 penalty assessed by the Hearing Officer. To that end, you contend that if the assessed "penalty is in anyway [sic] related to the disagreement of the size of the hole or decision not to immediately terminate the fueling operation," mitigation of the assessed penalty is appropriate for several reasons. First, you note that the Coast Guard inspector's estimate that the amount of fuel discharged could not have been caused by a "pin hole" leak was based on a Coast Guard inspector's view looking down 15 feet into the relevant tank, whereas your assertions regarding the hole's size were derived from a diver's inspection of the barge and the barge manager's inspection "on his hands and knees inside the tank." You next contend that the Coast Guard's assertion that the fueling operation could have been terminated sooner to mitigate the amount of

fuel discharged failed to consider that if the “fueling operation [had] been terminated and any substantial time elapsed before emptying the tank, it is possible the discharge from the hole may have been greater.” Finally, you contend that a consideration of “economics” supports your assertions in favor of mitigation. In that regard, you note that although “a \$2,000 fine is not onerous and would not have a great economic impact on...[your]...company,” you believe that the assessed penalty is “unnecessary...since...[you]...have already paid out almost \$90,000 as a direct result of this unfortunate accident.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

The record shows—and you do not dispute—that on December 17, 2005, the [REDACTED] began leaking fuel during transfer operations and that, as a result, a rainbow sheen was observed to be visible in the vicinity of the vessel. The record shows that fueling operations were eventually stopped and that a boom was deployed around the [REDACTED], although evidence contained in the case file shows that the [REDACTED] transferred approximately 1100 tons of fuel to the [REDACTED] before the discharge was discovered. Although the vessel’s operators asserted that the “pinhole” leak only caused one quart of fuel to be discharged into the waters of the San Diego Bay, Coast Guard personnel present at the scene estimated that 20 to 40 gallons of fuel had been discharged during the incident.

The record shows that in his Final Letter of Decision, the Hearing Officer addressed the violation as follows:

...In this case, a visible sheen was reported as a result of the discharge. A finding of actual harm to the environment in each case is not required for purposes of the regulation and the FWPCA.

I find that the size of a discharge is often determined by nothing more than someone’s subjective estimate of the discharge but the pollution investigators are trained to make such an estimate. Whether the discharge was more than a quart as you contend or 20 to 40 gallons as the investigator contends, it was a small discharge. I am inclined to accept the investigator’s conclusion that there was a hole larger than a “pinhole” and that the fueling operation was not terminated immediately when the crew became aware of the leak.

In determining a penalty, I have considered all of the following insofar as the entire record of the case permits: 1) the seriousness of the violation; 2) the economic benefit resulting from the violation; 3) the degree of culpability; 4) any other penalty for the same incident; 5) any history of prior violations; 6) the nature, extent, and degree of success of any efforts by you to minimize or mitigate the effects of the discharge; 7) the economic impact of the penalty on you; and 8) any other matter as justice may require.

Given that there is no dispute that a discharge occurred and that the party was the source of the discharge, I find the violation proved. Having considered all of the statutorily mandated factors, I believe that a reduction in the penalty amount is in

order but I will not set it aside. I will reduce the penalty from \$5,000.00 to \$2,000.00.

Since you do not deny that the [REDACTED] spilled fuel or that [REDACTED] is the responsible party, I consider the violation proved. The only consideration remaining is whether further mitigation of the penalty is required in light of the arguments that you have raised on appeal. Your main assertion is, in effect, that the Coast Guard has over-estimated the amount of oil discharged from the [REDACTED]—by concluding that the vessel’s hull had a larger hole than you asserted. I find this argument to be without merit. 33 USC 1321(b)(3) makes clear that “[t]he discharge of oil or hazardous substances...is prohibited” if the amount discharged is “in such quantity as may be harmful.” The amount of oil discharged in the instant case clearly is of a “harmful” quantity and is, therefore, prohibited under the statute.

Upon a careful review of the record, it is clear that the precise amount of oil discharged by the [REDACTED] is not known. While the Coast Guard Marine Violation Charge Sheet indicates that 40 gallons of bulk fuel were discharged by the vessel, you contend that only one quart of oil was discharged during the incident. Irrespective of that fact, since it is the intent of the statute to prevent all discharges of oil, I do not believe that it is necessary to determine the precise amount of product spilled to prove the violation occurred. Even evidence of a sheen, alone, is sufficient to justify the imposition of a civil penalty by Coast Guard Hearing Officers. Regardless of the amount of diesel discharged, the intent of the FWPCA, as amended by the Oil Pollution Act of 1990, is to prevent *any* discharges of oil. *See Chevron, U.S.A., Inc. v. Yost*, 919 F. 2d 27 (5th Cir. 1990); *Orgulf Transport Co. v. United States*, 711 F. Supp. 344, 347 (W.D. Ky. 1989).

In accordance with the dictates of 33 USC 1321(b)(8), the seriousness of the violation (or the amount of product spilled) is, indeed, one of the factors to be considered in the assessment of civil penalties in oil pollution cases like this one. However, that factor, alone, is not decisive. All of the factors are weighed against each other, ensuring that the penalty assessed is an appropriate reflection of the totality of the circumstances surrounding the violation. After a thorough review of the record, I am certain that the Hearing Officer gave proper consideration to the criteria listed in 33 USC 1321(b)(8) prior to assessing the penalty against Jankovich. However, while I acknowledge that the Hearing Officer significantly mitigated the initially assessed penalty, given the particular circumstances of this case, including the substantial sum (\$90,000.00) that Jankovich expended in correcting the small hole that led to the violation, the lack of any record of similar violations on the part of the company, and the fact that Jankovich took immediate steps to mitigate the effects of the discharge, I believe that further mitigation of the penalty is appropriate. As a result, I will assess a penalty of \$500.00 in this case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and [REDACTED] is the responsible party. For the reasons discussed above, I find a penalty of \$500.00, rather than the \$2,000.00 penalty assessed by the Hearing Officer, or \$11,000.00 maximum permitted by statute to be appropriate under the circumstances of this case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. This decision does not address or decide any liability that [REDACTED] may have for removal costs or damages, or any other costs arising from any discharge, or substantial threat of discharge, of oil involved in this case. See generally, but not exclusively, 33 USC §§ 1321 *et seq.* and 2701 *et seq.*

Payment of **\$500.00** 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. Payment should be directed to:

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

Interest at the annual rate of 1.00% accrues from the date of this letter but will be waived if payment is received within 30 days. In accordance with 33 USC 1321(b)(6)(H), if payment is not received in 30 days, in addition to the interest, an administrative charge of \$12.00 per month for the cost of collecting the debt will be assessed. Furthermore, if the debt remains unpaid for over 3 months, and for every 3 months thereafter, an additional quarterly nonpayment penalty of 20% of the aggregate amount of the assessed penalty and all accrued quarterly nonpayment penalties will be added to the debt, and [REDACTED] will be liable for all attorney's fees incurred and all other costs of collection.

In accordance with the regulations governing civil penalty proceedings, 33 CFR § 1.07, this decision constitutes final agency action.

Sincerely,

//s//

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

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center