

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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[REDACTED]
[REDACTED]
[REDACTED]

16460
07 July 2008

RE: Case No. 2257068
[REDACTED]
[REDACTED]
\$500.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2257068 which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a penalty of \$4,000.00 against you 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 \$4,000.00 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] on November 14, 2004, into Honolulu Harbor in Honolulu, Hawaii. The fuel oil that discharged caused a rainbow sheen on the waters of Honolulu Harbor, a condition specified in 40 CFR 110.3.

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 oil was discharged from the [REDACTED], you assert that you signed the Notice of Assumption issued to you after your vessel sank under duress and note that you were never provided with copies of Coast Guard logs that purportedly show that you called the Coast Guard "early" on the day that your vessel was sinking and were not provided adequate assistance to save your vessel. In addition, you also "dispute" the Coast Guard's assertion that you "did nothing to assist in the clean up" and add that you "paid for and put a diaper around the boat." Finally, you note that you are 71 years old and have a limited income because you are on Social Security and only "get \$586.00 a month" and further add that, prior to the relevant incident, you were living aboard your vessel and now that it is "gone," you have to "share living arrangements...in Hawaii." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded maximum due process during informal administrative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and have been upheld in Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

Before I address the circumstances surrounding the violation, I feel it is necessary to address the progression of this case. A review of the record reveals that prior to the assessment of the civil penalty at issue in the instant case, the Hearing Officer followed all regulatory procedures and ensured that you were fully apprised of and had the opportunity to exercise your rights in this matter. You were given the appropriate notice of the initiation of the Coast Guard's civil penalty action, advised of your right to request a hearing, provide any written evidence and argument in lieu of a hearing, or pay the amount specified in the notice as being appropriate. The record shows that although you initially requested that a hearing be held in the matter, after experiencing several scheduling conflicts—in response to your requests, the Hearing Officer rescheduled the hearing twice—you informed the Coast Guard Hearing Office, via telephone, that you no longer wanted a hearing and that whatever the Hearing Officer decided would be fine with you. In so doing, you did not present any evidence or argument in response to the violation. Irrespective of that fact, the Hearing Officer issued a Final Letter of Decision in the matter wherein he elected to show “some leniency” after considering the fact that you “lost” your vessel during the relevant incident. As a consequence, the Hearing Officer's Final Letter of Decision mitigated the initially assessed \$10,000.00 penalty to \$4,000.00. In accordance with 33 CFR 1.07-65(b), the Hearing Officer's Final Letter of Decision also advised you of your right to appeal the decision, which the record shows you have done. Because the matters you now present—for the first time—on appeal were not submitted to the Hearing Officer prior to the issuance of his Final letter of Decision, your right to have those issues considered on appeal has been waived. *See* 33 C.F.R. 1.07-70(a). Irrespective of that fact, in the interest of fairness, I have carefully reviewed the entire record with the arguments that you raise on appeal in mind and I find that the Hearing Officer did not err in finding the violation proved.

The instant civil penalty case is taken pursuant to 33 USC 1321(b)(3), a statute that precludes the discharge of oil or hazardous materials into or upon the navigable waters of the United States. On appeal, you do not deny that your vessel discharged a quantity of oil that caused a sheen on the navigable waters of the United States and instead, focus on whether the Coast Guard was correct to issue you a Notice of Assumption in this case. In that vein, you assert that you attempted to alleviate the threat of discharge caused by the sunken vessel by placing a “diaper” around it and insist, contrary to statements contained in the case file, that you did attempt to assist in the clean up. At this point, it is important to note that the two matters (the spill and its subsequent clean up) are separate and distinct. For the purposes of this case, whether you aided in the clean up of the spill or whether the Coast Guard's conclusions with regard to the corrective

measures that you undertook to abate the threat of any further discharge from the vessel were correct, are simply not relevant. In the case at hand, you are charged with a violation of 33 USC 1321(b)(3) for discharging oil or hazardous materials into the navigable waters of the United States in a prohibited quantity; the discharge caused a sheen. Accordingly, the assessment of a civil penalty is appropriate if you are the owner of a vessel that discharged oil into or upon the navigable waters of the United States in a prohibited quantity. Since you do not deny either of those facts, I find that the Hearing Officer did not err in finding the violation proved.

Although I have determined that the Hearing Officer did not err in finding the violation proved or in assessing a monetary penalty for it, I note that you have raised concerns about your financial condition on appeal. Specifically, you have asserted that you are an elderly person on Social Security. 33 USC 1321(b)(8) provides that the following factors must be considered in determining the amount of any penalty assessed under the statute: 1) the seriousness of the violation; 2) the economic benefit to the violator, if any, resulting from the violation; 4) the degree of culpability involved; 5) any other penalty for the same incident; 6) any history of prior violations; 7) the nature, extent, and degree of the success of any efforts of the violator to minimize or mitigate the effects of the discharge; 8) the economic impact of the penalty on the violator; and, 9) any other matters as justice may require. Although the Hearing Officer substantially mitigated the assessed penalty due to the fact that you “lost” your vessel, I believe that further mitigation of the penalty is appropriate given the economic factors that you raise on appeal. Given the fact that you have a limited budget due to the fact that you are on Social Security, I believe that the assessment of a \$4,000.00 penalty would have a crippling economic impact on you. Therefore, although the Hearing Officer was neither arbitrary nor capricious in assessing a penalty of \$4,000.00 based on the evidence contained in the case file, in consideration of the further mitigating evidence that you have submitted on appeal, I will reduce the assess penalty to \$500.00.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that you are the responsible party. The decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, however, I find a penalty of \$500.00, rather than the \$4,000.00 assessed by the Hearing Officer or \$11,000.00 maximum permitted by statute, to be appropriate in light of 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 you may have for removal costs or damages, or any other costs arising from any discharge, or substantial threat of discharge, of the oil involved in this case. *See generally, but not exclusively, 33 USC §§ 1321 et seq. and 2701 et seq.*

Payment of **\$500.00** 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 70945
Charlotte, NC 28272

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. 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 you will be liable for all attorney's fees incurred and all other costs of collection.

Should you still believe that you are financially unable to pay these penalties, you may request establishment of a payment plan. Requests for relief should be directed to the Chief, Claims Branch, Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California 94501-5100.

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