

MEMBER ALERT



Shipowners Claims Bureau, Inc., Manager
One Battery Park Plaza 31st Fl., New York, NY 10004 USA
Tel: +1 212 847 4500
Fax: +1 212 847 4599

www.american-club.com

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RECENT COURT DECISION IN US CONCERNING THE DUTY TO “IMMEDIATELY” NOTIFY COAST GUARD RE HAZARDOUS CONDITION ABOARD A VESSEL

While the following does not directly relate to P&I or FD&D cover since it bears upon activity considered criminal with the jurisdiction in question, Members whose vessels trade in US waters should be aware that failure to “immediately” notify the U.S. Coast Guard of a known hazardous condition aboard a vessel can subject the crew and owner to civil and criminal penalties under The Ports and Waterways Safety Act (PWSA) 33 U.S.C. §§1232.

Further, when the United States Coast Guard requires “immediate” notification of a hazardous condition on board a vessel in U.S. waters, under US law, United States courts will interpret that term strictly, and substantial consequences follow from a failure to comply, as a recent decision by the United States Court of Appeals for the Sixth Circuit starkly demonstrates.

Background: *United States vs. Canal Barge Company*

In the recently decided case of *United States vs. Canal Barge Company*, the United States Court of Appeals for the Sixth Circuit held that a delay of approximately five days in reporting a leak in a barge loaded with benzene constituted a “willful and knowing” failure to immediately notify the Coast Guard of a known hazardous condition under the PWSA exposing the vessel’s crew and owner to criminal penalties.

Further, the failure to so notify amounted to a “continuing violation” exposing the vessel’s owner and crew to prosecution in each and every jurisdiction through which the vessel passed until the failure to report was cured.

The PWSA provides that “whenever there is a hazardous condition either aboard the vessel or caused by a vessel or its operation, the owner, agent, master, or person in charge shall immediately notify the nearest Coast Guard Sector Office or Group Office.” 33 CFR §§160.215.

The term “hazardous condition” is defined to include “any condition that may adversely affect the safety of any vessel, bridge, structure or shore area or the environmental quality of any port, harbor or navigable waterway of the United States. It may but need not, involve collision, allision, fire, explosion, grounding, leaking, damage, injury or illness of a person aboard, or manning shortage, 33 CFR 160.204.

Negligent failure to report a hazardous condition may be penalized with civil penalties. 33 USC §§1232 (a). A willful or knowing failure to report may be prosecuted as a Class D felony punishable by a fine of not more than \$50,000 for each violation or imprisonment for not more than five years or both 33 USC §§1232 (b).

Criminal charges can be brought against the offending employee and/or his employer. 33 USC §§1232 (b).

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The recent case: details

The *Canal Barge* case involved a barge carrying 400,000 gallons of benzene down the Mississippi River. The barge was owned by the Canal Barge, Inc. and was being operated by Conoco Phillips to transport benzene from Wood Island, Illinois to Catlettsburg, Kentucky. The barge sprang a leak near St. Louis, Missouri. Members of the barge's crew discovered the leak and reported the problem to their superiors, including the owner's port captain. The senior employee on board who was acting as pilot initially instructed the crew to fix the leak with a bar of soap. The port captain later instructed they use an epoxy patch, the soap presumably having failed to do the job. The vessel's captain, who was apparently off duty, learned of the leak and presumably the epoxy patch after waking up from a nap.

The epoxy patch held for about four days, during which time the barge was transferred to a new tug near Cairo, Illinois at the confluence of Mississippi and Ohio rivers, and continued up the Ohio River, where the patch ultimately failed in Kentucky. The captain of the new towboat notified the Coast Guard office in Louisville of the problem. The barge was dropped in a fleeting area near Mount Vernon, Indiana, where environmental crews cleaned the benzene from the barge deck and permanently repaired the leak.

The US government filed an indictment in the Western District of Kentucky in which they charged the barge owner, its pilot, the port captain and the vessel's captain with (1) conspiracy to violate the PWSA, (2) violation of the PWSA, and (3) negligent violation of the Clean Water Act. After a two week trial, the jury returned a guilty verdict on the second count ("knowing and willful violation of the PWSA") but acquitted the defendants of the remaining two counts (conspiracy to violate the PWSA and violation of the Clean Water Act).

The defendants moved for acquittal on the grounds that the evidence was insufficient to support a finding of "knowing and willful violation of the Act," and on the procedural grounds that venue was improper in Kentucky because the failure to report occurred in St. Louis. The District Court acquitted the defendant on the basis of the venue issue, but denied the other aspects of the motion.

The Government appealed. The Sixth Circuit eventually overturned the acquittal, finding that the failure to immediately report a hazardous condition is a "continuing violation," and therefore the charges could be brought in any district through which the vessel passed before the Coast Guard was notified.

More importantly, on the substantive issues, the Court of Appeals found that the evidence was more than sufficient to establish a "knowing and willful" violation of the PWSA, not "poor judgment or an honest mistake" because: (1) senior officers and employees were aware of the leak and that leaking benzene posed a significant environmental or safety risk; (2) no Coast Guard office in any port prior to Louisville had been notified of the leak; (3) there was no entry in the tug boat log recording the leak or any report to the Coast Guard (4) all defendants should have known an epoxy patch would likely fail upon exposure to benzene; (5) the defendant failed to follow the Coast Guard approved vessel response plan, and (6) there was evidence that the decision to put off a permanent repair was motivated by a desire to save the company "time and expense."

On the issue of the time element of "immediate reporting," the Sixth Circuit stated:

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The natural reading of the regulation . . . is that the obligation to report starts immediately when the relevant action has the relevant knowledge . . . stated differently, the purpose of the word “immediately” is simply to preclude a defense that the duty was discharged by giving notice several hours – or in this case, days – after the hazard was discovered.

Simply put, immediate means immediate. Any delay increases the risk of non-compliance with the Act.

Implications of the decision and lessons to be learned from it

The lessons to be drawn from the case are:

- The US Coast Guard and courts enforce all applicable environmental regulations vigorously.
- Owners should alert all officers and crew members of their obligation under the PWSA to “immediately” report any and all hazardous conditions to the Coast Guard, and that criminal penalties can follow from failure to comply.
- The obligation to report should be a part of the vessel’s response plan.
- Good intentions will not be presumed, nor will they likely suffice to excuse a failure to report.