

U.S. Department
of Transportation

**United States
Coast Guard**



COMMANDANT
U. S. Coast Guard

2100 Second Street, SW
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-1527
FAX: (202) 267-4496

16460
January 30, 2002

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

RE: MV99002754
T/B [REDACTED]
[REDACTED]
Dismissed

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV99002754, which includes your appeal on behalf of the operator of the T/B [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a penalty of \$2000.00 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 assessment was based on the finding that, in violation of 33 USC 1321(b)(3), asphalt residues, in a quantity that may be harmful were discharged from the T/B [REDACTED] in the vicinity of the Isle of Palms Beach, Charleston, South Carolina, on or about May 13-14, 1999. The three tar balls discharged, measuring 8 to 12 inches in length and 4 to 6 inches in diameter, caused one or more of the conditions specified in 40 CFR 110.3.

On appeal, you deny the violation and assert that the "decision of the Hearing Officer finding [REDACTED] violated 33 USC 1321(b)(3) must be set aside and the civil penalty vacated because it is not supported by substantial evidence in the record as a whole." You assert that the "sole 'substantial evidence' provided to [REDACTED] and upon which the Coast Guard has relied in determining this 'match' is the conclusion of the Marine Safety Lab" and add that "[a]lthough [REDACTED], on three occasions...requested the analysis pursuant to which the alleged 'match' was made...the procedure employed and the actual underlying documents for the conclusion, the U.S. Coast Guard has refused to produce this information." You further contend that "[a]n inadvertent discharge of asphalt at sea through the [REDACTED]'s hoses is not possible because once the cargo hoses have been emptied and secured for sea they require the use of booms to lift and move them" and add that "tar balls of the dimensions that were found at the Isle of Palms could not have been formed in the cargo hoses of the [REDACTED] because an eight inch diameter hose cannot form tar balls four to six inches in diameter and tar balls are not subject to shrinkage due to weathering." You assert that the "lab results were unreliable indicators of [REDACTED]'s guilt because the lab was asked to compare the tar balls with samples taken from the Terminal's transfer manifold, not from the [REDACTED]'s hoses" and further add that "the relative age of the Terminal's samples could not be determined because of the inability of the lab to test for the effects of weathering." You conclude that the "product from which the samples were taken at the Terminal could have been delivered anytime prior to the discovery of the tar balls" and add that samples taken from "three prior shipments of asphalt

which were delivered to the Terminal by [REDACTED] from February through May 1999, would match the lab conclusions due to the fact that they were from the same refinery which had the same source of crude oil.” You further contend that the T/B [REDACTED] “departed the Terminal during ebb tide thus assuring had there been any discharge...it would have been pushed out to sea and not back to shore.” Finally, you contend that the Hearing Officer denied [REDACTED] due process when he relied on “the Coast Guard report of the May 12th shore side spill for which the terminal was fined, which is not in the record.” Your appeal is granted for the reasons described below.

First, I believe a brief recitation of the facts surrounding this incident is in order. At 0500 on May 12, 1999, the T/B [REDACTED] began transferring asphalt at the [REDACTED] in Charleston, South Carolina. The discharge was suspended from 0605 to 0800 when a relief valve at the terminal failed, resulting in a spill of asphalt from the terminal into the Cooper River. The Coast Guard was informed of the spill, for which [REDACTED] took full responsibility. Thereafter, the Coast Guard supervised clean-up of the spill and authorized the T/B [REDACTED] to resume transfer operations at 0800. The T/B [REDACTED] completed transferring its cargo of asphalt at 0445 on May 13, 1999 and departed for New York at 0820 on the same day. On May 14, three tar balls were discovered on the beach at the Isle of Palms, South Carolina. The Coast Guard cleaned up the tar balls, retained a sample, and, upon concluding that they were asphalt, secured samples from the [REDACTED]. No samples, however, were ever taken from the T/B [REDACTED]. The Coast Guard’s Marine Safety Laboratory tested the spill samples and concluded that they were from the same source of those in the terminal. Because the T/B [REDACTED] completed discharging its cargo just one day before the tar balls were found, the Coast Guard concluded that the tar balls were discharged from the T/B [REDACTED] while it was enroute to New York. Based upon this same evidence, the Coast Guard also concluded that the spill was intentional.

I will first address your contention that the Coast Guard’s case was not supported by substantial evidence in the record. I concur with your assessment. Coast Guard civil penalty procedures require that the decision of the Hearing Officer to assess a civil penalty must be based upon substantial evidence in the record establishing the violation. *See* 33 CFR 1.07-65. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence. While the Administrative Procedure Act, 5 USC 551 *et seq.*, does not specifically address the appropriate standard of proof in administrative proceedings, both case law and administrative practice clearly show that the standard of proof in such proceedings is a preponderance of the evidence standard. Under this test, Coast Guard Hearing Officers must be convinced that the weight or the majority of the evidence supports the Coast Guard’s case. *See, Steadman v. SEC*, 450 U.S. 91 (1981). Having reviewed the case file, I am not convinced the Coast Guard met this evidentiary standard.

Without question, the Coast Guard’s case against the T/B [REDACTED] is primarily based upon the “Oil Sample Analysis Report” compiled by the Coast Guard’s Marine Safety Laboratory in Groton, Ct. Using samples taken from the tar balls found at Isle of Palms Beach and asphalt taken from the [REDACTED] (as opposed to the T/B [REDACTED]), the Coast Guard used both “Gas Chromatography” and “Gas Chromatography-Mass Spectrometry” methods to determine that the two samples were “derived from a common source” and that any differences

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noted were “consistent with weathering of the spilled oil.” The Coast Guard’s method of analysis of oil is specifically designed for fingerprint analysis and has been substantiated to provide virtually identical fingerprints for samples derived from a “common source” of spilled oil after sample preparation.

The Coast Guard’s Oil Identification System (OIS) can be a powerful tool in aiding field investigators in determining the source of an oil spill. While normally compelling evidence, the evidentiary value of the “Oil Sample Analysis Report” in this case is less compelling for several reasons. First and foremost is the fact that the investigators never obtained a sample from the suspect source, the T/B [REDACTED]. Instead, the investigators took a single sample from the terminal transfer manifold at [REDACTED] on May 14, 1999, the day following the departure of the T/B [REDACTED]. As a result, the Oil Sample Analysis Report essentially documents a link between the tar balls and the [REDACTED]. While there may be circumstances when an Oil Sample Analysis Report could, by itself, rise to the level of substantial evidence, this is not such a case. Rather, additional evidence is needed to satisfy the substantial evidence requirement. Guidelines published by the Marine Safety Laboratory advise that chemical testing should normally be combined with physical and circumstantial evidence developed during the investigation. Admittedly, there is some circumstantial evidence in the case file linking the T/B [REDACTED] to the spill. There apparently was no other transfer of asphalt at [REDACTED] between the time the T/B [REDACTED] off-loaded and the time the tar balls were discovered. Thus, there is an inference that the sample obtained from the terminal manifold was residual asphalt left over from the transfer operation. Also, the tar balls were found in close proximity on the beach shortly after the T/B [REDACTED] had passed Isle of Palms on May 13, 1999 on its way to New York.

However, there are numerous weaknesses in the Coast Guard’s case as well. In addition to not taking any samples from the T/B [REDACTED], there was a known spill at the [REDACTED] on May 12, 1999 that was not attributable to [REDACTED]. In addition, it appears the Coast Guard made no effort to interview or obtain written statements from anyone associated with this incident. That includes terminal personnel as well as personnel from the tug and barge. Thus, there is no direct evidence within the file of what actually occurred on board the tug and barge following its departure from [REDACTED]. [REDACTED] countered with several allegations regarding conditions aboard the barge which it claims made it impossible for a discharge to occur. While many of these allegations are factually unsupported, the Coast Guard has the responsibility of proving the case with substantial evidence. Based on my review of the complete record, I simply am not convinced the Coast Guard has met its burden of proof.

While my findings of a failure of proof is dispositive of this case, I also want to comment on your allegation that the Hearing Officer deprived [REDACTED] of due process by relying on evidence not in the record. Specifically, you allege that the Hearing Officer had access to the Coast Guard report of its clean up of the [REDACTED] spill that occurred while the T/B [REDACTED] was off-loading. In support of this contention, you cite the Hearing Officer’s final decision dated October 5, 2000 where he stated as follows:

The report indicates that the asphalt from the May 12 spill was removed under Coast Guard supervision and that all of the spill was recovered. While it is possible that there

may have been some residual, I find it is unlikely given all the other factors that these 'tar balls' given there (sic) size and the site of their discovery were from the May 12 spill.

While not totally free of doubt, I do not believe that the Hearing Officer relied on the Coast Guard report of the May 12 clean up in reaching his conclusion. Instead, I believe the Hearing Officer's conclusion is based upon the rebuttal comments submitted by the Commanding Officer of Marine Safety Office Charleston dated December 2, 1999 and contained within the case file. The rebuttal comments read as follows:

The tar balls, more accurately described as 'tar cylinders,' did not originate from the spill at the [REDACTED] on 12 May 1999. **The asphalt involved in that spill was completely removed under the supervision of Coast Guard personnel...**

The language highlighted above clearly mirrors that contained in the Hearing Officer's decision letter. The second portion of the quotation is likely to have been the result of the Hearing Officer's reading of additional rebuttal comments submitted by Marine Safety Office Charleston in their letter dated December 13, 2000. Therein, the Commanding Officer stated as follows:

considering...the location of the tar ball discovery, the timing and route of the T/B [REDACTED]' transfer and transit, and the fact that no similar asphalt transfer took place for over a month prior to the discovery, I am confident that the T/B [REDACTED] caused this spill to occur...

I conclude, therefore, that the Hearing Officer did not rely on any evidence outside the record in concluding that [REDACTED] was responsible for the spill in issue. The conclusions of the Hearing Officer are based on information contained in the record, including the rebuttal comments submitted by Marine Safety Office Charleston. I also note that all of the rebuttal comments have been provided to [REDACTED].

While I believe that the Hearing Office obtained the information in issue from the rebuttal comments submitted by the Marine Safety Office, I must note that he had an opportunity to directly address your allegations and clarify the matter before forwarding the appeal to the Commandant. This he failed to do. Instead of acknowledging the source of his conclusion, he simply wrote "NONE" in the space allotted for his comments. While I am confident that my interpretation of the situation is correct, I nonetheless acknowledge that the Hearing Officer's failure to clarify this issue creates an element of doubt.

Finally, I will address your concerns regarding the "technical data" that you have not received. You requested full details of the Coast Guard Marine Safety Lab's testing of the samples at issue in the case. After a careful review of the Hearing Officer's hearing notes and bearing in mind that you were allowed to review those notes to ensure their accuracy, I am convinced that you did not raise that issue at the hearing. Under 33 C.F.R. 1.07-70(a), only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal. As this issue was not submitted to the Hearing Officer before the issuance of his final decision,

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your right to have it considered on appeal has been waived. Even still, I find the Hearing Officer's disposition of your FOIA requests to be disturbing.

The record indicates that you made FOIA requests in your letters dated September 10, 1999, June 28, 2000, June 30, 2000, November 13, 2000, and February 21, 2001. These requests were for general and specific information concerning "the entire Investigative Report on this alleged incident." Although the Hearing Officer informed you in an undated letter under the heading "PGN" that "you were provided a complete copy of all the information in our files," you continued to request additional information, specifically the Coast Guard's report of the May 12 spill at the [REDACTED] and the full analytical report from the Coast Guard Marine Safety Laboratory. The record clearly indicates that you were not provided this information. While I believe that you were, indeed, given the Coast Guard's full file of the case in issue, I nonetheless acknowledge that the other information requested should have been provided to you. Indeed, under the Coast Guard's interpretation of FOIA, your requests should have been acted upon. The Commandant has established that FOIA, 5 USC 552, "establishes a presumption that records in the possession of agencies and departments of the Executive Branch of the United States Government are accessible to the people" *Instruction of the Commandant No. M5260.3, p. 1-1(1996)*. Therefore, "it is the Commandant's Policy to make records maintained by the Coast Guard available to the public to the greatest extent possible in keeping with the spirit of the FOIA." *Id.* at 1-2. In the instant case, the information that you requested should have either been provided directly to you or steps should have been taken to ensure that you were aware of the procedures necessary to make a formal FOIA request. However, since I have dismissed the case, the Coast Guard's error is rendered harmless.

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

Sincerely,

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DAVID J. KANTOR

Deputy Chief

Office of Maritime and International Law

By direction of the Commandant

Copy: Commander, U.S. Coast Guard Atlantic Area
Commander, Finance Center