



16731

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

May 25, 2006

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$15,000.00

Dear Ms. McGee:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal on behalf of [REDACTED], (hereinafter "[REDACTED]") as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$15,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 31.01-1	Operation of a tank vessel without ensuring a biennial/annual inspection was conducted.	\$15,000.00

The violation occurred on March 20, 2003, when [REDACTED]'s uninspected vessel, [REDACTED], transported 348 barrels of production sludge (containing 30% oily subject) from the King's Ridge production tank facility, in Lafourche, Louisiana, to Newpark Environmental Services, in Morgan City, Louisiana.

On appeal, although you state that "[REDACTED]...does not agree with many of the factual conclusions" contained in the Hearing Officer's Final Letter of Decision, your arguments center "on the excessive amount of the fine imposed under the circumstances of this case." To that end, you contend that because [REDACTED] did not intentionally violate the regulation, does not have a history of prior Coast Guard violations, and has "expended a total of \$2,058,841 in an attempt to comply with USCG requirements," the penalty should be waived in this case. You further contend that because [REDACTED] has "finally succeeded in obtaining Certificates of Inspection for all four of its vessels," the "imposition of a penalty does not serve the goal of the civil penalty process and causes an extreme and unwarranted financial hardship." In addition, you assert that "[t]he imposition of this penalty is simply punitive and does not contribute to the Coast Guard's stated goal." Your appeal is denied for the reasons discussed below.

After a thorough review of the record, I feel it necessary to begin by addressing one key issue. Irrespective of the amount of money that [REDACTED] expended to achieve compliance with the applicable inspection regulations, the Coast Guard's determination that [REDACTED]'s vessels required inspection is not at issue in these proceedings. While [REDACTED] does not contest this fact on appeal, the record shows that the bulk of [REDACTED]'s initial correspondence with the Hearing Officer centered on [REDACTED]'s continued belief that its vessels should not be subject to Coast Guard inspection requirements. The decision on that issue was finalized on January 10, 2003, when the Commandant (Captain T.A. Cherry, by direction) denied [REDACTED]'s appeal of the OCMI's determination that [REDACTED]'s "[REDACTED] oil" barges were subject to inspection. Therefore, the only issues that I will consider on appeal are whether there is substantial evidence in the record to support the Hearing Officer's conclusion that a violation of 46 CFR 31.01-1 occurred, and, if such evidence is present, whether the penalty assessed by the Hearing Officer is appropriate under the circumstances of the case.

46 CFR 31.01-1 states, in relevant part, as follows:

Every tank vessel subject to the regulations in this subchapter shall be inspected every 5 years or more often, if necessary, by the Coast Guard to see that the hull, boilers, machinery, equipment, apparatus for storage, and appliances of the vessel comply with the regulations in this subchapter.

When a vessel successfully completes the inspection required by 46 CFR 31.01-1, it is issued a Certificate of Inspection which serves as proof of compliance with Coast Guard regulations. *See* 46 CFR 31.05-1. As I stated above, the Coast Guard's determination that [REDACTED]'s vessels were subject to inspection became final on January 10, 2003. Although the issue was resolved at that time, the record shows that "[REDACTED] oil" barges like [REDACTED]'s had not historically been subject to Coast Guard inspection requirements, the cognizant Officer in Charge, Marine Inspection, (hereinafter "OCMI") afforded [REDACTED] the opportunity to continue operating prior to inspection—while the inspection issue was under consideration by the Commandant, and, thereafter, as [REDACTED] took the additional steps necessary to achieve compliance with the applicable inspection regulations—under strict operational conditions. In his June 14, 2002, letter to [REDACTED], the OCMI identified the operational conditions as follows:

I am willing to allow your vessels to resume "[REDACTED] Oil" work, provided the following conditions are met:

1. All 19 items from the "Critical Items List" you provided...are corrected to the satisfaction of the attending inspector.
2. Each vessel is outfitted with Discharge Removal Equipment that meets the requirements...in 33 CFR 155 Subpart B.

3. Each vessel is provided with Oil Transfer Procedures in accordance with Title 33 CFR 155.720.
4. A Vessel Response Plan is developed that meets the requirements...in Title 33 CFR 155 Subpart D for the applicable Route and Service that your vessels will meet.
5. After each operation, the vessel's tanks will be cleaned to the greatest extent possible prior to the vessel getting underway.

In addition, after stating that [REDACTED]'s vessels were initially identified as Tank Vessels because they were designed to carry oil or hazardous material in bulk, the OCMI instructed [REDACTED] to look into the feasibility of certificating its vessels as something other than "Tank Vessels." Read together, the letter evidenced the Coast Guard's desire to allow [REDACTED]'s barges to resume "[REDACTED] Oil" work, but did not grant [REDACTED] the authority to transport cargo. The record shows that, thereafter, but before the vessel was issued a Certificate of Inspection (temporary or otherwise), on March 20, 2003, [REDACTED] transported 348 barrels of production tank sludge before being issued a Certificate of Inspection.

In her Final Letter of Decision, finding the violation proved, the Hearing Officer stated as follows:

Although you may have historically operated without certification in the past, guidance was provided to you by the local Coast Guard (both Houma and Morgan City), by the Eighth Coast Guard District, and by Headquarters that required your vessel specifically to come under inspection. Through a number of in-person meetings and in writing, the Coast Guard consistently advised you that you must be inspected and could not continue to carry produced water until you were inspected.

On March 20, 2003, as evidenced by a "Waste Shipping Control Ticket," [REDACTED] transported 348 barrels of production sludge containing 30% oily residue. A Temporary Certificate of Inspection was not issued to [REDACTED] until August 11, 2003. I find the charge proved.

Given the evidence contained in the case file, I do not find that the Hearing Officer erred in so concluding. Therefore, the sole issue remaining for consideration is whether the \$15,000.00 penalty assessed by the Hearing Officer is appropriate under the circumstances of the case. The record shows that in deciding to assess a penalty of \$15,000.00 in this case, the Hearing Officer stated as follows:

In determining an appropriate penalty, I considered that you are now in compliance with the inspection requirements. I also considered that you are a small business and experienced significant costs and lost cash flow to bring

vessels into compliance. However, you benefited economically by avoiding these costs for many years of operation.

* * *

I also considered that the reason the Coast Guard determined that vessels such as yours fall under the scope of 46 CFR, Subchapter D, is serious injuries and a fatality resulted on vessels in similar operation.

You are now in compliance and a primary goal of the civil penalty process is to ensure compliance with the regulations. You have no extensive history of violations. Taking everything into consideration, a final penalty of \$15,000 is assessed for this violation.

On appeal, you contend, in effect, that the Hearing Officer was arbitrary and capricious in assessing such a penalty in this case due to [REDACTED]'s lack of a violation history, the fact that [REDACTED] spend considerable sums bringing its vessels into compliance with Coast Guard regulation, because [REDACTED]'s vessels have continuously operated safely, and because the assessment of the penalty does not assist the Coast Guard in achieving its stated goal of compliance, in this case, because the vessel has been inspected since the violation occurred. I do not agree.

46 USC 3718 authorizes the Coast Guard to assess a penalty of \$25,000.00 against persons who violate the Coast Guard's Vessel Inspection regulations. The penalty was increased to \$27,500.00 by the Coast Guard's Civil Money Penalties Inflation Adjustments Final Rule effective May 7, 1997. As I have already discussed, the record contains substantial evidence to support the Hearing Officer's conclusion that the violation occurred. As a result, the Coast Guard is authorized to assess a penalty of up to \$27,500.00 for the violation. Indeed, the record shows that the Hearing Officer did so via her Preliminary Assessment Letter. The record also shows that, a result of the arguments that you raised, including [REDACTED]'s subsequent compliance and the costs associated with bringing its vessels into compliance, the Hearing Officer mitigated the initially assessed penalty by nearly 50% when she assessed a final penalty of \$15,000.00. Because the record shows that the Hearing Officer considered the issues that you present on appeal in mitigating the initially assessed penalty, I do not find your appellate arguments in mitigation persuasive.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that [REDACTED] is the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$15,000.00** 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 1.00% 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 [REDACTED] continue to believe that it is financially unable to pay the assessed penalty, it 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,

//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