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Coast Guard Hearing Office

*“Hearing Office is our Name,
Maritime Safety and Security is our Aim”*

Hearing Office Mission: Adjudicate civil penalty cases. The civil penalty process is remedial in nature. Its goals are to gain compliance with statutes and regulations the Coast Guard enforces and to deter future violations. A fair and informal administrative process promotes maritime safety, security and environmental protection.

GREETINGS

From Robert Bruce
Chief, Coast Guard Hearing Office



HEARING OFFICE NEWS

Happy 2013; have a safe and prosperous new year!

Our major article in this newsletter addresses cases alleging violations involving requirements for accurately maintaining oil record books. Until recently, the Hearing Office rarely, if ever, saw this type of case. Now, we seem to be getting these cases on a fairly regular basis.

As the article notes, these cases can present challenges that are absent when enforcing less complex requirements. It is especially important to note that 33 U.S.C. § 1908(b) includes two civil penalty provisions. Under one, a penalty up to \$40,000 may be assessed for violations of applicable laws and regulations, whereas a penalty of up to \$8,000 may be assessed for false, fictitious or fraudulent statements or representations related to the same laws and regulations. If a unit wants the higher maximum penalty to apply, the case file should make it clear that the unit is alleging a violation of a specifically identified law or regulation, even if there was some falsification of the oil record book. If the case file places the emphasis on the falsification of the oil record book and suggests that the violation being alleged is falsification of the oil record book, then the Hearing Officer may find that the lower maximum penalty, specifically for false statements, is applicable. I commend the article to anyone dealing with an oil record book case.

These newsletters are posted on our website www.uscg.mil/legal/cgho and on the Coast Guard's website HOMEPORT.



Section 201 of the Coast Guard and Maritime Transportation Act of 2012 amended 14 U.S.C. § 88 by adding a new subsection (e), prohibiting intentional interference with Coast Guard transmissions for maritime safety. This new law authorizes the assessment of a \$1,000 civil penalty, in addition to making such interference a class E felony.

That same Act also delayed new mandatory examination requirements for certain fishing vessels to October 15, 2015, that were originally scheduled to go into effect after October 15, 2012. For details about this change, go to <http://www.fishsafe.info>. Notwithstanding the new compliance date, the Coast Guard is recommending that fishing vessels undergo the free dockside safety examination as soon as possible.

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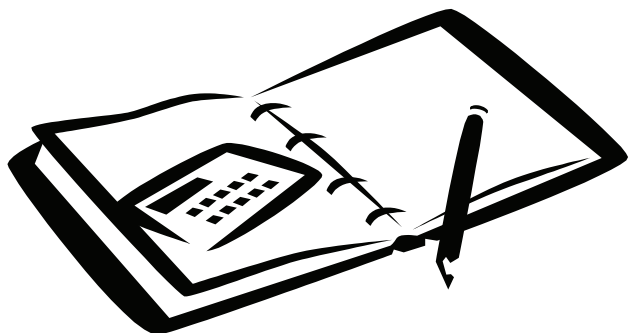
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Hearing Office is our Name, Maritime Safety and Security is our Aim



Oil Record Book Violation Cases

CDR M. Hammond

One of the of the more challenging types of civil penalty cases the Hearing Office receives are Oil Record Book violation cases. Such cases typically arise from the discovery during a Port State Control Examination of an apparent overboard discharge of oily waste through the misuse of the vessel's oily water separator, or via a bypass configuration (sometimes referred to as a "magic pipe"), and the failure to properly record such discharges in the Oil Record Book. Oil Record Book violation cases tend to be complex, very technical in nature and, depending on the circumstances of the case, may require the analysis of a significant amount of evidence. This article is intended to provide a review the legal basis for the requirements pertaining to Oil Record Books, and highlight important considerations regarding jurisdiction when foreign-flagged vessels are involved. It will also discuss the different maximum penalties applicable to violations of certain oil record book requirements as opposed to violations involving false or fraudulent statements relating to the Act to Prevent Pollution From Ships (APPS) and the International Convention for the Prevention of Pollution From Ships (MARPOL) requirements.

The Requirements

APPS both implements MARPOL and makes it unlawful to violate MARPOL. 33 U.S.C. § 1907. Oil Record Book entry and maintenance requirements can be found in regulations 17 and 36 and Appendix 3 of Annex I of MARPOL. Regulation

17 covers the requirements for machinery space operations, while Regulation 36 discusses the cargo/ballast operations. The corresponding U.S. regulations pertaining to Oil Record Books can be found at Title 33 Code of Federal Regulations (C.F.R.), Part 151. The regulations in 33 C.F.R. § 151.25, which mirror the regulations and requirements in Annex I, require that each oil tanker of 150 gross tons and above, ship of 400 gross tons and above other than an oil tanker, and manned fixed or floating drilling rig or other platform maintain an Oil Record Book for machinery space operations. Oil tankers of 150 gross tons and above, or a non oil tanker that carries 200 cubic meters or more of oil in bulk, must also maintain a separate Oil Record Book on cargo/ballast operations.

The regulations describe the specific operations, depending on vessel type, for which entries in the Oil Record Book are required. The described operations are required to be fully recorded without delay in the Oil Record Book. Each entry in the Oil Record Book must be signed by the person or persons in charge of the operations concerned and each completed page shall be signed by the master or other person having charge of the ship. Additionally, accidental or other exceptional discharges of oil or oily mixture must also be described in the Oil Record Book, including the circumstances of, and the reasons for, the discharge. The Oil Record Book must be kept in such a place as to be readily available for inspection at all reasonable times and shall be kept on board the ship and maintained by the master or other person having charge of a ship.



Jurisdiction (Foreign vessels and the date of violation)

Jurisdictional elements should be given careful attention in Oil Record Book violation cases involv-

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ing foreign-flagged vessels. It is very important to clearly lay out the evidence supporting jurisdiction and to allege a violation date that relates to acts occurring while the vessel is subject to U.S. jurisdiction.



Oil Record Book requirements may be enforced against foreign-flagged vessels only for violations that occur within the navigable waters of the United States or

at a port or terminal under the jurisdiction of the United States. 33 U.S.C. § 1902(a). See also 33 C.F.R. § 151.09. When a foreign flag vessel is involved, the jurisdictional elements should focus on the *date that the Oil Record Book was presented* to the boarding team for inspection while the vessel was at a port or terminal subject to U.S. jurisdiction. While the improper entry or failure to record a required entry in the Oil Record Book may have occurred outside U.S. waters, it is when the vessel entered U.S. waters and presented an improperly maintained Oil Record Book that matters.

This position is consistent with court decisions addressing the issue: *U.S. v. Ionia Management S.A.*, 555 F.3d 303 (2d Cir. 2009); *U.S. v. Jho*, 534 F.3d 398 (5th Cir. 2008); *U.S. v. Petraia Maritime, Ltd.*, 483 F. Supp.2d 34 (D.Me. 2007). In *U.S. v. Jho*, the court stated, at page 403: "...[W]e read the requirement that an oil record book be 'maintained' as imposing a duty upon a foreign-flagged vessel to ensure that its oil record book is accurate (or at least not knowingly inaccurate) upon entering the ports of the navigable waters of the United States . . ." [Emphasis added.] Think about this when putting together a civil penalty case involving a foreign-flagged vessel's failure to make required oil record book entries related to use of a "magic pipe," improper use of the oily water separator, or overboard discharges. While those acts may have occurred outside U.S. jurisdiction and the acts themselves may not be cognizable violations, they *may* be used

to prove the elements of an Oil Record Book violation. Nevertheless, however relevant those acts may be to the substantive Oil Record Book violations, they are not what you should be focusing on for meeting the jurisdictional elements of the Oil Record Book violations under 33 C.F.R. § 151.25. For that purpose, focus instead on presentation of the Oil Record Book after the vessel arrived in the U.S.

Failure to maintain vs. false, fictitious statements

APPS and the regulations thereunder address both the failure to maintain an oil record book and false, fictitious or fraudulent statements. Pursuant to 33 U.S.C. § 1908(b)(1), a person is liable for a civil penalty of up to \$40,000 per violation per day, including the failure to maintain an oil record book. See also 33 C.F.R. § 151.04(a). Additionally, 33 U.S.C. § 1908(b)(2) makes a person liable for making a false, fictitious or fraudulent statement in any statement or representation that is required to be made under MARPOL, APPS, or the regulations thereunder. 33 C.F.R. 151.04(b). The civil penalty for this violation can be up to \$8,000 for each statement or representation made. (See 33 C.F.R. § 27.3, Penalty Adjustment Table).

It is important to consider the nature of the violations for which civil penalties may be assessed under 33 U.S.C. § 1908(b)(1) and (2), and to decide if you want to allege a violation of the requirement to maintain the Oil Record Book, for which the maximum penalty is \$40,000, or allege a false statement type violation, for which the maximum penalty is \$8,000. Although the facts of a case may support alleging either type of violation or both, it is important to understand the different nature of the violations that come within one penalty provision or the other. First, in order for a violation of 33 C.F.R. § 151.25 to have occurred, the evidence must show that a required Oil Record Book entry was not fully recorded without delay. Second, in order to have a violation for a false, fictitious or fraudulent statement, the evidence must show that the oil record book was presented as true, even though it was

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false, fictitious or fraudulent, during the course of the investigation to inspectors or investigators as required by MARPOL or APPS.

In cases where there clearly is evidence that the chief engineer and master made false or fraudulent entries in the oil record book, for example, it may be possible to charge either a failure to maintain type violation or a false statement type violation, or both. If the party is charged pursuant to 33 USC 1908(b)(1) or 33 C.F.R. § 151.25, then the factual elements of the case file should clearly show a failure to comply with the requirement to fully record without delay certain required operations. Evidence of the Oil Record Book entry and the dates of entry are important to show that the entry was not fully recorded; meaning it was incomplete or inaccurate. If no entry was made, then the evidence must show what entry should have been made and why.

If the party is charged pursuant to 33 U.S.C. § 1908 (b)(2) or 33 C.F.R. § 151.04(b), the evidence in the case file should show the false, fictitious or fraudulent statement or representation made that was required to be made as part of the port state control examination. The dates of this incident should be



the dates of the boarding when the Oil Record Book was presented as true to inspectors or investigators (or any other statement made to inspectors/ investigators as part of the administrative inspection).

The evidence must show that the statement or representation made was one that was required to be made as part of the port state control exam. If one charged party is charged with a failure to maintain type of violation and a false statement type violation, based on the same Oil Record Book entries, the Hearing Officer may decide that it is fair to assess just one penalty for the violations arising from a single act or transaction. On the other hand, if the chief engineer or master make false state-

ments about the Oil Record Book or related operations to investigators during a Port State Control examination, in addition to presenting an inaccurate Oil Record Book, it may be appropriate to allege both of the violations. If a unit believes that the circumstances surrounding a single act or transaction warrants more than one violation and one penalty, they should contact their servicing legal office for assistance.

Supporting evidence (*more is not always better*)

Oil Record Book violation cases usually contain a significant amount of evidence. For the most part this evidence is relevant, but oftentimes units include extraneous, irrelevant information. When putting a case together, careful consideration should be given to what evidence should be included in the case file. As always, the focus should be on that evidence that clearly supports jurisdiction, the elements of the violation, and any aggravating or mitigating factors.

Including irrelevant information can be a distraction and is not helpful for the Hearing Officer in determining whether the violation as alleged did or did not occur. Also, if copies of an entire Oil Record Book, Tank Sounding Logs or other large documents are included the case file, it should be made clear which specific portion(s) of each document has/have probative value. *(For further discussion on case evidence, see Hearing Office Newsletter Vol. XII, July 2011 article "Finding the Happy Medium." You can also find useful information in the Civil Penalty Case Guide found on the Hearing Office website.)* A clear understanding of the regulation that was allegedly violated is helpful when determining the details necessary to be documented to constitute *prima facie* evidence in support of each element of the violation. This will not only aid in the Hearing Officer's decision, but will also provide the charged party with a clear understanding of the alleged violation and the basis upon which to make an informed decision when responding to the allegations.

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K.N.O.T.**(Knowledge Note or Tip)****Whom do you charge if the boat owner is on board but is not operating the boat?**

Civil penalty case processing officials take note—recently the Coast Guard Appellate Authority dismissed a Coast Guard Hearing Officer-assessed Warning against an operator in circumstances where both the operator and the vessel owner had written to the Hearing Officer, stating that: 1) the operator was only temporarily conning the vessel while the owner was showing Coast Guard Boarding Officers around the vessel; and 2) the vessel owner was assuming full responsibility for the deficiencies revealed by the boarding (Activity No. 4037521). Both owner and operator had asked the Hearing Officer to dismiss the case against the operator.

The Enforcement Summary had charged the operator, not the onboard owner. The vessel owner nevertheless supplied the Hearing Officer with proof of compliance (i.e. presented evidence of new flares, placard, registration, etc.). The Activity Summary Report (ASR) had described the vessel as a 38-foot recreational vessel with 16 people aboard. Both owner and operator were named in the report, and the words “Owner on board—not operator” appeared under “Owner Status.” The ASR made no mention of the operator “temporarily” operating the vessel while the owner escorted the Boarding Officers.

The decision to charge a particular individual is up to the charging unit, based on the available evidence and the provision of law involved. Sometimes more than one person can be charged for the same violation. If, instead of charging everyone who might be liable, only one person is going to be charged, which person should it be?

Tellingly, the Appellate Authority declined to state that it was unlawful to charge the operator, concen-

trating instead on the limited role the operator played in this case, and the owner’s stated willingness and ability, during the boarding and during the civil penalty phase, to assume all responsibility for the alleged violations and to correct the deficiencies.

Although the appeal decision in this case seems to be limited to its particular facts, it serves as a reminder that civil penalty cases are submitted to achieve compliance with the law and to deter future violations, and that the charging decision can have an impact on how effective the case will be in achieving those objectives.

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JUST FOR FUN by ADMIN

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WHAT'S IN A NUMBER?

A number is nothing in and of itself. A number is a creation used in counting and measuring. Numbers can convey "magnitude" or "degree." Numbers are relative and can be expressed as a ratio or percentage. Sometimes numbers are used simply as convenience for certain functions such as telephone numbers, lock combinations, etc. Today we hear much about business measures or business metrics. Often these "metrics" are used to measure the success or failure of a desired outcome.

Here are some Coast Guard Hearing Office metrics (as of December 31, 2012) that provide a "how goes it" glimpse into our work:

Number of case files received by the Hearing Office with violation dates in 2008: 947

Number of case files received by the Hearing Office with violation dates in 2009: 1444

Number of case files received by the Hearing Office with violation dates in 2010: 1498

Number of case files received by the Hearing Office with violation dates in 2011: 1622

Number of case files received by the Hearing Office with violation dates in 2012: 1024

Number of case files received by the Hearing Office in 2012 regardless of violation date: 1405

Number of preliminary assessments issued in 2012: 1293

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2012: 963

Number of violation case files returned to the program manager for deficiencies in 2012: 149

Number of hearings held in 2012: 11