

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

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

16460  
November 14, 2008

RE: Case No. 2347314  
[REDACTED]  
[REDACTED]  
Dismissed

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2347314 which includes your appeal on behalf of [REDACTED] (hereinafter "ATS"), as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a warning against ATS 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 warning 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] into Puget Sound on April 5, 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 acknowledge that the [REDACTED] engines "do in fact generate a visible, albeit small, silvery sheen under at-idle conditions," you assert that the warning at issue in this case must be dismissed "based on the obvious inequity of the federal government approving the design specifications, sale and utilization of marine diesel engines and, at the same time, holding that the proper operation of such engines constitutes a violation of federal law." In that vein, you note that the Hearing Officer "correctly" found that your vessel was "in technical violation of the law" but simultaneously acknowledged that under such a "literal interpretation most marine diesel engines of this design will likely produce [a] sheen under some circumstances." As such, you assert that the more logical approach, which you feel should be followed in this case, has been articulated by the Captain of the Port, Puget Sound (hereinafter "COTP") who responded to your request for clarification of the definition of "excessive oil discharge" by stating that "it is permissible while at idle at the pier to have a slight sheen...but there should be no trace of sheen while underway" and concluding that such definition would

constitute “the standard at which...[the COTP would]...determine whether or not your vessel...[was]...emitting an excessive amount of oil from the engines.” You further assert that “[u]sing the...[COTP’s]...standard, evidence in this case clearly demonstrates no violation occurred.” After a thorough review of the record, I find your assertions persuasive and will grant your appeal.

The record shows—and you do not dispute—that the [REDACTED] emitted a sheen from its engines on the day that the alleged violation occurred. Irrespective of that fact, however, the evidence contained in the record shows that it is not abnormal for diesel engines, such as those used by the [REDACTED], to emit such a sheen when they operate at idle conditions, especially in cold weather situations. More importantly, the record contains a report from the Cummings Corporation, the manufacturer of the vessel’s engines, which shows that an examination of the vessel’s engines after the incident revealed that the engines were “operating within design specifications.” In addition, correspondence in the case file shows that Coast Guard personnel confirmed that “[t]he only time we saw a sheen was when the vessel was idling at the dock or coming into the dock at slow speeds while in the harbor” and that “there was no sheen while underway at speed, only while at idle.”

In her final letter of decision, the Hearing Officer addressed the violation as follows:

According to 33 U.S.C. 1321(b), it is U.S. law that there should be no discharges of oil upon U.S. navigable waters. It is a violation of 33 U.S.C. 1321(b)(3) to discharge oil upon navigable waters in such quantities as may be harmful. 40 CFR 110.3(b) defines such quantities as may be harmful to include discharges that “Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.” If all other elements are present, any sheen is a violation—not an “excessive” sheen, but any sheen.

The Coast Guard personnel at the hearing, from Sector Seattle, agreed with the proposition that reciprocating diesel engines of the design and characteristics of this case, with wet exhaust, in some cases emit a sheen while at idle (pierside). The Puget Sound...[COTP]...letter of April 8, 2005, which you presented, states “[A]lthough it is possible while at idle at the pier to have a slight [sheen] (rainbow) with these engines, there should be no trace of diesel while underway. This will be the standard at which we will determine whether or not your vessel is emitting an excessive amount of diesel from the engines.” The Coast Guard’s last word at the hearing was that they want to be understanding of wet exhaust.

The local Coast Guard position is not in the law. I know of no legal provision that requires the Coast Guard to take this position. If there is any official Coast Guard-wide policy on the matter, I am not aware of it. In short, we are in a realm of prosecutorial discretion.

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From what I heard at the hearing, there are likely many wet-exhaust diesel-powered vessels in the U.S. that discharge a sheen at times, especially in cool climates. It is interesting that this has apparently not been addressed except in the

isolated case such as this one. It is a bit disconcerting to me, and undoubtedly to you, that as a practical matter, you face a combination of luck and subjective standard as to when enforcement action may be taken against you, as long as your vessel uses these, what I have no reason to doubt are generally well-designed and well-built, engines. For this reason, as well as your cooperation with the Coast Guard in efforts to resolve the issue after the initial report, I am assessing a warning.

While the Hearing Officer was correct to note that, under 33 USC 1321(b)(6), the discharge of oil in “harmful” quantities into or upon the navigable waters of the United States is a violation, I do not agree with the Hearing Officer that all discharges of oil which cause a sheen are, by the nature of that simple fact, “harmful” discharges necessitating the imposition of a penalty. In that regard, I note that a regulatory exemption to the general proposition that a sheen, itself, represents a harmful quantity of oil has been set forth at 40 CFR 110.5. In that vein, the regulation specifically makes clear that “[d]ischarges of oil from a properly functioning vessel engine” are “not determined” to be “harmful.” *See, e.g., U.S. v. Fredericks*, 38 F.Supp.2d 396 (D.Virgin Islands 1999). Accordingly, the Hearing Officer’s conclusion that “any sheen is a violation” is incorrect if that relevant sheen emanated from a “properly functioning” diesel engine. Since the record contains evidence to support a conclusion that the vessel’s engines were operating properly at the time of the incident—the report from Cummings NW—I find that the discharge at issue here came from a “properly functioning diesel engine.” As such, the sheen cannot be considered to be representative of a discharge of a “harmful” quantity of oil and a violation of 33 USC 1321(b)(6). Therefore, I will dismiss the warning assessed by the Hearing Officer for the violation.

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