



16200

[Redacted]
Attn: [Redacted]
[Redacted]
[Redacted]
[Redacted]

July 20, 2011

RE: Case No. 2917150
[Redacted]
[Redacted]
\$1,000.00

Dear Mr. [Redacted]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Case No. 2917150, which includes your appeal on behalf of [Redacted] ([Redacted]) as operator of the [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>
33 CFR 105.200	Failure of facility owner or operator to ensure the facility operates in compliance with security requirements.	\$5,000.00

The violation occurred on April 15, 2007, when an unidentified man entered the facility and began to take pictures. This security breach was not reported in accordance with [Redacted]'s Facility Security Plan (FSP).

On appeal, you do not deny that the violation occurred, but you seek mitigation of the penalty assessed by the Hearing Officer. You assert that you are a small operation that employs only one full-time employee. You also assert that your FSP has been amended to make it less likely that a violation like this will occur again. Finally, you note that the original Notice of Violation proposed a penalty of \$3,000.00 for the alleged violation, which was increased by the Hearing Office. Therefore, you request that the assessed penalty either be waived or reduced.

The facts of the violation are not in dispute. On April 15, 2007, an unknown man drove onto [Redacted]'s facility and began to take pictures. Although the man left the facility when he was approached by security personnel and the Facility Security Officer (FSO) informed the local Coast Guard unit of the incident, but no one informed the NRC of the incident until two days later.

33 CFR 105.200 provides, in relevant part:

- (b) For each facility, the facility owner or operator must:

- (5) Ensure that the facility operates in compliance with the approved FSP.

Section 11.4 of [Redacted]'s Coast Guard-approved FSP identifies a list of things that must be done in the event of a security breach. At the end of that list was notification of the NRC.

The record shows that [Redacted] did, in fact, inform the NRC of the breach two days after the incident. It might be said that [Redacted] followed its FSP, notifying authorities of the breach in the order in which they were listed in the plan. However, [Redacted]'s FSP must be interpreted in light of the regulations, which require that notification to the NRC be made "without delay." 33 CFR 101.305(b). Notification two days after the event cannot be considered compliance with the FSP.

Although the record shows that a violation of 33 CFR 105.200 occurred, some factual matters in the record call for further attention. In his Final Letter of Decision, the Hearing Officer stated that [Redacted] did not inform the NRC of the incident until the Coast Guard instructed the company to do so. There is no evidence in the record to support this conclusion. Although [Redacted] waited two days to inform the NRC of the incident, nothing in the record suggests that [Redacted]'s late notification was prompted by Coast Guard directive.

In addition, there is an issue as to whether the intruder was in a restricted area. There is a statement in the initial file by a FSO to the effect that the intruder was told that he was in a restricted area. [Redacted]'s response to the Hearing Officer's initial notification letter asserts that the individual was outside of any restricted area. The term "restricted area" means "the infrastructures or locations identified in an area, vessel, or facility security assessment or by the operator that require limited access and a higher degree of security protection. The entire facility may be designated the restricted area, as long as the entire facility is provided the appropriate level of security." 33 CFR 101.105. The FSO's statement suggests that the intruder was in a restricted area, but against [Redacted]'s statement that he was not, that suggestion does not amount to substantial evidence that he was in a restricted area. The Hearing Officer did not make a finding resolving this issue, leaving the appearance that he continued to consider the breach to have occurred in a restricted area, which is not supported by the evidence.

These two factual discrepancies between what the Hearing Officer apparently believed and what the record supports call for corrective action. The less serious factual circumstances lead me to reduce the assessed penalty.

Other mitigating factors in the record are as follows. First, [Redacted] amended its FSP to avoid a recurrence of the violation. As the Hearing Officer noted, this does not necessarily require reduction of the penalty, as such corrective measures are to be expected. Second, as [Redacted] notes for the first time in its letter of appeal, the Port is relatively small in size and employs only one full time employee. On the other hand, the record also shows that [Redacted] has a history of a similar violation—a violation of 33 CFR 105.255(e) that occurred on May 19, 2005.

Considering all the circumstances, I will reduce the \$5,000.00 penalty assessed by the Hearing Officer to \$1,000.00.

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. I find a penalty of \$1,000.00 to be appropriate under the circumstances of this case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR Subpart 1.07, this decision constitutes final agency action.

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 531112
Atlanta, GA 30353-1112

Interest at the annual rate of 1% accrues from the date of this letter but will be waived if payment is 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//

L. I. McCLELLAND
Civil Penalty Appellate Authority
By direction of the Commandant

Copy: Coast Guard Hearing Office
Coast Guard Finance Center