

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-0941
Phone: (202) 372-3796
Fax: (202) 372-3972

[REDACTED]
[REDACTED]
[REDACTED]

16460
November 12, 2008

RE: Case No. 2498236
[REDACTED]
[REDACTED]
\$1,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2498236 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 \$10,000.00 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 was based on the Hearing Officer's finding that, in violation of 33 USC 1321(b)(3), fuel and oil, in a quantity that may be harmful, was discharged from the [REDACTED] into the waters of the Pacific Ocean, near San Clemente Inland, California on September 19, 2005. The approximately 650 gallons of fuel and 50 gallons of oil discharged from the vessel caused one or more of the conditions specified in 40 CFR 110.3.

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 material into or upon the 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 that may be harmful. A discharge of any amount of oil that causes a film, sheen, or discoloration upon the surface of the water may be harmful and is prohibited.

On appeal, you do not deny that the violation occurred, but rather, seek mitigation of the penalty assessed by the Hearing Officer. To that end, you contend that you "are in financial trouble and can not [sic] afford to pay such a large penalty." At the same time, you note that you and your wife are "in major credit card debt and have a second mortgage on...[y]our home at 100% loan to value" and add that your financial situation is further hindered by the fact that you have an outstanding debt that you must repay to the IRS. You have provided banking and tax information to support your assertions in this regard. You conclude by stating that "[t]he past year has been really difficult for...[yourself and your family]...after the sinking of [y]our business and vessel both financially and emotionally." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I begin, I believe a brief recitation of the facts of the case is in order. The record shows that on September 19, 2005, the [REDACTED] suffered a catastrophic casualty when it allided with the rocky coast of San Clemente Island in California. The allision led to the sinking of the vessel and its subsequent discharge of approximately 650 gallons of fuel and 50 gallons of oil. The record shows that the discharged fuel and oil caused a sheen covering an area of approximately ¼ mile by ½ mile. Fortunately for all parties involved, however, the 50 gallons of oil spilled during the incident were thought to have been collected by absorbent booms placed around the vessel in the time period initially following the casualty. In addition, the 650 gallons of fuel spilled were thought to have been disbursed and dissipated by wind and weather conditions at the time of the casualty. Indeed, after a recovery assessment was conducted, it was concluded that the casualty and resultant fuel and oil spill had not left any threat or impact on the wildlife and environment in the area.

The allision occurred at approximately 5:30 a.m. after the vessel's operator, [REDACTED], fell asleep at the helm. Although the vessel was lost during the incident, the record shows that all of the vessel's seven passengers, including yourself, safely disembarked the vessel, without injury, immediately after the allision occurred. The record similarly shows that you immediately and properly ensured that the Coast Guard was informed of the incident, informed the vessel's operator that she would have to undergo chemical testing as soon as possible after the incident, and took quantifiable steps to prevent the loss of the vessel (attempted to plug the hole in the vessel's hull and pump incoming water from the vessel) while simultaneously ensuring the safety and security of the vessel's passengers and crew. Sadly, your efforts were to no avail and the vessel was lost as a result of the incident.

I will now address the alleged violation. As I have already stated, the record shows that you do not deny either that the discharge at issue here occurred, or that your vessel was responsible for it. Given your admission in this regard, as well as the evidence contained in the case file—including photos that clearly show a visible sheen emanating from your vessel, I find that the Hearing Officer was correct to conclude both that the violation occurred and that you, as the vessel's owner, are an appropriate party to be charged with the violation. Accordingly, the only consideration remaining is whether mitigation of the penalty assessed by the Hearing Officer is appropriate under the circumstances of the case. After a thorough review of the record, I believe that it is.

33 USC 1321(b)(8) provides that the following factors must be considered in determining the amount of the penalty, "the seriousness of the violation, 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 the 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." In this case, a careful review of the Hearing Officer's Final Letter of Decision shows that she did not expressly consider any of these factors but, instead, found that mitigation of the \$10,000.00 penalty initially assessed was not appropriate because you had not provided evidence to support your assertions regarding your financial situation. As I have already noted, on appeal, you have provided evidence, including financial statements and tax records, which show that the casualty at issue here has undoubtedly caused a severe financial hardship for yourself and your family.

On that basis alone, I believe that mitigation of the near maximum penalty assessed by the Hearing Officer is appropriate in this case.

At the same time, however, I believe that mitigation of the penalty is also appropriate when one carefully considers the factors set forth in 33 USC 1321(b)(8). Under the statute, the first factor to be considered in determining the amount of an assessed penalty is “the seriousness of the violation.” In this case, the record shows that although a considerable quantity of fuel and oil was discharged (approximately 700 gallons), the bulk of the spill dissipated as a result of wind and weather conditions. More importantly, the record shows that after a recovery assessment was conducted, there were no indications that the spill had caused a threat or impact on wildlife or the environment. Viewed in this light, I find that this spill, though considerable in size, was not sufficiently serious to justify the assessment of a significant monetary penalty. At the same time, I note that the discharge at issue caused no “economic benefit to the violator.” Instead, the record shows that the incident giving rise to the violation caused you and your family severe financial hardship in that you lost not only your vessel, but also your family’s main source of income. At the same time, a consideration of the “degree of culpability involved,” further supports a conclusion that mitigation of the assessed penalty is appropriate. A careful review of the record shows that your culpability for the violation—the discharge—stems solely from the fact that you are the owner of the vessel. Indeed, as I have already noted, the incident, itself, was caused by the negligence of the vessel’s operator, a licensed operator who fell asleep while at the helm. Although the record does not show that “any other penalty for the same incident” was assessed against you, a careful review of your “history of prior violations,” shows that you have had only one other violation case initiated against you and that you have never committed a discharge violation like that at issue here. Consideration of “the nature, extent, and degree of the success of any efforts of the violator to minimize or mitigate the effects of the discharge,” also supports mitigation of the assessed penalty. Although the record shows that your efforts to prevent the sinking of the vessel were to no avail, I believe that your actions in quickly notifying the Coast Guard of the incident while simultaneously securing the safety of your passengers and crew, assured not only that the negative effects of the spill were mitigated, but also assured the safety of life at sea. Finally, I note that consideration of “the economic impact of the penalty on the violator” supports a conclusion that mitigation of the assessed penalty is appropriate under the circumstances of this case. The record shows, as I stated above, that you have lost both your vessel and your chief source of income as a result of the incidents giving rise to the violation at issue in the case at hand and that the situation, itself, has left you in a state of severe financial hardship. Under such circumstances, I believe that the near maximum penalty assessed by the Hearing Officer would have a crippling effect on both yourself and your family. Therefore, based on a careful consideration of the factors articulated in 33 USC 1321(b)(8) and in the interest of justice, I will mitigate the penalty assessed by the Hearing Officer to \$1,000.00.

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 Hearing Officer’s determination that the violation occurred was neither arbitrary nor capricious and is hereby affirmed. However, for the reasons discussed above, I find a penalty of \$1,000.00, rather than the \$10,000.00 penalty assessed by the Hearing Officer to be appropriate under the circumstances of this case.

November 12, 2008

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

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 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