

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re

HYDRO-DREDGE CORP.,

Respondent

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Docket No. I-80-03

Initial Decision

This is a proceeding under the Marine Protection, Research, and Sanctuaries Act, Section 105(a), as amended, 33 U.S.C. 1415(a), for the assessment of civil penalties for the unauthorized dumping of material into the ocean in violation of Section 101(a) of the Act, 33 U.S.C. 1411(a).^{1/}

1/ Section 105(a) of the Act, 33 U.S.C. 1415(a), provides in pertinent part as follows:

Any person who violates any provision of this subchapter, or of the regulations promulgated under this subchapter, or a permit issued under this subchapter shall be liable to a civil penalty of not more than \$50,000 for each violation to be assessed by the Administrator. No penalty shall be assessed until the person charged shall have been given notice and an opportunity for a hearing of such violation. In determining the amount of the penalty, the gravity of the violation, prior violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation shall be considered by said Administrator. For good cause shown, the Administrator may remit or mitigate such penalty. . . .

Section 101(a) of the Act, 33 U.S.C. 1411(a), provides in pertinent part as follows:

Except as may be authorized by a permit issued pursuant to Section 102 or section 103 of this Act and subject to regulations issued pursuant to Section 108 of this Act, (1) No person shall transport from the United States. . . any material for the purpose of dumping it into ocean waters.

The proceeding was instituted by a complaint issued on September 19, 1980, by the United States Environmental Protection Agency ("EPA") charging Hydro-Dredge Corp. with dumping material into the ocean in an area off Portland (ME) Harbor on August 22, 1979, without a permit authorizing the disposal of material at that location. Assessment of a penalty of \$10,000 was proposed.

Hydro-Dredge answered, and while not denying the unauthorized dumping, contested the appropriateness of the proposed penalty. Pursuant to the rules of practice governing these proceedings, 40 C.F.R. Part 22, a hearing was requested.

A hearing was held in Boston, Massachusetts on March 4, 1981. Following the hearing, the parties submitted briefs on the legal and factual issues. On consideration of the entire record and the briefs submitted by the parties, a penalty of \$4,000 is assessed. All proposed findings of fact inconsistent with this decision are rejected.

Findings of Fact^{2/}

1. On August 22, 1979, Hydro-Dredge was awarded a contract by the U. S. Army Corps. of Engineers (the "Corps") to dredge approximately eight hundred and fifty-seven thousand (857,000) cubic yards of material from the "Federal Channel and Training Basin" in Portland (ME) Harbor.

^{2/} Except where otherwise noted, these findings are based upon the allegations in the complaint and admissions thereto in the answer.

2. The contract specified that Hydro-Dredge was to transport the dredged material to, and deposit the dredged material at, a government- furnished disposal area, located beyond the territorial sea, approximately eight and one-half (8.5) nautical miles from the nearest land, and fifteen (15) nautical miles from Portland Harbor. This disposal area was marked with a government-furnished orange buoy, equipped with a flashing white light.
3. In lieu of issuing a permit, the Corps selected this disposal area by application of the same criteria in determining the effects of the dumping as were required for evaluation of permits issued by the EPA on applications for ocean dumping of materials, pursuant to Section 102(a) of the Act, 33 U.S.C. Section 1412(a), and the regulations issued thereunder, 40 C.F.R. part 227. This method of selecting a disposal area is authorized by Section 103(e) of the Act, 33 U.S.C. 1413(e), and is required by Corps regulation, 33 C.F.R. 209.145(e)(2)(ii).^{3/} Administrative Law Judge ("ALJ") Ex. 1
4. Pursuant to the contract, Hydro-Dredge commenced dredging operations on September 28, 1979.
5. Included in Hydro-Dredge's equipment was the towboat "Swift" and the scow "S-102."

3/ Section 103(e) of the Act, 33 U.S.C. 1413(e) provides as follows:

In connection with Federal projects involving dredged material, the Secretary may, in lieu of the permit procedure, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under subsections (a), (b), (c), and (d) of this section.

6. The S-102 is a dump scow with six compartments. It has no means of self-propulsion.
7. At approximately 8:40 a.m. on Saturday, August 2, 1980, the Swift departed Portland Harbor, towing the S-102 about three hundred (300) feet behind by means of a hauser. At that time, the S-102 was filled with approximately one thousand, six hundred (1,600) cubic yards of material dredged from the Federal Channel and Turning Basin, to be dumped at the approved dumpsite.
8. The only person aboard the S-102 at that time was one Dave Venturone. His duty was to dump the contents of the scow when the scow reached the approved dump site. Transcript ("Tr") 64.
9. Mr. Venturone was not the regular scowman but had been hired hours before as a substitute for the regular scowman who had been injured. Tr 64.
10. The day before being hired by Hydro-Dredge, Mr. Venturone had received some training on how to dump the scow by taking a trip to the government-furnished disposal area accompanied by an experienced scowman. Such training was considered sufficient under normal conditions to acquaint Mr. Venturone with his duties aboard the scow. Tr. 62, 64, 69.
11. Paragraph 2A-7.4 of the dredging contract required that Hydro-Dredge provide and maintain a radio communication between the towboat and the scow.
12. The procedure usually followed en route from the dredgesite to the dumpsite was to test the radio when leaving the Portland

Harbor, and to test the radio again immediately after the towboat and scow passed West Cod Ledge and made an easterly turn to the dump. Tr. 61, 65.

13. The procedure on reaching the dumpsite was for the captain of the towboat to radio the scowman and tell him to prepare to dump the scow. When the scow was actually in the dumpsite, the towboat would blow five consecutive whistles as a signal to the scow to dump its contents. The dumpsite was also marked by a special buoy with a white flashing light. Tr. 50-51, 67.
14. The voyage from Portland Harbor to the government-furnished disposal area with a loaded scow takes approximately four hours.
15. On August 2, 1980, the weather conditions outside Portland Harbor consisted of dense fog and visibility was reduced to about seventy-five (75) yards.
16. The radio was tested when the towboat and scow left the harbor and found to be functioning. Tr. 61-62, 77.
17. At approximately 11:05 a.m. on August 2, 1980, while the towboat and scow were in the vicinity of West Cod Ledge and still about an hour or more from the dumpsite, the captain of the towboat detected on the radar screen some approaching fishing vessels nearby. As a warning, the captain gave one prolonged and two short blasts on the towboat's horn, a standard signal in the trade to warn of the approaching towboat and scow. The captain tried to make radio contact with the scow before giving the

signal, but was unable to do so because the radio was not functioning at that time. Tr. 57, 77-78.

18. The scowman Venturone, unaware that the scow had not reached the dumpsite, and mistaking the fog signal for the signal announcing the arrival at the dumpsite, dumped the scow in the vicinity of West Cod Ledge, about five (5) nautical miles west of the designated disposal area. Tr. 58, 74.

Discussion and Assessment of Penalty

Hydro-Dredge does not dispute that it dumped material into the ocean in an area outside the disposal area approved under the terms of Hydro-Dredge's contract with the U. S. Army Corps of Engineers. What it does contest is the appropriateness of a \$10,000 penalty for this illegal dumping as proposed by complainant.

Section 105(a) of the Act provides that, "i/n determining the amount of the penalty, there shall be considered the gravity of the violation, prior violations by the persons charged, and their demonstrated good faith in attempting to achieve rapid compliance after notification of a violation."

The "gravity" of the violation can be evaluated by consideration of two factors, the gravity of harm and the gravity of misconduct.^{4/} Indeed, in this case, the EPA has put both factors in issue.

4/ See In re City of Philadelphia, Case No. 76-1, slip op. at 42-43 (EPA Region III, April 22, 1972) (initial decision), Aff'd by Regional Administrator (May 16, 1978).

As to the gravity of harm, the EPA alleges that the unauthorized dumping has "impaired" both the water and the ocean bottom in the vicinity of West Cod Ledge.^{5/} Hydro-Dredge denies this and contends that all that has been shown is some unquantifiable possibility of harm.

It is true, as the EPA seems to concede, that it has not been shown with certainty that the unauthorized dumping injured any marine life and, in particular, damaged any of the lobster population in the area.^{6/} What the record does show is that injury to the lobster population was more likely to occur in the vicinity of West Cod Ledge than at the authorized dumpsite, and that this was a consideration in the selection of the final dumpsite.^{7/} The record also shows that another important reason in selecting the final dumpsite was to pick a location far enough out from Portland Harbor to keep to a minimum any interference with the active commercial fisheries in Portland Harbor.^{8/} The gravity, the harm must be evaluated accordingly, in light of the fact that

^{5/} See amendment to par. 22 of the complaint, Tr. 6. "Impair" would appear to mean some actual deterioration in the quality of the environment.

^{6/} On the other hand, neither has it been established that the lobster population suffered no injury in view of the testimony of Mr. Reynolds. EPA Ex. 6 and Tr. 85-162.

^{7/} See testimony of John W. Hurst, Tr. 9-10; testimony of Sheldon D. Pratt, Tr. 39, 47.

^{8/} See testimony of Sheldon D. Pratt, Tr. 44-45; Final Environmental Impact Statement, Supplemental Statement, EPA Ex. 4.

these concerns with not interfering with fishing activities in Portland Harbor and with not injuring the marine life, had resulted in locating the authorized dumpsite several miles beyond the area where the unauthorized dumping occurred. The fortuitous circumstance that there may have been no actual interference with fishing activities or injury to marine life is not grounds for mitigating the proposed penalty. The purpose of the penalty is to forestall harm by deterring dumping outside the carefully selected authorized dumpsite, and not simply to punish after the fact only those actions which have caused environmental harm.

When it comes to Hydro-Dredge's "misconduct," on the other hand, there are mitigating factors to be considered. The radio equipment on board the scow for communicating with the towboat was functioning when the towboat and scow left Portland Harbor.^{9/} The scowman, Venturone, was hired because of an injury that befell the regular scowman, and no other experienced scowmen were available.^{10/} Venturone was considered experienced enough to dump the scow under normal conditions by the federal inspector whose duty it was to oversee compliance with the dumping requirements.^{11/}

^{9/} Tr. 61-62, 77. The malfunctioning was caused by the ground line breaking off, and was corrected by the time the towboat and scow were back in the Harbor. Tr. 66.

^{10/} Tr. 63-64.

^{11/} Tr. 68-69.

The captain of the towboat only became aware that the radio was not working when he tried to alert the scowman to tell him about sounding the fog signal. At that point, however, the captain appears to have had no choice but to give the fog signal because the approaching boat was closing in on him.^{12/} The scowman, evidently mistaking the fog signals given by the towboat as well as by other boats in the area for the dump signal tried to communicate with the scow, and being unable to do so nevertheless went ahead and dumped the scow.^{13/}

The EPA argues that it was incumbent upon Hydro-Dredge to hire a scowman with sufficient experience in training to know that enough time had not elapsed for the scow to be at the dumpsite, and to be able to distinguish between the fog signals and the prearranged dump signal. That Hydro-Dredge did not have such an experienced scowman in reserve, does not in itself signify a desire on Hydro-Dredge's part to scrimp in meeting its obligations under the dredging contract, contrary to what the EPA claims. It does not follow that Hydro-Dredge should necessarily have foreseen and guarded against the combination of events bringing together at one time the malfunctioning of the radio, the unavailability of an experienced scowman, and the foggy weather conditions which caused the confusing horn signals.

^{12/} Tr. 77-78, 82.

^{13/} Tr. 74

The EPA argues that there was a prior violation by Hydro-Dredge under similar circumstances. The reference is to a consent order issued against Hydro-Dredge in May 1980, for an unauthorized dumping under the same dredging contract, which also occurred in the vicinity of West Cod Ledge. (Docket No. I-80-02).^{14/} The allegations of the complaint in that case, however, do not show that the circumstances there were so similar to those in the present case as to evidence a disposition on Hydro-Dredge's part to ignore its statutory and contractual obligation to dump only at the government-designated disposal site.^{15/}

The EPA also questions Hydro-Dredge's good faith efforts to rectify the violation and bring itself into compliance, arguing that Hydro-Dredge made no efforts to recover the spoil and has only agreed to comply with the contract in the future. It is difficult to see how Hydro-Dredge could have recovered the spoil short of possibly dredging it back up and thereby increasing the likelihood of environmental damage.

^{14/} EPA Ex. 2.

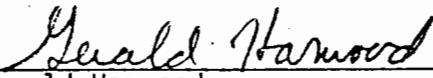
^{15/} According to the allegations in the complaint in the prior case, which were neither admitted nor denied by Hydro-Dredge, the unauthorized dump was apparently the result of Hydro-Dredge not having the radio equipment required by contract and also of the inexperience of the scowman. Here Hydro-Dredge did have the required radio equipment which was functioning when the towboat and scow left the Harbor. Nor does there appear to be any question about the regular scowmen employed by Hydro-Dredge being sufficiently experienced. Instead, the problem was the unavailability of the experienced scowman and the inexperience of the substitute scowman in carrying out his duties in foggy weather conditions. EPA Ex. 2.

No doubt the violation could have been avoided by Hydro-Dredge's being more circumspect in training Venturone or in instructing him on what to do in the situation in which he found himself with no radio communication, and in heavy fog with the danger of confusing the fog signals with the dump signal. Consequently, Hydro-Dredge cannot be exonerated from all liability. But the circumstances in this case do not show such careless disregard by Hydro-Dredge of its contractual and legal obligations to justify a penalty of \$10,000. Instead, I find that an appropriate penalty is \$4,000.

16/
ORDER

Pursuant to Section 105(a) of the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. 1415(a), a civil penalty of \$4,000 is hereby assessed against Respondent Hydro-Dredge Corporation for violation of the Act found herein.

Payment of the full amount of the penalty assessed shall be made within sixty (60) days after service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty, payable to the Treasurer of the United States of America.



Gerald Harwood
Administrative Law Judge

May 14, 1981

16/ Unless an appeal is taken pursuant to Section 22.30 of the rules of practice, or the Administrator elects to renew this decision on her own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).