



16731  
August 17, 2009

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

RE: Case No. 2587456  
[REDACTED]  
M/V [REDACTED]  
\$5,000.00

Dear Mr. Allen:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2587456, which includes your appeal on behalf of [REDACTED] (hereinafter "[REDACTED] Charters"), as owner of the M/V [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>
46 CFR 4.05-1	Failure to give immediate notice of a marine casualty involving the occurrence listed in 46 CFR 4.05-1.	\$10,000.00

The violation resulted from the M/V [REDACTED]'s allision with the southwest side of the [REDACTED] at 10:30 p.m. on February 11, 2006, on the Atlantic Intracoastal Waterway near Deerfield Beach, Florida. The Coast Guard contends that, in violation of 46 CFR 4.05-1,

August 17, 2009

[REDACTED] Charters failed to provide immediate notice of a reportable marine casualty, the vessel's allision with the bridge.

On appeal, you contend that the violation should "properly" be dismissed for two reasons: 1) because [REDACTED] Charters notified the Coast Guard of the "minor bridge allision" as soon as the company learned of it and, in so doing, complied with 46 CFR 4.05-1(a) and 2) that [REDACTED] Charters complied with the notice requirements of 46 CFR 4.05-10(b) by filing a written report of the marine casualty (via CG Form 2692) without delay, an action that, pursuant to 46 CFR 4.05-10(b), "expressly satisf[ies] the notice requirement of 46 CFR 4.05-1(a)." In addition, you "respectfully request...that either oral argument or a hearing be held regarding this matter. Your appeal is denied for the reasons described below.

Before I begin, I believe a brief recitation of the facts surrounding the violation is in order. The record shows—and you do not deny—that on February 11, 2006, at approximately 10:30 p.m., the M/V [REDACTED], while under the command of Coast Guard licensed Captain [REDACTED], allision with the [REDACTED]. The allision occurred while Captain [REDACTED] was attempting to dock the [REDACTED] at "Charlie's Crab Dock" in Deerfield Beach, Florida. The record shows that because the starboard engine was "shut down," Captain [REDACTED] used only the port engine to approach the dock. Unfortunately, as Captain [REDACTED] attempted to dock the vessel, the port engine throttle failed. Apparently, when Captain [REDACTED] attempted to apply reverse throttle to dock the [REDACTED], the port engine actually applied forward thrust. After Captain [REDACTED] shifted the throttle to neutral and made a second attempt to apply reverse thrust, the vessel engine again provided forward thrust. As a result, Captain [REDACTED] disengaged the port engine, an action that ultimately led the M/V [REDACTED] to drift approximately 25 feet north, at a speed between dead slow to one knot, into a vertical piling on the southwest side of the [REDACTED]. Although the record shows that the M/V [REDACTED] sustained damage on its port hull during the allision, the bridge remained unharmed.

The record shows that after the incident occurred, Captain [REDACTED] inspected the vessel to both determine the degree of any damage sustained and to address any resultant safety concerns. Immediately thereafter, in accordance with applicable company policy, Captain [REDACTED] attempted to contact [REDACTED] Charters via telephone. Due to the late hour of the allision, he was unable to reach any of the company's principals and was forced to leave a voicemail message regarding the allision with one of the company's principals. The record shows that [REDACTED] Charters learned of the incident at 9:30 a.m. the following morning, when one of the company's principals, Mr. [REDACTED], received Captain [REDACTED]'s voice mail message. Upon receipt of the message, Mr. [REDACTED] immediately contacted Captain [REDACTED] to obtain details of the incident and, shortly thereafter, met with the Captain at the dock where the vessel was located. Upon observing the vessel, Mr. [REDACTED] immediately told Captain [REDACTED] to report the allision to the Coast Guard. The record shows that Captain [REDACTED] did so by calling the local Coast Guard Sector office at

August 17, 2009

approximately 10:30 a.m., roughly 12 hours after the allision occurred. The following day, Monday February 13, 2006, Captain [REDACTED] faxed a Coast Guard Form 2692, Report of Marine Accident, Injury or Death, with the local Coast Guard office.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety, security and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal adjudicative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and upheld by the Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will begin by addressing your request for oral argument or a hearing on appeal. Your request to this end fails to acknowledge the informal nature of the Coast Guard's civil penalty process. The procedures for the assessment of Coast Guard civil penalties are contained in Part 1.07 of Title 33 of the Code of Federal Regulations (33 CFR 1.07). After a thorough review of the record, I find that prior to the assessment of the civil penalty at issue in the instant case, the Hearing Officer followed all regulatory procedures and ensured that [REDACTED] Charters was fully apprised of, and had the opportunity to exercise, its rights in this matter. The record shows that [REDACTED] Charters was given the appropriate notice of the initiation of the Coast Guard's civil penalty action, advised of its right to request a hearing, provide any written evidence and argument in lieu of a hearing, or to pay the a[REDACTED] specified in the initial notification letter as being appropriate for the relevant violation. Moreover, the record shows that rather than requesting a hearing while the case was pending before the Coast Guard Hearing Officer, you submitted written evidence on behalf of [REDACTED] Charters to address the alleged violation. The record further shows that the Hearing Officer carefully considered the issues raised within your initial written correspondence before issuing her August 3, 2008, final decision in the matter. In accordance with 33 CFR 1.07-65(b), the Hearing Officer's final decision properly informed [REDACTED] Charters of its right to appeal the Hearing Officer's decision to the Commandant, United States Coast Guard, which the record shows you have done. Under 33 CFR 1.07, there are no provisions for either a hearing or oral argument on appeal. Furthermore, since the penalty in issue is administrative in nature, and not criminal, you have no right to a formal court proceeding with respect to the violation. Accordingly, your request for oral argument or a hearing on appeal is improper at this stage of the proceedings and is, therefore, denied.

In addition, I note that throughout your appeal brief, you request not that the penalty assessed by the Hearing Officer be dismissed, but rather that the "NOV against [REDACTED] Charters...[be]...dismissed." The applicable procedural regulations make clear, in relevant part,

that “[i]f a party declines the Notice of Violation [NOV] within 45 days, the case file will be sent to the District Commander for processing under the procedures described in 33 CFR 1.07-10(b).” See 33 CFR 1.07-11(d). Under 33 CFR 1.07-10(b), if the District Commander determines, as he did in this case, that “a *prima facie* case does exist, a case file is prepared and forwarded to the Hearing Officer, with a recommended action.” When this action occurs it is no longer the NOV that is in dispute, but rather, the evidence and information that is contained in the relevant case file. Indeed, the regulations dictate that “[t]he Hearing Officer decides each case on the basis of the evidence before him.” See 33 CFR 1.07-15(b). Therefore, the relevant issue here is not whether the NOV should be dismissed but rather, whether the Hearing Officer’s decision to assess the \$5,000.00 monetary penalty at issue here was properly based on “substantial evidence in the record” and made in accordance with the applicable law and procedures. See 33 CFR 1.07-65(b).

I will now address your appeal arguments in the order in which they were raised. On appeal, you first contend that “[t]he record indicates dismissal of the NOV against [REDACTED] Charters...is proper where the owner immediately notified the Coast Guard upon learning of the allision.” To that end, you contend that “[t]he record clearly demonstrates that the vessel owner, [REDACTED] Charters...immediately upon learning of the minor bridge allision, went to inspect the vessel for damage and then immediately instructed Captain [REDACTED] to notify the Coast Guard.” You further add that because Captain [REDACTED] did so, [REDACTED] Charters “fully complied with 46 CFR 4.05-1(a).” At the same time, you assert that under 46 CFR 4.05-1, “the person in charge of a vessel...(i.e. a person with knowledge of the allision) provide notice to the Coast Guard of a reportable incident.” Citing 46 CFR 4.05-1(a), which mandates that “the owner, agent, master, operator, or person in charge” notify the Coast Guard immediately of a reportable marine casualty, including an “unintended strike of (allision with) a bridge,” you contend that “enforcement of the subject violation against the absentee owner is unfair, in this instance, because it penalizes the owner for failing to immediately report an allision that it did not know had occurred.” To that end, you note that the owners of the M/V [REDACTED] “were not onboard the vessel at the time of the allision and had no knowledge of the incident until approximately ten hours” after the allision occurred. You insist that “[s]uch a fact pattern is not unusual” because “[v]essel owners routinely employ Coast Guard Licensed masters to operate vessels in the absence of the vessel owner” and argue that “[t]he relevant portion of the Code of Federal Regulations envisions this scenario and therefore indicates that [the] ‘owner, agent, master, operator, or person in charge’ of a vessel which allides with a bridge shall notify the Coast Guard of the allision.” At the same time, you state that because the vessel owner was not aboard the vessel at the time of the allision, it “could not have immediately notified the Coast Guard of the allision because it did not have knowledge of the allision when it occurred.” As a consequence, you conclude that “[t]he only person who would have been able to provide immediate notice to the Coast Guard was Capt. [REDACTED], because he was the master, operator, or person otherwise in charge of the M/V [REDACTED] at the time of the allision, as 46 CFR 4.05-1 envisions.” Thus, you assert that “[a]ny failure to immediately notify

August 17, 2009

the Coast Guard properly rests upon Capt. [REDACTED], not [REDACTED] Charters.” After a thorough review of the record, I am not persuaded by your assertions in this regard.

As you note in your appeal brief, 46 CFR 4.05-1(a) states, in relevant part, as follows:

Immediately after the addressing of resultant safety concerns, the owner, agent master, operator, or person in charge shall notify the nearest Marine Safety Office, Marine Inspection Officer or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in...An unintended grounding, or an unintended strike of (allision with) a bridge.

Based upon the plain meaning of the regulation, it is clear that any member of the aforementioned class may be required to submit immediate notice of the marine casualty. Indeed, there is no emphasis on the “person in charge” requirement. While all of the parties listed in the regulation do not have to provide the notice, all have the responsibility to ensure that the notice is immediately provided to the Coast Guard.

The record shows that, in her final decision in the matter, the Hearing Officer addressed the issue as follows:

...46 CFR 4.05-1 requires notification of a marine casualty “[i]mmediately after the addressing of resultant safety concerns.” The evidence shows that the allision occurred on February 11, 2006 at or about 10:30 p.m. The Coast Guard was notified by telephone at or about 10:30 a.m. the next morning. ...

\* \* \*

The regulation requires truly immediate notification, allowing delay only if it is essential to avoid danger. If the written notification (submission of the CG-2692) occurred immediately after any safety concerns were addressed, it would fulfill the requirement of §4.05-1. Clearly, notification 12 or 36 hours after the incident, and almost as long after the vessel was safely moored, was not immediately after any safety concerns were addressed.

While I acknowledge that the record shows that [REDACTED] Charters did not learn of the incident until 9:30 a.m. the morning after the allision occurred, I do not find that there is substantial evidence in the record to support a conclusion that the company met the regulatory reporting requirement. While [REDACTED] Charters seeks to avoid responsibility for the violation because it did not learn of the incident until the following day, I note that the Company’s written policies seem clearly to contemplate that it will bear responsibility for reporting any incidents or accidents to the Coast Guard. Indeed, the record shows that the

August 17, 2009

“Incident & Accident Reporting” portion of the company’s written policy document states as follows:

1. The CAPTAIN and the CRUISE DIRECTOR are required to report all incidents, accidents, something unsafe or not in the best interest of the PBC team, immediately to your supervisor.
2. Upon completion of the charter, the Captain and the Cruise Director must fill out an “INCIDENT REPORT” spelling out what happened and how to prevent similar occurrence(s) in the future. Be accountable for your actions, never make excuses or blame others for something you are responsible for.

In this case, although [REDACTED] Charters correctly argues that Captain [REDACTED] should have made the immediate notification to the Coast Guard, it fails to acknowledge that, in failing to do so, Captain [REDACTED] followed company policy. The record shows that Captain [REDACTED] called principals from [REDACTED] Charters immediately after he addressed any resultant safety concerns and informed the company of the incident. While it is true that Captain [REDACTED] is responsible for making such immediate notification, as I have already mentioned, that responsibility is borne equally by [REDACTED] Charters. Moreover, even if I accepted [REDACTED] Charters arguments regarding knowledge of the marine casualty at issue here, I would nonetheless find that the company failed to provide the immediate notice required by 46 CFR 4.05-1. The affidavit of Mr. [REDACTED], a principal of [REDACTED] Charters, shows that although he learned of the [REDACTED]’s allision with the bridge at 9:30 a.m. on February 12, 2006, he ordered Captain [REDACTED] to notify the Coast Guard of the allision one hour later, after he traveled to the vessel’s mooring to discuss the matter with the captain. In so doing, Mr. [REDACTED] clearly failed to meet the immediate notification requirement of 46 CFR 4.05-1. Accordingly, I am not persuaded by your first appeal argument.

I will now address the second issue raised in your appeal brief. Citing 46 CFR 4.05-1(b), you contend that because “[REDACTED] Charters filed a written report of the allision as specified in 46 CFR 4.05-10, without delay, by the morning of Monday February 13, 2006” the company complied with the reporting requirement of 46 CFR 4.05-1(a). In that vein, you contend that the “Federal Register clearly demonstrates that the Coast Guard purposefully revised the Code of Federal Regulations to indicate that if written notice of a reportable event is filed timely, the written notice satisfies the notice mandated by 46 CFR § 4.05-1.” At the same time, you argue that “the Hearing Officer ignored the clear language of...[46 CFR 4.05-10(b)]...and the Federal Register and, instead, interpreted ‘without delay’ to be synonymous with the term ‘immediate.’” You contend that because the “Coast Guard never amended the language of 46 CFR §4.05-10(b) to state that if a party *immediately* files a report pursuant to 46 CFR §4.05-10(b), then the report shall suffice as notice mandated by 46 CFR § 4.05-1,” the assessment of a penalty is

August 17, 2009

inappropriate in this case. [emphasis in original] You further argue that the Coast Guard has “rejected suggestions to alter the phrase ‘filed without delay’ as used in 46 CFR §4.05-10(b)” and has, instead, “consistently and purposefully stated that if a written report is filed *without delay*, pursuant to 46 CFR §4.05-10(b), then the report shall suffice as notice required by 46 CFR §4.05-1(a).” [emphasis in original] You add that “[t]his distinction is important because 46 CFR §4.05-10(a) allows an owner, agent, master, or operator five days to file a written report after the occurrence of a reportable incident.”

You assert that in this case, “[REDACTED] Charters learned of a reportable incident on February 12, 2006 and by February 13, 2006 had its captain...file a Form 2692 with the Coast Guard” and conclude that “[t]his filing satisfied the reporting requirement of both 46 CFR §4.05-10 and §4.05-1.” In this vein you contend that if the Hearing Officer’s decision “is allowed to stand...[it]...imposes a new burden upon vessels owners, not onboard their vessel at the time of a reportable incident...to file a written report ‘immediately’ following a reportable incident” and insist that “[t]he Hearing Officer’s decision is unsupported by either the text of the Code of Federal Regulations or decisions of the Commandant regarding the applicable sections of the Code of Federal Regulations” and “contradicts the clear intent of the Coast Guard to ease the burden upon mariners of reporting incidents to the Coast Guard.” For the reasons discussed below, I do not find your arguments to this end persuasive.

In essence, you contend that because [REDACTED] Charters submitted Coast Guard Form 2692 to the Coast Guard within three days of the relevant incident, the company met the reporting requirements of 46 CFR 4.05-1 and 46 CFR 4.05-10. I do not agree with your interpretation of the applicable regulations.

46 CFR 4.05-10 states as follows:

(a) The owner, agent, master, operator, or person in charge shall, within five days, file a written report of any marine casualty. This written report is in addition to the immediate notice required by §4.05-1. This written report must be delivered to the Coast Guard Marine Safety Office or Marine Inspection Office. It must be provided on form CG-2692...

(b) If filed without delay after the occurrence of the marine casualty, the notice required by paragraph (a) of this section suffices as the notice required by §4.05-1(a).

[Emphasis added] As has already been discussed, you conclude that because [REDACTED] Charters filed CG Form 2692 within three days of the incident, that filing was “without delay” and that, per 46 CFR 4.05-10(b), the reporting requirement of 46 CFR 4.05-1(a) was satisfied. The record shows that while the matter was pending before the Hearing Officer, you supported

August 17, 2009

your assertion to this end by relying on the Commandant's decisions in the *Savoie* and *Hodnett* cases. Appeal Decisions 2261 (SAVOIE) and 2447 (HODNETT). I do not agree with your conclusions and find your reliance on the *Savoie* and *Hodnett* cases to be misplaced.

I initially note that the wording of 46 CFR 4.05-1 has been changed since the Commandant's decisions in the *Savoie* and *Hodnett* cases. This change was the direct result of the tragic derailment of Amtrak's Sunset Limited passenger train near Mobile, Alabama on September 22, 1993. The derailment occurred following an allision by an uninspected towing vessel with a railroad bridge that altered its alignment. The Coast Guard investigation of this incident led to a study entitled Review of Marine Safety Issues Related to Uninspected Towing Vessels. This study contained a number of recommendations to enhance maritime safety. One of the recommendations called for a regulatory project to improve procedures whereby information concerning allisions and other hazardous conditions is promptly reported. This recommendation was based on a finding that there was a substantial potential for misunderstanding the then-existing regulations as to which incidents required immediate notice, by whom, and to whom.

To clarify matters, changes were made to both 46 CFR Part 4 and 33 CFR Part 160 in separate rulemaking projects in 1994. 46 CFR 4.05-1 was changed to require that specified marine casualties be reported **immediately** after addressing resultant safety concerns. The prior iteration of 46 CFR 4.05-1 required that notice be given "as soon as possible" in specified situations. Clearly, the new wording conveys more urgency. In addition, the aforementioned study also found that the phrase "as soon as possible" allowed for considerable personal interpretation and, thus, did not effectively promote maritime safety. The use of the word "immediate" is much less prone to varying interpretation. Quite simply, the report must be provided immediately after safety concerns have been addressed. That clearly was not done in this case. Although the incident at issue occurred at approximately 10:30 p.m. on February 11, 2006, [REDACTED] Charters did not notify the Coast Guard of the incident until 10:30 a.m. on February 12, 2006, approximately 12 hours later. Moreover, the company did not file its written report of the incident with the Coast Guard until 7:30 a.m. on February 13, 2006, more than two days after the incident occurred. More importantly, the record shows that the master of the M/V [REDACTED] notified [REDACTED] Charters of the incident on the same evening that it occurred (after addressing any resultant safety concerns).

This brings us to 46 CFR 4.05-10, which requires the filing of a written report of a marine casualty within five days. The reporting requirement set forth in 46 CFR 4.05-10 is a separate and distinct requirement from the immediate notice requirement of 46 CFR 4.05-1(a). Indeed, 46 CFR 4.05-10 makes clear that "...[t]his written report is in addition to the immediate notice required by §4.05-1." In essence, two reports of the marine casualty are required: 1) an initial notification (presumably bereft of all of the information required by CG Form 2692) immediately after any safety concerns are addressed; and 2) a CG Form 2692. However, 46 CFR 4.05-10(b) provides that when the CG Form 2692 is filed "without delay," it will satisfy the initial reporting

August 17, 2009

required by 46 CFR 4.05-1. I believe that the purpose of this provision is that, when a CG Form 2692 is filed immediately after any safety concerns are addressed, that form will meet the reporting requirements of both 46 CFR 4.05-1 and 46 CFR 4.05-10. That certainly did not happen in this case. In a situation involving a hazardous condition, such as the Amtrak incident, submission of a written report that is not immediate could have catastrophic consequences. Even a one hour delay could prove to be disastrous. Thus, while the regulation does not specifically define what the phrase “without delay” means, I believe that the history of these provisions makes clear that there is little, if any, time distinction between the “immediate” notification requirement and the requirement that written notice be filed “without delay” to satisfy the immediate reporting requirement. In this case, Form 2692 would have to have been received on the same evening of the incident, after the master addressed any associated safety concerns caused by the allision, to meet the immediate reporting requirement of 46 CFR 4.05-1(a). Since the record shows that, in this case, the Coast Guard Form 2692 was not submitted until more than two days later, the notification contained therein was not “without delay” and therefore, does not satisfy the reporting requirement of 46 CFR 4.05-1(a).

As previously indicated, I find Appeal Decisions 2261 (SAVOIE) and 2447 (HODNETT) unpersuasive. As the Hearing Officer noted in her final letter of decision, those decisions were issued prior to regulatory changes initiated in response to the Amtrak incident. Whereas reports of marine casualties used to be required to be submitted “as soon as possible,” the regulatory changes made clear that such reports were required to be made “immediately” after addressing any resultant safety concerns. As such, I agree with the Hearing Officer’s conclusion that “the revision of the regulation vitiates any precedential value of both of those decisions.” Here, the evidence shows that the safety concerns were quickly addressed and the vessel was subsequently moored at the dock. A written notification that arrives more than two days later certainly does not satisfy the “without delay” requirement of 46 CFR 4.05-10(b).

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] Charters is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. I find the \$5,000.00 penalty assessed by the Hearing Officer, rather than the \$27,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

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

August 17, 2009

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

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1% 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.

Sincerely,

//s//

F. J. KENNEY  
Captain, U.S. Coast Guard  
Chief, Office of Maritime and International Law  
By direction

Copy: Commanding Officer, Coast Guard Hearing Office  
Commanding Officer, Coast Guard Finance Center