

U.S. Department of  
Homeland Security

United States  
Coast Guard



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REDACTED  
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Pittsburgh, PA 15222

16460  
07 June 2007

RE: REDACTED  
REDACTED  
REDACTED  
\$52,500.00

Dear REDACTED:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the files in Civil Penalty Cases REDACTED and REDACTED for Commandant-level review. The cases were consolidated before the Hearing Officer and will remain so consolidated on appeal. The appeal is from the action of the Hearing Officer in assessing a penalty of \$2,500.00 in case number REDACTED and a penalty of \$50,000.00 in case number 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 of the \$52,500.00 penalty was based on a finding that, in violation of 33 USC § 1321(b)(3) oil, in a quantity that may be harmful, was discharged from the REDACTED facility on November 28, 2002, and from 1-5 March, 2003, into the Detroit River. The discharge on November 28, 2002, of approximately 396 gallons of oil caused a sheen that was approximately 26,018 feet long and 1,500 feet wide, a condition specified in 40 CFR § 110.3 as did the discharges of approximately 10 gallons per day from 1-5 March, 2003.

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 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 violations occurred, you raise several arguments to support your conclusion that it is improper to assess a civil penalty against National Steel. To that end, you assert: (1) that the Coast Guard is estopped from assessing a Civil Penalty against National Steel because the company has filed for bankruptcy and is subject to a liquidation plan; (2) that the exception to the automatic stay provision in federal bankruptcy law, 11 USC 362(b)(4), which allows the government to seek to enforce its regulatory powers, is irrelevant; (3) that the Coast Guard may not seek to recover a civil penalty before National Steel is discharged from bankruptcy; and (4) that the civil penalty amount assessed by the Hearing

Officer is excessive. You conclude by noting that “the Coast Guard’s assumption that the imposition of a civil penalty will deter National Steel from committing violations in the future is misplaced given that National Steel has ceased operations and liquidated most of its assets as part of the Plan approved by the Bankruptcy Court.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the issues that you raise on appeal, I believe a brief recitation of the facts of the two cases is appropriate. On November 28, 2002, Coast Guard personnel from Marine Safety Office Detroit responded to a report of an oil discharge at REDACTED. Upon arriving at the scene, the investigators observed an oil sheen emanating from outfall #008. A Canadian Coast Guard overflight witnessed and documented the discharge and concluded, due to the dimensions of the resultant sheen (approximately 26,018 feet long by 1,500 feet wide), that approximately 396 gallons of oil had been discharged. Upon interviewing employees at the facility, the investigators learned that the source of the discharge was an overflowing sump tank. In addition, the investigators noted that a deliberate decision was made to continue pumping an oil/water mixture to this sump tank after exceeding the tank’s maximum gauging, which prevented an accurate assessment of the current volume of liquid in the tank. When the tank overflowed, the contents were discharged into the Detroit River via outfall #008.

The record shows that on March 1, 2003, an employee from REDACTED notified the National Response Center that there was a discharge from outfall #008 and attributed the problem to maintenance issues with the sump tank. The employee stated that a company had been hired to pump out the sump tank, and that sorbent booms had been deployed at the scene of the spill. When Coast Guard pollution investigators returned to the scene on March 2, 2003, they again observed an oil sheen emanating from outfall #008. After several hours of searching the plant for the source, which the investigators never identified, the sheen discontinued. Thereafter, on March 3, 2003, an employee from REDACTED reported to the investigators that there had been an intermittent sheen from outfall #008 throughout the day, and that when the sump tank pump was shut down, the oil sheening stopped. The employee claimed that booming the outfall was impossible due to ice flow in the river. On March 4, 2003, the investigator again learned from a REDACTED employee that a sheen was still emanating from outfall #008. When the investigators arrived, they observed a heavy sheen coming from the outfall and concluded that heavy ice conditions made booming the discharge impossible. Employees performed various tests and experiments in order to determine the source of the sheening and remained convinced that the problems with the sump tank and pump were the cause. On March 5, 2003, a sheen persisted from outfall #008. At that time, REDACTED hired a company to empty the sump tank and transfer the contents to temporary “frac” tanks. Once this was completed, the sheening ceased.

On April 3, 2003, Marine Safety Office Detroit sent a letter to REDACTED requesting information for a mechanical means of correcting the sump tank pump problem, an estimate of the amount of oil discharged, and a description of the treatment process for the collected oil. REDACTED did not respond to this letter, therefore no solution to the mechanical sump tank pump problem was ever communicated. Based on information from the company hired to empty the sump tank, the investigators estimate that approximately 10 gallons of oil were discharged into the Detroit River each day over the 5 day period.

I will now address the issues that you raise on appeal, beginning with your first two assertions. As is discussed above, you first contend that the Coast Guard is estopped from assessing a Civil Penalty against National Steel because the company has filed for bankruptcy and is subject to a liquidation plan. In addition, while you acknowledge that there is an exception to the automatic stay provision for a governmental entity that is taking action against the debtor for violations within the government's police or regulatory power, you claim that in the instant cases, that exception is irrelevant "given that the Coast Guard is seeking to recover a civil penalty for alleged violations post-confirmation."

As you correctly note in your appeal, when a debtor files a petition in bankruptcy, an automatic stay goes into effect, which typically prevents creditors from making further attempts, outside of the bankruptcy petition, to collect debts. As you are aware, there are exceptions to the automatic stay including the exception noted at 11 USC 362(b)(4), the so-called "police power" exception. On appeal, you contend, in effect, that the "police power" exception is inapplicable to the instant cases because "the Coast Guard is seeking to recover a civil penalty for alleged violations post-confirmation." In that vein, citing National Labor Relations Board (NLRB) v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 2002), you assert that "a government agency may not rely on the police or regulatory power exception to the automatic stay to advance an action outside of bankruptcy to collect purely monetary damages from a debtor." After a thorough review of the relevant case law, I do not find your assertions regarding the operation of the "police power" exception to be persuasive.

In Board of Governors of Federal Reserve System v. MCorp. Financial, Inc., 502 U.S. 32 (1991), the Supreme Court stated:

It is possible, of course, that the Board proceedings, like many other enforcement actions, may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate, but that *possibility* cannot be sufficient to justify the operation of the stay against an enforcement proceeding that is expressly exempted by § 362(b)(4). To adopt such a characterization of enforcement proceedings would be to render subsection (b)(4)'s exception almost meaningless. If and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 USC § 1334(b). We are not persuaded, however, that the automatic stay provisions of the Bankruptcy Code have any application to ongoing, nonfinal administrative proceedings.

*See also Penn Terra Ltd. v. Department of Environmental Resources, Com. of Pa.*, 733 F.2d 267, (C.A.Pa.,1984). As such, the Court made clear that if a governmental entity is exercising its police or regulatory power, its action in so doing will not be barred by the automatic stay provision; instead, such actions are exempted under 11 USC 362(b)(4). Moreover, the legislative history behind section 362(b)(4) clearly supports the idea that the governmental enforcement of environmental protection regulations is excepted from the automatic stay:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S.Rep. No. 989, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5837-38.

In addition, on appeal, you describe two tests that courts have created in order to determine if the action by the governmental entity is truly an exercise of its police or regulatory powers. First, you note that under the “pecuniary purpose test,” courts examine whether the governmental proceedings relate primarily to the protection of the government’s pecuniary interest or to the public welfare. You state that “if the government action related primarily to a pecuniary interest rather than to the public welfare, the action is subject to the automatic stay.” You also describe the “public policy test” wherein courts consider whether the government’s action effectuates public policy or fixed private rights. In so doing, you state that under the test, “actions which effectuate public policy are within the police or regulatory power exception to the automatic stay while actions which are intended to protect private rights are not excepted.”

In support of your contention, in this regard, you cite National Labor Relations Board (NLRB) v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 2002). In that case, the NLRB initiated an action against the debtor post-petition for allegedly violating labor laws. The NLRB issued an order requiring the debtor, among other things, to cease unfair labor practices and reimburse employees and the Union for any losses suffered. While the court describes the “pecuniary purpose” and “public policy” tests that you refer to in your appellate brief in that case, I note that when discussing the “pecuniary purpose” test, the court was much more precise than you iterated. In that regard, the court noted that “[u]nder the pecuniary purpose test, the court asks whether the governmental proceeding relates *primarily* ‘to the protection of the [government’s] pecuniary interest in the debtors’ *property* and not to matters of public safety and health.” National Labor Relations Board (NLRB) v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6<sup>th</sup> Cir. 2002)(emphasis added)(quoting In re State of Missouri, 647 F.2d 768, 776 (8th Cir.1981), *cert. denied*, 454 U.S. 1162, 102 S.Ct. 1035, 71 L.Ed.2d 318 (1982)).

In the instant cases, the Coast Guard is not seeking to secure any pecuniary interest in National Steel’s property. Rather, the Coast Guard is engaging in remedial action to encourage compliance with environmental laws and deter future infractions. In so doing, the Coast Guard is enforcing regulations that are directly related to protecting the environment and ensuring the public health and safety. Therefore, there is no bar to the Coast Guard’s initiation of civil penalty action in this case.

You further argue that “the civil penalty amount assessed by the Hearing Officer is excessive.” You note that the Coast Guard is required to consider:

the seriousness of the violation or violations, 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 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.

33 U.S.C. § 1321(b)(8). You also state “[i]n assessing National Steel a civil penalty of \$2,500 for the alleged violation on November 28, 2002 and \$50,000 for the alleged violations from March 1, 2003 through March 5, 2003, the Coast Guard has incorrectly quantified the factors above.” I note that you do not describe how the Coast Guard “incorrectly quantified the factors,” rather you simply assert that it has.

In support of the \$2,500.00 penalty for the violation on November 28, 2002, the Hearing Officer reasoned:

[t]his discharge of oil was medium along the continuum of seriousness in terms of the amount of oil discharged and harm to the environment. You were culpable in that the discharge occurred as a result of overfilling a sump tank. Your response effort consisted of placing containment and sorbent material around the outfall, but the majority of the slick down river was not recoverable. The case file shows no history of prior pollution incidents. You did not address whether you have taken any corrective action to prevent another discharge. You state you “currently have no assets and will not be emerging from bankruptcy.” Taking everything into consideration, a final penalty of \$2,500.00 is assessed for this violation.

The Hearing Officer clearly took into account the factors of 33 U.S.C. 1321(b)(8) and assessed a penalty that was \$8,500.00 less than the authorized maximum. *See* 33 CFR Part 27. The Hearing Officer’s determination of the penalty in this case was clearly commensurate with the seriousness of the discharge, prior offenses, and efforts taken to mitigate future discharges.

In support of the \$50,000.00 penalty for the violations from March 1-5, 2003, the Hearing Officer reasoned:

[t]his discharge of oil was small along the continuum of seriousness in terms of the amount of oil discharged and harm to the environment. Your response effort consisted of placing containment and sorbent material around the outfall, but it was five days before you actually secured the discharge. The case file shows a history of prior pollution incidents. You did not address whether you have taken any corrective action to prevent another discharge. You state you “currently have no assets and will not be emerging from bankruptcy.” Taking everything into consideration, a final penalty of \$10,000.00 is assessed for each violation.

Once again, the Hearing Officer took into account the factors pertinent to determining a penalty, and assessed a penalty less than the maximum permitted by statute. The Hearing Officer was

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persuaded by, which a review of the case file demonstrates, the evidence that the response effort to secure the discharge was substandard, and that there has been no showing of an effort to prevent future discharges. This demonstrates a serious degree of culpability on the part of National Steel Inc. considering the discharges were directed into the Detroit River from which recovery of the spilled oil was not possible. The Hearing Officer's assessment of a \$50,000.00 penalty for this 5 day period of offenses is commensurate with the seriousness, history, culpability and mitigation efforts related to this offense.

Finally, you correctly noted that "the Coast Guard may not seek to recover a civil penalty before REDACTED is discharged from bankruptcy." While your statement, in that regard, is correct, the present administrative proceedings are directed at determining whether there were violations of 33 USC 1321(b)(3) in November 2002 and March 2003, not at collecting or enforcing any penalty assessed. Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that National Steel is the responsible party. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Because the record is silent as to whether National Steel's Bankruptcy claim has been discharged, this decision does not constitute an attempt to collect the penalty. The case file is being forwarded to the Coast Guard Claims and Litigation Branch, Maintenance and Logistics Command Pacific, the office responsible for civil penalty collections, for further action when such action is appropriate.

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 National Steel may have for removal costs or damages, or any other costs arising from any discharge, or substantial threat of discharge, of the oil or hazardous chemical involved in this case. *See generally*, but not exclusively, 33 USC §§ 1321 *et seq.* and 2701 *et seq.*

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