



16200
DEC 07, 2020

[REPRESENTATIVE]
[PARTY]
[ADDRESS]

RE: Activity No. 5759356
[PARTY]
[VESSEL]
\$15,000.00

Dear [REPRESENTATIVE]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Case No. 5759356, which includes your appeal on behalf of [PARTY], as owner of the [VESSEL]. The appeal is from the action of the Hearing Officer in assessing a \$15,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR § 160.105	Failure to comply with an order pertaining to the control of vessel or facility operations.	\$15,000.00

The violation occurred on October 10, 2018, when [PARTY] failed to file a heavy weather mooring plan, and failed to move the [VESSEL] from her berth in Lazaretto Creek, Tybee Island, Georgia, in violation of Captain of the Port (COTP) Order 047-18, as amended (the Order).¹ The Order was issued in anticipation of the forecast arrival of Hurricane Michael, and was based on the COTP's assessment that the vessel was not securely berthed in Lazaretto Creek considering the expected hurricane or tropical storm conditions, presenting a significant risk of damage to critical transportation infrastructure (the Highway 80 Bridge).

On appeal, you do not dispute the finding that [PARTY] failed to comply with the Order, but argue that no penalty is warranted, because [PARTY] made a good-faith effort to comply with the Order, and that, through no fault of [PARTY], timely compliance with the Order was impossible in fact. Specifically, you dispute the Hearing Officer's finding that [VESSEL] was

¹ The Order, as originally issued, required filing of a heavy weather mooring plan including relocation of the vessel no later than 8:00 pm, October 9, 2018. The COTP later amended the Order to extend the compliance deadline to 10:00 am, October 10, 2018.

denied dockage at the [Yacht Center] (SYC) due to the vessel's lack of insurance (a matter within [PARTY]'s control) on October 9, 2018. You argue that SYC denied the request for dockage because no suitable dock space was available (a matter beyond [PARTY]'s control). You also argue that no monetary penalty is warranted where violation of the Order did not, on this occasion, lead to any infrastructure damage—"no harm no foul."

The arguments you make on appeal are substantially similar to the arguments made before the Hearing Officer, which were duly considered by him.

You argue that unavailability of dock space, and not lack of insurance, was the determining factor that prevented [PARTY] from complying with the Order. You offer this impossibility argument to justify waiver of the penalty. Otherwise, the circumstances can be considered a factor in mitigation.

In support of your claim that lack of insurance was not the determining factor preventing compliance with the Order, you provided the Hearing Officer with a certificate of insurance, indicating that, as of October 10, 2018, [VESSEL] carried \$1 million in port risk insurance.

The Hearing Officer considered this certificate, but concluded that, based on all the evidence in the record, "it is apparent you did not have the updated policy by 10:00 am on October 10, 2018. . . . [H]ad you kept the insurance policy up-to-date, you could have moored the vessel at [SYC] and complied with the COTP order." Evidence supporting the Hearing Officer's conclusion included a Coast Guard Port Assessment Team Leader's statement that he received an email from you, at 10:00 am, October 10, 2018, stating that you were "working to obtain insurance but was having trouble reaching anyone." [CG Ex. 3.] The same Coast Guard statement adds that an insurance binder was received by email at 1421 hours on October 10. The certificate of insurance you provided with your response of February 21, 2019, is indeed dated October 10.

You also provided declarations from the vessel's captain and his wife, attesting that the captain's wife had spoken to representatives of SYC on October 10, prior to the arrival of Hurricane Michael, and been told by SYC that, regardless of [VESSEL]'s insurance cover, no space was available at that facility.

The declarations regarding your agents' contact with SYC conflict with the letter provided by SYC's Project Manager, stating, "I am not aware of any inquiries from MV '[VESSEL]' prior to hurricane Michael regarding a heavy mooring slip for their vessel to stay during the storm."

The Hearing Officer's finding that [VESSEL] remained uninsured at 10:00 am on October 10, 2018 is supported by substantial evidence. The Hearing Officer was also justified in concluding that the lapse of insurance was "definitely a factor" in [PARTY]'s inability to comply with the Order. The evidence certainly allows for the possibility that if you had had proof of insurance sooner, you could have sought space at SYC sooner and likely found space.

Whether you lacked insurance that might have allowed mooring at SYC or there was no space at SYC when a request was made by the captain's wife, it is clear that heavy weather planning did not begin early enough to create a viable plan. You knew based on events in September 2018

that you needed a heavy weather plan to move the vessel from its Lazaretto Creek berth. You did not show that complying with COTP Order 047-18 was impossible, only that you were unable to accomplish it, having made insufficient preparations earlier.

Nevertheless, based on all the circumstances, the Hearing Officer did mitigate the penalty from the preliminary amount of \$30,000 to \$15,000.

Finally, you argue that, because [VESSEL]'s mooring arrangements did not result in any economic or environmental damage, no penalty is warranted—"no harm, no foul."

I reject this argument, as did the Hearing Officer. Had violation of the Order resulted in damage to the Highway 80 Bridge, as feared, or other damages, that damage might well have been considered a factor in *aggravation* of the violation. But the fortuitous *lack* of damages on this occasion is not a factor in *mitigation*. The elements of [PARTY]'s violation of the Order, and thereby of 33 CFR § 160.105, have been established, by substantial evidence in the record. Consequential damages are not a required element to establish a violation of § 160.105.

I find that there is substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred and that [PARTY] is the responsible party. The penalty is within the amount authorized. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR Subpart 1.07, this decision constitutes final agency action.

Payment of **\$15,000.00** 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. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 979123
St. Louis, MO 63197-9000

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 2% accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

L. I. McCLELLAND
Civil Penalty Appellate Authority
By direction of the Commandant