

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

By CDR Scott Klinke

Overview

Recently, the Coast Guard has initiated some civil penalty cases that alleged that a facility was the source of a discharge of oil into a U.S. navigable waterway via a storm water system. In each case, the primary evidence consisted solely of a small sheen of oil found in the facility's storm water system which matched a sample of oil taken in a waterway. The oil in the waterway was near a sewer outfall that the facility's storm water system can discharge into. However, other facilities can also discharge into the sewer. On the surface it appears the charged facility must be the source of the oil due to the matching samples and a civil penalty is warranted, right? Not necessarily, and in these recent cases the alleged violations were eventually dismissed due to lack of evidence, especially the failure of the Coast Guard to determine a feasible source of the discharged oil.

In cases like these, it is important to remember the purpose of pollution investigations. The COTP or OCMI conducts pollution investigations to determine the cause not only of the pollution but also of the failures that led to the discharge. Pollution incident investigations should not be conducted solely to determine civil or criminal liability. (Marine Safety Manual, Volume V, Chapter 8, page B8-1)

Case Scenario

The following is a hypothetical summary of facts drawn from recent facility related oil spill cases that will be used to explain the issues that resulted in the dismissal of the alleged violations.

- There is a report of 600 gallons of oil reported in a river, and no one is assuming responsibly for the spill.
- There is no witness to the discharge identifying the path of the discharge or source of the spill.
- During the Coast Guard pollution investigation, which occurred within a day of the oil in the water being reported, the pollution investigators (PIs) observe oil concentrated around and discharging from a city owned storm water (sewer) system outfall into the river.
- Based on the facts above, the PIs feel they need not consider other possible sources, i.e. vessel's that are or were in the channel, or other outfalls that discharge into the river.

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

- The PIs find oil and a strong odor of oil at various locations in the city’s sewer upstream from the discharge and the PIs visit nearby facilities to see if they had a spill.
- The PIs discover a very small sheen of oil located in a facility’s storm water system.
- The PIs take a sample of the sheen discovered in the facility’s storm water system and a sample at the site of the spill in the river.
- The two samples are determined to be a “match” after being tested at a laboratory.
- Because the two samples are determined to be a “match,” the PIs conclude the facility must be the source of the 600 gallon spill and therefore the Responsible Party. A civil penalty case is then initiated against the facility.
- The facility’s storm water system is isolated from the city’s sewer system, and consequently the river, by either an Oil Water Separator (OWS) or some other mechanical means, i.e. an inflatable plug.
- There is no substantial evidence which proves that the OWS or inflatable plug were inoperable or intentionally bypassed, no signs of any oil staining on the walls in the facility’s storm water system from 600 gallons of oil allegedly being in the storm water system, no strong smell of oil anywhere in the facility’s storm water system or grounds, and no signs of a spill or clean up anywhere on the facility grounds.
- No oil samples are taken or tested from the oil at other facilities able to discharge into, or oil discovered at other locations in the city’s sewer system which leads to the outfall in the river.
- No samples are taken from waste oil tanks located on the alleged RP’s facility where oil in the amount of the spill is stored to determine if the type of oil contained in those tanks is even the same type of oil discovered on the water in the river.
- No evidence is provided to indicate whether or not the waste oil tanks located on the alleged RP’s facility recently or ever failed / ruptured causing a release of 600 gallons of oil.
- No evidence is provided to indicate any abnormalities in the amount of waste oil the alleged RP has stored or removed by a disposal company.

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

- PIs did not follow up or take samples when notified of known historic oil that was currently in the city's sewer system.

- Oil Sample Chain of Custody forms were not fully or correctly completed.

Evidence Needed to Pursue a Class I Civil Penalty for an Oil Spill

In order to successfully pursue a Class I civil penalty, the Coast Guard must provide sufficient evidence to prove by a preponderance of the evidence the five following elements: 1) A discharge of oil or a hazardous substance; 2) From a known source; 3) With a known Responsible Party; 4) Into or upon the navigable waters of the United States; 5) Creating a sheen, sludge, film, or emulsion or meeting the Reportable Quantity (i.e., a harmful quantity).

In cases where the discharge was not directly observed and the path of discharge must be proved by circumstantial evidence, the biggest challenge may be determining the “known or possible source,” that is, element 2 above. A “possible source” is defined as any vessel, facility, etc., carrying / storing the same type of oil as the slick, and located in such a place as to have feasibly caused the slick.

In the scenario described above, there was no Responsible Party admitting to the spill or any witness to the discharge stating the source and path of discharge. To determine a “possible source” of the spill, the PI must meet the elements of a Circumstantial Evidence Case. In order to do this, they have the burden of proving: 1) The path of the RP's source oil to the water, and 2) A conclusive match between the slick and the RP's source oil. Or, they can prove: 1) A conclusive match between the slick and the RP's source oil, and Conclusive non-matches between all other possible sources and the slick.¹ (Marine Safety Manual, Volume V, Chapter 8, page B8-7) In several of the cases the Hearing Office has received, and as described in the scenario above, the Coast Guard failed to provide sufficient evidence to prove the two elements of a Circumstantial Evidence Case in either of the ways described.

¹ In the Appeal Decision in Civil Penalty Case No. 3501203, dated January 18, 2013, the Appeal Authority discussed the evidentiary value of a Marine Safety Laboratory (“MSL”) report of a match between oil samples, saying: “Oil sample analysis is comparative analysis, and the level of certainty to be attributed to conclusions from oil sample analysis depends upon the degree to which all possible sources are represented in the analysis – despite the use of shorthand terms such as ‘conclusive match’ in MSL comparison criteria. Hence the conclusiveness of an MSL match is not absolute unless all possible sources have been sampled and analyzed. . . . The beginning of wisdom in oil sample analysis is to understand that a ‘petroleum fingerprint’ is not unique as a human fingerprint is unique. The Hearing Officer did not display this wisdom.” PIs should presume that Hearing Officers have now assimilated this wisdom. That is why, to perfect a circumstantial evidence case, it is necessary to have, in addition to a report of a match between oil samples, either a well-established path of discharge or non-matches with other potential sources of the discharge. Oil sampling and a non-match is not required if the PI can satisfactorily explain why a source of oil was not a potential source of the discharge in question.

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

The Problems with the Coast Guard Cases

In these cases, the Coast Guard claimed the path of the RPs source oil was from the facility's storm water system (i.e. the location where they found a small sheen of oil) which they claimed entered and traveled through the city's sewer system, and then out into the river. While that seems logical and plausible on the surface, the problem arises because this is simply the PI's theory, and it is not supported by evidence that oil from the alleged RP's facility actually entered the city's sewer system. Remember, the facility's storm water system was isolated from the city's system by either an OWS or inflatable plug. The PIs needed to provide evidence which proved that either the OWS or the plug was inoperable or intentionally bypassed allowing the oil to escape from the facility and then enter into the city's sewer system. Without this evidence, the Hearing Officer must conclude the OWS or plug was operational and therefore the oil could not have escaped the facility's storm water system. Remember the Coast Guard ALWAYS has the burden of proving whatever they are alleging the charged party did or did not do. This lack of evidence results in a failure to establish element one, "The path of the RP's source oil to the water." This means the possible source has not been established and it is not appropriate for the Hearing Officer to find a prima facie case as one of the elements of a Circumstantial Evidence Case has not been established.

Another problem with the evidence in these cases concerns determination of the "source oil." The evidence only indicated a small sheen in the facility's storm water system, yet there was over 600 gallons of oil recovered from the water in the channel. Stepping back and looking at the totality of the circumstances and evidence, you have to ask yourself, where could 600 gallons of oil have come from? The facility's storm water system did not somehow magically generate oil by itself; therefore, you cannot automatically assume that it is the source of the oil. Six hundred gallons of oil would have to either have been accidentally spilled somewhere on the facility grounds and entered into the storm water system, or it would have to have been intentionally dumped into the facility's storm water system, if in fact the oil came from the alleged RP's facility. This amount of oil would also likely result in some residual clinging on the walls of the storm water system, evidence of a spill cleanup, or damage to a waste oil tank, yet the Coast Guard presented no evidence of any of this in these cases.

In order to determine the source oil, the PI needs to investigate further and provide evidence of where the large amount of oil could have feasibly come from on the facility, i.e. some storage tank, a spill from a delivery tank truck, etc. Failure to complete this essential step in the investigation results in that small sheen of oil found in the facility's storm water system being simply classified as residual oil which may or may not have been in the path of some other party's source oil. Furthermore, with no logical explanation of where the oil could have come from on the alleged RP's facility, it is just as plausible and reasonable that the oil discovered in the facility's storm water system could be the result of oil entering from the city's sewer system.

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

Summary of Evidence Needed to Successfully Establish a Circumstantial Evidence Case

Considering the discussion above, you may be able to see what additional evidence is needed to prove a Circumstantial Evidence Case. To summarize, below are the key types of evidence needed to help support this kind of Circumstantial Evidence Case:

- Sample results collected at multiple points throughout the potential path of discharge.
- Sample results from tanks / locations on the suspected RP's facility where the oil could have logically come from. This will confirm if the type of oil stored on the facility is even of the same general type of oil that was discovered in the water, if not the exact oil. It will also tell you if the facility is even able to spill the amount of oil discovered in the water.
- Sample results of the slick.
- Evidence that the suspected RP's facility had any recent spills or clean up operations, and if applicable where the clean up was located in relation to the facility's storm water system inlets. The evidence would have to show that the spill location on the facility could have reasonably resulted in the oil travelling to and entering into the facility's storm water system.
- Evidence of damage to waste oil tanks / locations which could even hold the amount of oil recovered.
- Evidence that the suspected RP's facility did not dispose of their normal quantity of waste oil to an outside disposal service.
- Evidence of oil residue and / or odor in the suspected RP's facility storm water system which would support a spill in the amount of oil discharged.
- Evidence of damage or intentional bypass to any device or mechanism designed to isolate the suspected RP's facility's storm water system, such as an OWS or plug, from discharging into the city's storm water system or directly into a U.S. navigable waterway.
- Samples from all other reasonably possible sources that were subsequently determined to be non-matches.
- Properly filled out Oil Spill Sample Chain of Custody forms.

Facility Oil Spills
The Failure to Properly Establish a Circumstantial Evidence Case

Final Words

In these cases, it may be impossible to tell if the PI charged the right or the wrong facility for the spill, because they made assumptions without providing sufficient evidence to prove them. When there is no direct evidence of the path of discharge, the PI must meet the elements for a circumstantial case. Claiming that a small sheen located on a facility must be the source of oil, simply because it happens to “match” what was in the water in the river, with absolutely no evidence or even a theory of where the large amount of oil could have come from on the facility, is simply not enough to prove the charge. You must either have a “match” to a unique source of oil with a feasible path of discharge or a “match” to a source of oil and evidence ruling out other possible sources. Remember, at the beginning of this article, I reminded you that “The COTP or OCMI shall conduct pollution investigations to determine the cause not only of the pollution but also of the incident causing the pollution. Pollution incident investigations should not be conducted solely to determine civil or criminal liability.” In these cases, the cause of the spill had unfortunately NOT been determined as the investigation stopped before the root cause was determined. As a result of the failure to determine the cause of the discharge, the investigation cannot identify those measures that would prevent future occurrences, which is truly the ultimate goal of the investigation in the first place. If the cause of the spill has not been determined, then it goes to reason that more investigation may be needed before a successful civil penalty case can be initiated.