

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-0941
Phone: (202) 372-3790
Fax: (202) 372-3972

16460
10 April 2008

REDACTED
REDACTED
REDACTED
REDACTED
Attn: REDACTED

RE: Case No. 2377161
REDACTED
REDACTED
\$5,000.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2377161 which includes your appeal on behalf of REDACTED (REDACTED) as owner of the REDACTED. The appeal is from the action of the Hearing Officer in assessing a penalty of \$6,500.00 against you 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 of the \$6,500.00 penalty was based on a finding that, in violation of 33 USC 1321(b)(3), oil, in a quantity that may be harmful, was discharged from the REDACTED on March 21, 2005, into the Arthur Kill waterway in Elizabeth, New Jersey. The diesel discharged caused a rainbow sheen on the waters of the Arthur Kill, a condition specified in 40 CFR 110.3.

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 oil was discharged from the REDACTED into the Arthur Kill, you assert that the penalty assessed by the Hearing Officer is "inappropriate" in light of the circumstances surrounding the violation. To that end, you begin by asserting that "[t]he facts and circumstances of the spill indicate unequivocally that the spill occurred due to inattentiveness of the PIC for the barge" who "in violation of REDACTED policies and procedures...failed to have scuppers in place at the time of the spill." In that vein, you assert that because the individual responsible for the spill "has been fined personally by the Coast Guard and has been reprimanded by REDACTED for his failure to follow REDACTED's policies and procedures...nothing further could be done in this situation so as to avoid the spill" and imply that, in light of this information, the assessment of a penalty against REDACTED is

inappropriate. Irrespective of your assertions regarding fault, however, you note that “REDACTED responded immediately to the spill, deploying personnel and a third-party clean-up contractor to the scene for an effective clean-up of all product that was spilled” and conclude that “there is no question but that REDACTED’s response [to the spill] was thorough and effective.” At the same time, you “note that there is confusion as to the amount of product that was spilled” and insist that “the Coast Guard’s high-end estimate [of the amount of fuel spilled] was grossly inaccurate.” To further support mitigation of the assessed penalty, you note—as you did with the Hearing Officer—that REDACTED has shown a “serious commitment to training and safety” by receiving ABS approval of its ISO 9000 Quality Manual and by taking the steps necessary to receive similar approval of its ISO 14001 Environment Manual. In addition to these general considerations regarding the appropriateness of the assessed penalty, you take issue with several of the Hearing Officer’s specific findings, asserting that those findings—regarding the amount of product spilled, REDACTED’s violation history, whether REDACTED properly reported the spill, REDACTED’s level of prosperity, and whether REDACTED properly accepted aid in cleaning up the spill—are “unfounded and particularly inappropriate.” Finally, you cite 33 USC 1321(b)(8)—the factors to be considered in determining the amount of a civil penalty under the FWPCA—and contend that “the fine levied in this case is inappropriate...[because]...[t]here was clearly no economic benefit to REDACTED from the violation.” In so stating, you assert that “REDACTED was required to extend significant sums of money to clean-up the spill, which resulted, exclusively, from the failure of its employee to follow well-established company procedures in contravention of his training.” In that vein, you conclude that “REDACTED submits that it has no culpability” for the spill and “did everything it could possibly do to avoid the incident.” At the same time you assert, contrary to allegations contained in the case file that “REDACTED has not had an incident involving the absence of scuppers in over ten years” and, although you acknowledge that “REDACTED has had occasional minor discharges from its barges and/or tugs, given the sheer number of vessels operated by REDACTED and the huge number of transfers in which its barges are engaged, REDACTED believes its safety record is among the best in the industry.” As a consequence, you conclude that “fines in instances such as the one presented by this case—where a discharge occurs under circumstances that simply cannot be prevented by REDACTED—is significant and a challenge to the continued viability of REDACTED” and insist that “[t]he interests of justice...are convincingly in favor of not fining REDACTED.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address your appeal arguments, I believe that it would be beneficial to address the circumstances surrounding the violation. The record shows that on March 21, 2005, Coast Guard Activities New York received a report that there was a spill of approximately 2 gallons of diesel fuel at the LORCO Federal Petroleum Facility, located on the Arthur Kill waterway in Elizabeth, New Jersey. When Coast Guard pollution investigators arrived at the spill site, they observed a response boat, boom around the vessel, diesel soaked absorbent pads in the water around the REDACTED, a vac truck in the vicinity of the spill, and recoverable product in the water covering an area of approximately 30 ft. by 35 ft. which had been boomed in. Upon viewing the scene, pollution investigators concluded that the spill was larger than the 2 gallons that had been initially reported. The REDACTED was moored port side to the transfer station at the facility. The record further indicates that pollution investigators noticed oil stains on the port stern hull of the barge below the scuppers, a fact that indicated that the scuppers were not in

place at the time of the spill. Moreover, pollution investigators observed several locations of oil staining on the starboard side of the barge's hull in the area of the scuppers and a large stain in the vicinity of the barge's #2 starboard wing tank.

The record shows that throughout the course of the investigation, the barge captain, who was serving as the REDACTED's tankerman for the relevant transfer, stated that while he was beginning to fill the #1 port wing tank, he left the valve of the #2 starboard wing tank partially open. He acknowledged that he was monitoring the #1 wing tank when he heard the splashing sound of liquid hitting the deck at the same time the overfill alarm was sounding. At that time, he noticed that the #2 starboard wing tank was overflowing out of the open hatch, onto the deck, and overboard into the Arthur Kill waterway and, as a result, radioed the facility's person in charge to secure the transfer.

The record shows that the exact amount of diesel fuel discharged into the waters of the Arthur Kill is unknown. Irrespective of that fact, Coast Guard pollution investigators surmised, based on the reported transfer rate of 3000 barrels per hour, and the fact that it took approximately 1-2 minutes to completely shut down the transfer, that approximately 2100 to 4200 gallons of diesel fuel was discharged from the REDACTED. The record further shows that the initial notification indicating that only 2 gallons of diesel oil spilled from the vessel was the result of miscommunication as information regarding the spill traveled through numerous parties. Indeed, the Coast Guard Form 2692 "Report of Accident, Injury or Death," filed by the barge's Superintendent indicated that an estimated 2000 gallons of diesel oil was spilled during the incident.

Finally, the record shows that REDACTED acknowledges that the diesel spill at issue in this case occurred as a result of errors committed by the barge's Person in Charge (PIC). Indeed, REDACTED acknowledges that the PIC errantly failed to have scuppers in place at the time of the relevant fuel transfer in violation of REDACTED's policies and procedures. The PIC was not only subjected to civil penalty action as a result of his involvement in the spill at issue here, but he was reprimanded for his failure to follow REDACTED's stated policies and procedures.

As I have already stated, although you do not deny that the REDACTED was responsible for the oil spill at issue in this proceeding, based on both your admission to that effect and the evidence contained in the record, I find that the Hearing Officer did not err in concluding that a violation occurred. I will now turn my attention to the issues that you raise on appeal, beginning with your assertion that REDACTED, due to its lack of culpability for the incident, itself, is not responsible for the violation. I do not agree.

As I have already stated, it is the mandate of Congress, as expressed through the FWPCA, that there shall be no discharges of oil or hazardous materials into or upon the navigable waters of the United States. *See* 33 USC 1321(b)(1). Moreover, the FWPCA provides, in relevant part, that "[a]ny owner, operator, or person in charge of any vessel, onshore facility, or offshore facility...from which oil or a hazardous substance is discharged...may be assessed a class I or class II civil penalty." *See* 33 USC 1321(b)(6)(A). It is not necessary to find intent or negligence, as the law prohibits any discharge of oil or hazardous material that may be harmful. On appeal, your primary assertion is that because the spill was the result of the fact that REDACTED's employee "acted contrary to REDACTED's policies, procedures and training in

allowing the over-filling to occur and by failing to employ scuppers which would have prevented product from spilling off the barge” and “nothing further could have...[been]...done in this situation so as to avoid the spill,” it was inappropriate for the Hearing Officer to assess the monetary penalty at issue in this proceeding. Your argument, to this end, fails to acknowledge the fact that the alleged culpability of others cannot be used as a defense for REDACTED to avoid its overall statutory and regulatory responsibility with respect to the pollution incident at issue in this case. *See, e.g., U.S. v. Marathon Pipe Line Co.*, 589 F. 2d 1305 (7th Cir. 1978); *U.S. v. Tex-Tow, Inc.*, 589 F. 2d 1310 (7th Cir. 1978). Accordingly, your assertions with regard to REDACTED’s culpability for the spill are not persuasive.

Next, I will address your assertions with regard to the Hearing Officer’s findings. On appeal, you contend that “[i]n reaching...[her]...conclusions the Hearing Officer cited several findings that REDACTED believes to be unfounded and particularly inappropriate.” To that end, you contend that the following factors were inappropriately “noted” by the Hearing Officer:

1. that approximately 2100 gallons of diesel fuel was discharged;
2. that REDACTED Transportation has had several incidents of similar violations for a discharge of oil involving a barge’s scuppers being left open or not mechanically installed, a common mistake with the company;
3. that the initial notification made by REDACTED was reported as a few gallons, but was obviously no less than a few hundred gallons;
4. that REDACTED is a large and prosperous company and that paying the assessed penalty would not stop any evolutions or prolong any future transgressions on the part of the company;
5. that REDACTED turned down help from the LORCO/OSRO after the spill

After a thorough review of the record, I do not find your assertions in this regard to be persuasive.

On appeal, you imply that the above-noted findings were improperly relied upon by the Hearing Officer in reaching her conclusions. However, while I note that the Coast Guard did, in fact, raise these assertions within its Enforcement Activity Summary Report, a careful review of the Hearing Officer’s Final Letter of Decision does not support a conclusion that the Hearing Officer relied on these conclusions in determining either that the violation occurred or that REDACTED was an appropriate party to be charged with the violation. Indeed, the record shows that the Hearing Officer addressed the violation as follows in her Final Letter of Decision:

It is clear from the evidence in the case file that a spill did occur, and you do not deny that it did. The spill is a violation of 33 USC 1321(b)(3), and REDACTED Transportation, as the owner of the barge and Mr. Singer’s employer, is liable for a civil penalty of up to \$11,000 for it. I do not find your argument that responsibility for the spill should end with your employee convincing just because

10 April 2008

your company is ISM, RCP, and SIRE approved. This is especially true in light of your company's recent history of violations of the same federal regulation (8 violations between 28 October 2003 and 20 March 2005). I find that the violation did occur. A civil penalty of \$6,500 is assessed.

Accordingly, while the record does show that the "factors" you cite are, indeed, noted within the Coast Guard's case file, the record does not indicate that the Hearing Officer relied on those factors in reaching her decision in this case. In Coast Guard civil penalty proceedings, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts in the evidence. That factors with which you disagree are both contained in the record and were presented to the Hearing Officer for consideration is simply not inappropriate. This is especially true when the record contains, as it does in this case, no evidence to suggest that the Hearing Officer relied on such disagreeable factors in reaching her decision. Accordingly, I find your argument with respect to the Hearing Officer's "noting" of several factors contained in the record to be wholly unpersuasive.

Since your remaining appeal arguments may best be characterized as arguments in mitigation, I will now address whether the penalty assessed by the Hearing Officer is appropriate under the circumstances of this case. As you note in your appeal, 33 USC 1321(b)(8) provides that the following factors must be considered in determining the amount of the assessed penalty: 1) the seriousness of the violation; 2) the economic benefit to the violator, if any, resulting from the violation; 4) the degree of culpability involved; 5) any other penalty for the same incident; 6) any history of prior violations; 7) the nature, extent, and degree of the success of any efforts of the violator to minimize or mitigate the effects of the discharge; 8) the economic impact of the penalty on the violator; and, 9) any other matters as justice may require. *See* 33 USC 1321(b)(8). While the Hearing Officer did not address these factors individually in determining the amount of the penalty assessed in this case, she expressly noted REDACTED's extensive violation history in assessing the \$6,500.00 penalty at issue in this proceeding. After a thorough review of the record, I do not find the penalty assessed by the Hearing Officer to be either arbitrary or capricious. Nevertheless, I am willing to further mitigate the civil penalty to \$5,000.00. I do this because it appears to me that REDACTED has taken the steps that show it to be a responsible company that is committed to achieving compliance with environmental laws and regulations.

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 decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find a penalty of \$5,000.00, rather than the \$6,500.00 penalty assessed by the Hearing Officer, or \$11,000.00 maximum permitted by statute, appropriate in light of the circumstances of the violation.

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 REDACTED may have for removal costs or damages, or any other costs arising from any discharge, or substantial threat of discharge, of the oil involved in this case. *See* generally, but not exclusively, 33 USC §§ 1321 *et seq.* and 2701 *et seq.*

Payment of **\$5,000.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Interest at the annual rate of 1% 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 you will be liable for all attorney's fees incurred and all other costs of collection.

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