

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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16460

March 09, 2009

[REDACTED]

[REDACTED]

[REDACTED]

Attn: [REDACTED]

RE: Case No. 2530749

[REDACTED]

[REDACTED]

\$1,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2530749, which includes your appeal on behalf of [REDACTED], as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$2,000.00 penalty 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 penalty assessed was based on the Hearing Officer's finding that, in violation of 33 USC 1321(b)(3), oil, in a quantity that may be harmful, was discharged from the [REDACTED] into the Intracoastal Waterway, near Mile Marker 50, on August 10, 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 do not deny that the violation occurred, you seek mitigation of the \$2,000.00 penalty assessed by the Hearing Officer. To that end, you contend that in assessing the penalty at issue here, the Hearing Officer "has either not completely read...[your]...response or misunderstands...[your]...verbiage" when he indicated that you failed to dispute the charge that the mishap...[could]...be primarily attributed to the inexperience of the captain." To that end, you assert that the hearing officer erred in accepting the Coast Guard's assertion that [REDACTED] was at fault for the incident because it should have been aware—based on the vessel's known operational characteristics—that the vessel's operator lacked an appropriate level

of experience to safely operate the [REDACTED]. In that regard, you note, as you have throughout the course of these proceedings, both that the operator of the vessel was licensed by the Coast Guard as being fully qualified to operate vessels of the same or a similar class as that at issue here and that the operator had a “spotless” career before the incident giving rise to the instant violation case. As a result, you contend that because the Hearing Officer based his decision to assess a \$2,000.00 penalty on the “significant amount” of fuel spilled and the “inexperience” of the vessel’s operator, the penalty must be reduced upon consideration of the contradictory evidence in the record which shows that the vessel’s operator was not inexperienced in the operation of the [REDACTED] or any other vessel. At the same time, while you note that you are “at a disadvantage to argue” the hearing officer’s election to view the ‘significant amount’ of the spill as an aggravating factor, in mitigation you note that there was “no long term impact on the area, beyond the two days of clean-up.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

The record shows—and you do not dispute—that on August 10, 2005, the [REDACTED] sank, near mile marker 50, in the Intracoastal Waterway Port Allen/Morgan City Alternate Route near Addis, Louisiana. The vessel, which was being operated by Delaware Marine Operators, was loaded with 2500 gallons of diesel. It is estimated that, throughout the course of the sinking, the vessel discharged approximately 1,000 gallons of diesel into the navigable waters of the United States, which caused a visible sheen on those waters. After an investigation of the incident, Coast Guard personnel concluded that “it was clear that human error along with equipment conditions were factors that lead to the sinking.” Irrespective of that fact, however, the case file shows that [REDACTED] responded quickly and appropriately to the incident and, in so doing, mitigated any environmental and commercial damage (due to waterway closure) resulting from the spill.

The record shows that, in assessing the \$2,000.00 penalty at issue here, the Hearing Officer stated as follows:

In determining a penalty I have considered all the factors outlined in the statute that should be considered insofar as the entire record of the case permits: 1) the seriousness of the violation; 2) the economic benefit resulting from the violation; 3) the degree of culpability; 4) any other penalty for the same incident; 5) any history of prior violations; 6) the nature, extent, and degree of success of any efforts by you to minimize or mitigate the effects of the discharge; 7) the economic impact of the penalty on you; and 8) any other matter as justice may require.

The quantity of the discharge is a significant amount and you do not dispute the charge that the mishap can be primarily attributed to the inexperience of the Captain. I find the penalty of \$2,000.00 to be lenient and consistent with agency guidelines. I will not reduce the penalty.

After a thorough review of the record, while I do not believe that the Hearing Officer erred in assessing a \$2,000.00 penalty in this case, after a thorough review of the case file, I believe that

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mitigation of the initially assessed penalty is appropriate in this case. The record shows that the Hearing Officer based his decision to assess the penalty at issue here on both the size of the spill and his conclusion that a “mishap...attributed to the inexperience of the Captain” was the root cause of the incident. First, while I acknowledge that the record shows, at least to some extent, that the [REDACTED] may have had a slightly different steering mechanism than other vessels of its class, I do not concur with the Hearing Officer’s ultimate conclusion that [REDACTED] should pay a significant penalty for the Captain’s error. Indeed, contrary to the Hearing Officer’s conclusion, the record shows that [REDACTED] hired an experienced Captain who held a Coast Guard issued license authorizing him to operate certain classes of vessels, including the [REDACTED]. Moreover, the record does not contain any evidence to suggest that the company failed to inform the Captain of the vessel’s maneuvering characteristics and, instead, shows that other Captains who operated the vessel had no trouble acclimating to its maneuvering style. At the same time, I note that the Hearing Officer’s Final Letter of Decision did not acknowledge any of the mitigating evidence that [REDACTED] presented. In consideration of these factors, I will mitigate the assessed penalty to \$1,000.00.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and the [REDACTED] is the responsible party. For the reasons discussed above, I find a penalty of \$1,000.00, rather than the \$2,000.00 penalty assessed by the Hearing Officer, or \$11,000.00 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. This decision does not address or decide any liability that [REDACTED] 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 **\$1,000.00** 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

Interest at the annual rate of 1.00% 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 the Jankovich Company will be liable for all attorney’s fees incurred and all other costs of collection.

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