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December 31, 2009

REDACTED
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RE: Case No. 3120906
REDACTED
REDACTED
\$3,000.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 3120906, which includes your appeal on behalf of REDACTED (hereinafter REDACTED) as 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>
33 CFR 160.206	Failure to provide Notice of Arrival that contains all of the information items specified.	\$15,000.00

The violation was observed on December 3, 2007, during a joint inspection of the REDACTED conducted by personnel from the Coast Guard, the U.S. Department of Customs and Border Protection, the Coast Guard Investigative Service, the Coast Guard Field Intelligence Support Team for Jacksonville, Florida, and the Florida Department of Law Enforcement. The boarding of the REDACTED occurred while the vessel was moored at Blount Island Berth 33 on the St. John's River near Jacksonville, Florida.

On appeal, although you do not deny that the violation occurred, you seek either further mitigation of the penalty assessed by the Hearing Officer or the opportunity to participate in a "deferred installment payment plan." To that end, you contend that "[i]n these difficult and down economic times, a \$15,000.00 civil penalty would have an extremely negative impact and economic hardship on REDACTED Marine's business operation" and note that REDACTED diligently strives to maintain and improve its port and vessel operating procedures" to meet its "goal" of either "meet[ing] or exceed[ing] the regulation requirements among all governing agencies, from the United States Coast Guard to the Dept. of Homeland Security to the office of U.S. Customs and Border Protection. Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I begin by noting that the factual circumstances surrounding the alleged violation are not in dispute. The record shows—and you do not deny—that at the time of the boarding although REDACTED had provided all appropriate agencies with a Notice of Arrival (hereinafter “NOA”), the notice provided was both incorrect and incomplete. Specifically, although the NOA indicated that the vessel would arrive at Dania, Florida, with a crew of six persons (REDACTED), the crew actually contained seven persons, three of whom had not been identified on the NOA (REDACTED), while two who had been so identified were not found to be aboard the vessel (REDACTED). The case file shows that all of these individuals whether noted on the NOA or otherwise, passed all relevant background checks and were determined to pose no direct threat to the safety and security of the United States. Following the incident, the Coast Guard Captain of the Port of Jacksonville, Florida, issued an order mandating that vessel’s operators provide a Letter of Undertaking, agreeing, among other things to pay a penalty of \$32,500.00, should the violation be found proved prior to allowing the vessel to leave port. The record shows that REDACTED issued such letter on behalf of the vessel’s owners on December 3, 2007.

The record further shows that while the matter was pending before the Hearing Officer, REDACTED admitted that the violation occurred and affirmatively stated that “an administrative error” resulted in “an incorrect roster of crewmember names” being submitted to the relevant agencies prior to the arrival of the REDACTED at Jacksonville, Florida. Explaining the errors contained within the NOA, REDACTED noted as follows:

...the three crewmembers that were present on the vessel but not listed on that specific notification, are REDACTED crewmembers whose names have been correctly submitted and vetted by the U.S. Coast Guard on previous return arrivals; they are not new crewmembers. Two of these three crewmembers simply replaced the two departed crewmembers whose names were still on the arrival notice (our admitted administrative error), while the other crewmember aboard the REDACTED was under a doctor’s order, for a minor injury, and not yet fully fit for duty. We admit that all of this information should have been provided on the arrival notification.

At the same time, REDACTED informed the Hearing Officer of its commitment to “undertake additional training of administrative staff, at its own expense, to ensure that this administrative error is corrected going forward.” At the same time, in mitigation of the \$25,000.00 penalty initially assessed by the Hearing Officer, REDACTED noted that although its vessels require the filing of approximately 1000 NOAs per year, the instant civil penalty case is the first incident in which it has been found to have committed any errors of the requisite notification requirements.

I begin by noting that 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.

A careful review of the record shows that, after finding substantial evidence in the record to support a conclusion that the violation occurred, the Hearing Officer stated as follows with regard to alleged violation:

In your letter you acknowledge that there were three crewmembers present not listed in the NOA crew manifest and two crewmembers who were not present, but contained in [the] NOA. You state this was due to an administrative error on your part and the incorrect NOA was the first one submitted with errors in an estimated 4000 submissions over the previous four years.

Although your purported accuracy rate is laudable, there is no stipulation in the regulations that provides for an excusable error rate. Additionally, the vessel [']s crew list on file became incorrect when a new crewmember embarked in Ft. Lauderdale, Florida on November 15, 2007. The last change to the crew list occurred on November 22, 2007, eight days prior to the initial NOA submission for the vessel's arrival at Dania, Florida. Therefore, there were sufficient opportunities to correct the crew list prior to the submission of the initial NOA and prior to the arrival in the United States on December 3, 2007.

Taking into consideration the fact that you are providing additional training to deter these types of mistakes in the future, I am reducing the imposed penalty to \$15,000.00 which is my final determination in this matter.

While I agree with the Hearing Officer's conclusion that the violation occurred, I do believe it proper to consider REDACTED prior record for submission of NOAs as a matter in mitigation. I do not agree with the Hearing Officer's conclusion that mitigating evidence should only be considered if it is expressly allowed for in the applicable statute or regulations. In Coast Guard civil penalty cases, it is the responsibility of the Hearing Officer to determine the reliability of the evidence presented and to make any and all necessary conclusions with regard to that evidence. In this case, the Hearing Officer accepted REDACTED admission that an administrative error had occurred with regard to the arrival of the REDACTED, but refused to consider the company's track record of routinely submitting correctly completed notifications. Given the remedial nature of the Coast Guard's civil penalty process, I believe that a significant reduction of the penalty assessed by the Hearing Officer is appropriate in this case and a penalty of \$3,000.00 is hereby assessed.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and REDACTED the responsible party. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. However, I find a penalty of \$3,000.00, rather than the \$15,000.00 assessed by the Hearing Officer or \$32,500.00 maximum permitted by statute to be appropriate under the circumstances of this case.

December 31, 2009

Payment of **\$3,000.00** 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

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.0% 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