

U.S. Department
of Transportation

United States
Coast Guard



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16460

[REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

February 25, 2003

RE: MV00004254
M/V [REDACTED]
[REDACTED]
\$2,000.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00004254, which includes your appeal on behalf of the owners of the M/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a penalty of \$3,300.00 against [REDACTED], 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 was based on the finding that, in violation of 33 USC 1321(b)(3), diesel oil, in a quantity that may be harmful, was discharged from the M/V [REDACTED] into the Delaware River at Gloucester, New Jersey on November 3, 2000. The estimated 210 gallons of diesel that discharged caused one or more of the conditions specified in 40 CFR 110.3.

On appeal, you do not deny that the discharge occurred, but seek further mitigation of the penalty assessed by the Hearing Officer. You contend that the assessed penalty is "excessive based upon the gravity of the incident." To that end, you contend that the amount of diesel actually discharged into the Delaware River is significantly less than the amount estimated by the Coast Guard. You further assert that, with respect to the spill, the "crew exercised due diligence and could not have foreseen the fuel piping problem until it manifested itself" and add "all possible efforts were made to mitigate the amount and extent of the spill." Finally, you contend that the vessel's violation history, as well as the financial position of the company necessitates further mitigation of the penalty assessed. Your appeal is granted, in part, and denied, in part, for the reasons described below.

It is the mandate of Congress, as expressed through the Federal Water Pollution Control Act, that there shall be no discharges of oil or hazardous material into or upon the 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 that may be harmful. A discharge of any amount of oil that causes a film, sheen, or discoloration upon the surface of the water may be harmful and is prohibited.

I believe a brief recitation of the facts is in order. During ballasting operations on November 3, 2000, the Captain of the M/V [REDACTED] reported a spill of a mixture of diesel fuel and water at Pier 7 of the [REDACTED] in Gloucester City, New Jersey. It was later determined that the spill originated from a fuel line that ran through the #4 ballast tank. The Coast Guard issued a verbal Captain of the Port Order instructing the vessel to abandon further ballasting operations and remain in port. At that time, the Coast Guard informed the vessel's master that a cleanup contractor was required to remove the recoverable product from the water. The Coast Guard spoke with the vessel's agent who informed them that a cleanup contractor had been contacted and was on its way to assist the vessel. When the Coast Guard returned to the M/V [REDACTED], at 6:30 a.m. on November 4, 2000, no cleanup crew was present and the vessel's crew was seen scrubbing the vessel's hull and washing any remaining diesel into the Delaware River. At that time, MSO Philadelphia issued COTP Order number 111-00 requiring the vessel to hire a cleanup contractor. [REDACTED] arrived on scene at 9:00 a.m. on November 4, 2000, and completed the clean up of the spill at 3:00 p.m. that day.

Since you do not deny the violation, I consider it proved. The only consideration remaining is whether further mitigation of the penalty is required. You first contend that the Coast Guard has over-estimated the amount of diesel fuel spilled into the Delaware River. You contend that although MSO Philadelphia estimated that 100 gallons of diesel fuel spilled, "the official report indicates 'approximately 5 bbl [barrels] of diesel went over the side into the Delaware Bay.'" You further contend that [REDACTED]'s investigation of the incident, based upon the oil/water ratio "concludes that 50 gallons of product may have entered the Delaware Bay."

There is considerable confusion in the record as to the actual amount of diesel discharged by the M/V [REDACTED]. The statements of the three Coast Guard pollution investigators responsible for the investigation of the incident indicate that approximately 100 gallons diesel/water mix were spilled into the Delaware River, while the narrative portion of the Coast Guard's official report for the incident indicates that "approximately 5 bbl [barrels]" of diesel were spilled. Conversely, the "Elements of Violation" and "Evidence of Violation of Charge" portions of the Coast Guard's investigative report indicate that 210 gallons of diesel were spilled.

While I agree that the seriousness of the violation (or the amount of product spilled) is, indeed, one of the factors to be considered in the assessment of civil penalties, I note that that factor, alone, is not decisive in establishing that amount of the monetary civil penalty assessed. 33 USC 1321(b)(8) provides that the following factors must be considered in determining the amount of a civil penalty assessed as the result of a pollution incident: "the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of the success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require." All of the factors are weighed against each other, ensuring that the penalty

February 25, 2003

assessed is an appropriate reflection of the totality of the circumstances surrounding the violation.

Upon a thorough review of the record, I find that further mitigation of the penalty is appropriate. First, the record is clear that [REDACTED] took immediate steps to both notify the Coast Guard of the spill and to mitigate its harmful effects. [REDACTED] immediately notified NRC of the spill and ceased all ballasting operations while it simultaneously attempted to secure all product on the dock to prevent further spill. While the Coast Guard notes that a qualified clean-up crew did not arrive at the scene until 9:00 a.m. on the day after the incident, seemingly implying a malicious motive for the delay on [REDACTED]'s part, I am not persuaded that the record supports such a conclusion. The record clearly evidences that the spill occurred in the late evening hours of November 3, 2000, and that the Coast Guard learned of the spill as a result of [REDACTED]'s notification of NRC. Furthermore, as you pointed out in your initial letter to the Hearing Officer dated March 30, 2001, the [REDACTED] is a "freight vessel, not required to have a QI designated or on contract." You further noted that "[REDACTED], a QI service contractor, was contacted immediately after the spill by the vessel's agent; however, for some unknown reason, [it] did not respond that night with a clean-up contractor." Under these circumstances, I see no malice on [REDACTED]'s part and no indication that the company affirmatively attempted to slow clean up of the spill. In addition, although the record makes clear that the Hearing Officer considered the statements that you made with respect to culpability, there is no indication that he considered the other points that you made in mitigation, including your assertions with respect to subsequent remedial measures, the company's financial position, or the fact that the company has a clean violation history. In your letter of appeal, you noted that "this was the first such incident for the vessel" and that additional training has been implemented by [REDACTED]'s management to "avoid any such recurrence." In light of this information, I will mitigate the penalty to \$2,000.00.

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 \$2,000.00, rather than the \$3,300.00 assessed by the Hearing Officer, or \$11,000.00 maximum permitted by statute to be appropriate in light of the seriousness 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] Marine Industries, Inc. may have for removal costs or damages, or any other costs arising from any discharge, or substantial threat of discharge, of oil involved in this case. See generally, but not exclusively, 33 USC §§ 1321 *et seq* and 2701 *et seq*. Payment of **\$2,000.00** 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 100160
Atlanta, GA 30384

Subj.: MV00004254

16460

February 25, 2003

Interest at the annual rate of 4.25% 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 [REDACTED] 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