



16731

March 06, 2009

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

RE: Case No. 2487215  
[REDACTED]  
[REDACTED]  
Warning

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2487215 which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$5,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 C.F.R. 104.140(c)	Failure to implement Alternate Security Program in its entirety.	\$5,000.00

The violation was first observed on August 9, 2005, while Coast Guard personnel were conducting a site visit at Starved Rock State Park. During the visit, the [REDACTED] was observed to be moored to a tree in the State Park at mile marker 229.8 of the Illinois River. The Coast Guard alleges that in embarking and disembarking passengers at this location, the [REDACTED] violated 33 CFR 104.140(c) by allowing passengers to enter/leave the vessel at a facility (the Park) without an approved security plan.

On appeal, you deny the violation and contend that the assessment of a \$5,000.00 penalty in this case is "excessive" and "not necessary to accomplish the Coast Guard's ultimate goal... [of securing]...passenger vessels on the inland rivers." To that end, you contend that because "the undeveloped river shore of Starved Rock State Park... [is not]...a marine facility under the MTSA...the SPIRIT OF PEORIA was in full compliance with the terms of the Alternate Security Plan" and a violation of the applicable regulations could not have occurred. To support your assertion in this regard, you cite the regulatory definition of the term "facility" and note that because there were "no structures, bollards, or docks on the undeveloped river shore of the Starved Rock State Park," the park "was not a MTSA 'facility' at the time" of the violation. At the same time, you note that "[t]he reasonableness of...[y]our belief that the park was not a 'facility' is further affirmed by the fact that the Coast Guard subsequently designated it as a

‘public access facility’ because of its ‘minimal infrastructure.’” You further contend, “despite the alleged violation,” that “security was never compromised” because both the vessel and the state park had “active security measures in place...and transferred passengers in accordance with those security measures.” In this regard, you contend that “[i]t is reasonable to conclude that the Coast Guard felt that...[the security measures in place at the park]...were effective” because “[i]mmediately after the Notice of Violation, the Coast Guard rapidly gave first an interim approval for continued voyages and then designated the river shore as a Public Access Area upon application by the park.” You further assert that even if the record supports a conclusion that the violation occurred, “[a] \$5,000 civil penalty is not necessary to accomplish the Coast Guard’s security goals” and add that “[e]ven if...[I]...find that the proposed violation should stand,” I should “conclude that a warning is the proper action.” To support your assertion, in this regard, you note that “[a]s a result of the...Notice of Violation, the Coast Guard, the SPIRIT OF PEORIA, and Starved Rock State Park immediately cooperated to ensure security measures that conformed to the Coast Guard’s interpretation of MTSA” were implemented. In addition, you contend that the imposition of a \$5,000.00 penalty in this case would be equivalent to you “having no income for...[your]...family for a month.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

The facts of the case are not in dispute. The record shows that on August 9, 2005, Coast Guard personnel conducting a site visit at Starved Rock State Park observed the SPIRIT OF PEORIA moored to a tree in the park. Further investigation revealed that passengers embarked and disembarked the vessel from that location and had done so for years. While the SPIRIT OF PEORIA had a Coast Guard approved Alternate Security Program in place at the time of the alleged violation, Starved Rock State Park did not have an effective Coast Guard facility security plan or waiver in place. As a result, Coast Guard personnel concluded that in embarking and disembarking passengers at the Park on what was revealed to be a regular basis, the SPIRIT OF PEORIA failed to implement its Alternative Security Program in its entirety in that it called at a facility not covered by a similar Security Plan or Alternative.

As I have already noted, the crux of your appeal centers on the Coast Guard’s determination that Starved Rock State Park is a facility subject to MTSA regulation. Under the MTSA, the term “facility” “means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States.” *See* 46 USC 70101(2). In addition, the applicable regulations make clear that such a facility must be “used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.” *See* 33 CFR 101.105. On appeal, citing this definition, you contend that because there were no “structures, bollards or docks on the undeveloped river shore of the Starved Rock State Park...the park was not a ‘facility’” for the purposes of the MTSA. After a thorough review of both the case file and the applicable law and regulation, I do not agree.

On appeal, you argue that because the “undeveloped section of river shore” that the SPIRIT OF PEORIA moored at was wholly lacking in infrastructure, a violation could not have occurred. To address the issue, a review of the history of the regulations implementing the MTSA requirements, including those addressing the meaning of the term “facility” is appropriate. In the

Final Rule implementing the regulatory requirements of the MTSA, the Coast Guard stated as follows with regard to the definition of the term “facility”:

We recognize that the definition of “facility” in § 101.105 is broad, and we purposefully used this definition to be consistent with existing U.S. statutes regarding maritime security. A facility within an area that is a marine transportation related terminal or that receives vessels over 100 gross tons on international voyages is regulated under § 105.105.

*See* Implementation of National Security Initiatives, 68 Fed. Reg. 60,448-01, 60452 (Oct. 22, 2003). At the same time, the Final Rule made clear that “[a]ll other facilities in an area not directly regulated under § 105.105, such as some adjacent facilities and utility companies” would be covered under other portions of the Coast Guard’s Maritime Security Regulations. *Id.* In addition, the Final Rule made clear that “[i]f the COTP determines that a facility with no direct water access may pose a risk to the area, the facility owner or operator may be required to implement security measures under existing COTP authority.” Taken together, these comments show that the term “facility” is intended to be viewed broadly for the purposes of the MTSA implementing regulations. Irrespective of that fact, I note that a careful review of the record shows that throughout the course of these proceedings, you have alleged that because you moored the SPIRIT OF PEORIA at “an undeveloped section of river shore,” the alleged violation could not possibly have occurred because such a location cannot be viewed as a “facility” under the applicable law and regulations. You assert that your view in this regard is “affirmed by the fact that the Coast Guard subsequently designated...[the park]...as a ‘public access facility’ [under the authority of 33 CFR Part 105] because of its ‘minimal infrastructure.’” In asserting that the location lacks any infrastructure or improvement, you focus on the specific location where the vessel docked, namely “the undeveloped river shore or Starved Rock State Park.” However, that location does not constitute the entirety of the park, which I believe should be viewed in its entirety as the “facility” at issue here. Since the record contains evidence to show that the park, itself, has cottages, lodges, offices and various other shelters and improvements, under the broad definition discussed above, Starved Rock State Park certainly meets the definition of “facility” contained within the applicable regulations. Therefore, since Starved Rock State Park did not have a facility security plan, alternative or waiver in place at the time of the alleged violation, I find that the violation occurred.

Having determined that the Hearing Officer was correct to conclude that Starved Rock State Park was a facility under the applicable regulations, I must now determine whether the imposition of a \$5,000.00 penalty is appropriate under the circumstances of this case. The record shows that neither you nor the operators of the State Park believed that it was a MTSA facility prior to the initiation of the instant case. Irrespective of that fact, however, the record shows that within less than one week of the violation’s occurrence, the Park’s operators secured its interim designation as a “Public Access Facility” thus ensuring that a violation such as that at issue here would not reoccur. Given the remedial nature of the Coast Guard’s civil penalty process and the fact that all parties involved with the instant civil penalty case acted immediately to ensure that further violations of the MTSA regulations would not occur, I do not believe that the imposition of a monetary penalty is appropriate here and I will mitigate the assessed penalty to a warning.

March 06, 2009

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and the [REDACTED] is the responsible party. For the reasons discussed above, I find a warning, rather than the \$5,000.00 penalty assessed by the Hearing Officer, or \$25,000.00 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.

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