



LETTER DECISION

February 17, 2022

VIA REGISTERED MAIL AND EMAIL

Reference Number: AMP-003-2021

Ms. Stacey O'Dea
Legal Counsel to Hibernia Management
and Development Company Ltd.
20 Hebron Way
St. John's, NL A1A 0L9

Dear Ms. O'Dea:

Re: Request for Review AMP-003-2021

INTRODUCTION:

On August 17, 2019, the Canada-Newfoundland and Labrador Offshore Petroleum Board ("C-NLOPB") was notified by Hibernia Management Development Corporation ("HMDC") that a hydrocarbon release of an estimated 2,194 litres of petroleum (a spill) had occurred at the Hibernia platform, located on Production Licence PL 1001, which is a place within the Canada-Newfoundland and Labrador offshore area.

The spill was initiated by the loss of main power on the platform which resulted in the loss of instrument air pressure on the platform's deluge system causing a release of deluge water to the platform deck. The additional water on the deck drained into the Hazardous Open Drains Tank (HODT), exceeding the capacity of the tank. As a result, a fluid comprised of oil, water and other residues was discharged overboard via an overflow line.

On August 13, 2021, the C-NLOPB issued a Notice of Violation, AMP-003-2021 to HMDC under the *Canada-Newfoundland and Labrador Petroleum Administrative Penalties Regulations, SOR/2016-19* (the "Regulations"). The Notice of Violation ("NoV") set out a total penalty amount of \$40,000, comprising a base penalty of \$40,000 and applying gravity values of:

1. Item 3, -1 (mitigating) for the category: "Reasonable efforts to mitigate violation's effect"; and
2. Item 9, +1 (aggravating) for the category: "Increased risk of harm to people or environment".

On September 13, 2021, HMDC filed a Request for Review pursuant to section 202.2 of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, S.C. 1987 c. 3*, (the "Accord Act") in respect of the NoV requesting a review of the penalty amount (the "Request").



Pursuant to subsection 202.02(2) of the Accord Act, the Board appointed a three-person panel (the “Review Committee”), each of whom is a member of the Board, to conduct the review.

In accordance with the joint *C-NSOPB-C-NLOPB Administrative Monetary Penalty Guidelines, March 2017*, (the “Guidelines”), documents used to support the NoV were provided to HMDC and the Review Committee. The applicant, HMDC, indicated on the Request for Review form that its preference was for the review to be undertaken by written submission only. On November 12, 2021, HMDC submitted its submission and associated book of authorities including supporting documentation. The AMP Officer’s submission and book of authorities including supporting documentation was submitted on December 10, 2021. On January 10, 2022, HMDC submitted a final response to the AMP Officer’s submission. Upon confirmation that no further information would be received from the parties, the Review Committee commenced its review.

ISSUE UNDER REVIEW:

The NoV was issued in relation to an unauthorized spill from the Hibernia Platform on August 17, 2019. Pursuant to S. 160 (1) of the Accord Act, a spill means a discharge, emission or escape of petroleum, other than one that is authorized under subsection 161.5(1), the Regulations or any other federal law. The fact that a spill of petroleum occurred is not under dispute by HMDC.

The issue for determination in the HMDC review request is limited to the AMP Officer’s application of the +1 gravity value in item #9 on the NoV: *“Increased risk of harm to people of environment?”*.

The AMP Officer’s reasoning on this gravity value was stated in the NoV as follows:

“In correspondence provided from the ECCC-CWS on July 16, 2021, it was learned that while there was no confirmed impact to wildlife in the area of the spill, surveys conducted by ECCC-CWS during the month leading up to the spill and the weeks following the spill confirmed that various species of birds were present in the vicinity of the Hibernia platform. Based on this information, the ECCC-CWS concluded that the release of oil into the water from the Hibernia platform results in increased risk of harm to birds in the area.”

The NoV issued by the AMP Officer did not reference any other facts specific to the AMP Officer’s determination that there was an increased risk of harm to birds in the area that warranted the application of a gravity value of +1, including in the Relevant Facts section of the NoV.

DETERMINATION:

Both parties made submissions and cited authorities on the appropriate “standard of review” to be applied in this matter. We note that all the authorities cited pertained to judicial proceedings and none addressed the standard of review to be applied in an internal review process such as that found in the Accord Act. Having carefully considered the submissions and reviewed the cited authorities, the Review Committee declines to import judicial review concepts into this non-judicial proceeding. No standard of review is prescribed in the Accord Act or the Regulations and the Review Committee finds there is no need to import one for it to perform the duty assigned to it under the Accord Act.



On conducting a review of the documentation provided, the Review Committee has determined that the facts did not support the application of a +1 gravity value for the category of *“Increased risk of harm to people or environment”*, and therefore the revised penalty to be paid by HMDC is to be adjusted.

As neither the application of the base penalty amount of \$40, 000 as applied by the AMP Officer, nor the -1 gravity value for the category: *“Reasonable efforts to mitigate violation’s effect”*, were under review, the Review Committee has determined that the revised penalty to be paid by HMDC for AMP-003-2021 is \$28,000.

The reasons the Review Committee reached the foregoing conclusion are set out below.

RELEVANT FACTS:

As per the Guidelines, the Review Committee was provided with the NoV, the Request for Review, written submissions and supporting documentation and authorities relied on by the parties. Copies of disclosure documentation related to the August 17th loss of platform power included HMDC’s investigation report into the incident.

The documentation package also included email threads related to the spill detailing daily calls commencing August 19th, 2019 involving officials representing Environment and Climate Change Canada (ECCC-NEEC), Department of Fisheries and Oceans (DFO), Canadian Coast Guard (CCG), Canadian Wildlife Services (CWS), C-NLOPB and HMDC.

These daily call logs document an exchange of information including (a) actions commenced by HMDC to mitigate the effects of the spill and details on specific activities undertaken, and (b) specific instructions by regulators to HMDC in respect of these activities.

The following is a summary of the relevant facts in these documents considered by the Review Committee.

- On August 17th, 2019, at approximately 1656 hrs, the Hibernia platform experienced a loss of main power. The power outage initiated a series of events and actions which ultimately resulted in a loss of air pressure across the platform’s Compressed Air System. The loss of air pressure caused the platform’s fire suppression system to activate, initiating a deluge release from seven fire areas. The release of water at this high rate caused the level of fluid in the platform’s Hazardous Open Drain Tank (HODT) to rapidly increase, to the point of overflow, resulting in the release of a mixture of oil, water, and other residues from the tank to sea through an overflow line.
- The release of petroleum was an unauthorized spill and as such HMDC activated their spill response plan.
- On August 17th, platform personnel using the “thickness appearance rating” (TAR) code method calculated the hydrocarbon release at approximately 150 litres. At 0700 hrs, August 18, 2019, a contractor aerial surveillance flight was initiated for offshore observation of the sheen. The TAR code method was also used by the contractor to characterize the sheen. The initial surveillance flight determined the spill to equate to 2194 litres, or approximately 14 barrels of oil.



- Other activities in response to the spill included the deployment of tracker buoys, deployment of single vessel side sweep (SVSS) and use of mechanical dispersion. Vessels were tasked to respond to maximize recovery of fluid released. Wildlife observations were undertaken immediately on the 17th by platform personnel and vessel crews. Dedicated wildlife observers were mobilized to the field on August 18th.
- A water sampling program was also initiated on August 19th.
- Subsequent aerial surveillance flights on August 19th showed an estimated on-water volume down to 36 litres and 4.5 litres, again based on the TAR code calculation method.
- There are references on August 19th to some amount of oil recovered through SVSS activities although no volumes were provided in the documentation. *“SVSS from Paul A. Sacuta had recovered 2 to 3 cubes as of yesterday. This went up to 8 or 9 cubes overnight, but likely contained more water”*.
- The August 20th daily call log specifically referenced “1 oiled bird spotted” by a PAL aerial flight crew member and noted that a vessel had been dispatched to locate the bird, but it had not been found. Stranded bird surveys were being conducted twice daily as directed by CWS.
- The August 20th daily call log provided clarification that since the oiled bird could not be confirmed, the report would be revised to “may have been oiled but not confirmed”. Stranded bird surveys continued twice daily.
- In an August 21st email, HMDC advises that response efforts involving vessels were being scaled down with wildlife observations and water sampling continuing. Of note also was a correction related to the potential “oiled bird”. Given the low confidence of the crew member of the sighting, the height at which the plane was over the water, that no other crew member could corroborate the sighting and that the oiled bird could not be located by vessel, the reference to the oiled bird was removed from the flight report.
- It was acknowledged that by August 22nd, the sheen had fully dissipated.

The Review Committee was also provided a copy of a letter to the C-NLOPB dated July 16, 2021, from an official with the Canadian Wildlife Services (CWS) with the subject line: ***“Risk of harm to migratory birds during the Hibernia spill, 17 Aug, 2019”***. The correspondence expresses an opinion as to the impact oil spilled in open water can have on birds, the challenges associated with determining the impact and suggests bird densities at-sea can be used to assess the risk and estimate the impacts of offshore spills.

The letter references studies of bird populations near the Grand Banks oil production areas (2009 and 2012) and states that *“Surveys conducted in the vicinity of the Hibernia platform during the month before and the weeks following the August 17th spill documented more than 15 species of seabirds”*.

The letter concludes: *“Given the regular occurrence of migratory birds in the vicinity of offshore production platforms on the Grand Banks, the release of oil into the water from the Hibernia platform resulted in increased risk of harm to birds in the area.”*



HMDC NOVEMBER 12, 2021 SUBMISSION:

Additional relevant factors the Review Committee considered from the HMDC written submission include but are not limited to the following:

- 32. *“HMDC operates under regulatory approval obtained by CNLOPB which allows for the release of petroleum into the ocean from its operations at an oil-in water concentration of up to 15 ppm. The environmental effects of these releases are closely monitored...these releases are not contraventions of the Act.”*
- 33. *“Furthermore, samples collected at the location of the spill indicated that oil was non-detectable, and therefore it is unlikely to have caused an increased risk of harm to the environment.”*
- 38. *“The AMP Officer’s reason for increasing the gravity value under item 9 to +1 is a misinterpretation of section 4 of the Regulations and lacks sufficient support. The AMP Officer explained in the NoV that the gravity value of item 9 was increased to +1 because of the nature of the violation, oil being released into the water, increases risk of harm to birds in the area. A violation, which is taken into consideration when applying a base penalty, should not also be reconsidered when assessing additional factors to increase or decrease the gravity of the circumstances. This implies that spills (of any concentration or magnitude) that rise to the level of an AMP violation carry a greater inherent risk and therefore should attract a greater than the base penalty.”*

CNLOPB DECEMBER 10, 2021 SUBMISSION:

Additional relevant factors the Review Committee considered from the AMP Officer’s written submission include but are not limited to the following:

- 36. *“The assessment of whether there was an increased risk of harm to people or the environment for criteria #9 under section 4 on the NoV and in ss. 4(2) of the Regulations, is a matter of mixed fact and law. Accordingly, the AMP Officer determined the gravity factors assigned were sufficient and reasonable having regard to the facts in the NoV and the supporting documentation...”*
- 37. *“The AMP Officer accepted the TAR Code calculations...for the 2194 litres of petroleum. Although the petroleum was dispersed, there is no evidence it was substantially recovered.”*
- 38. *“In addition to the ECCC-CWS letter ECCC-CWS had been directly involved in daily situational updates regarding the spill response and had direct knowledge of this specific incident and related risks”.*
- The water sample data provided were from water samples taken two days after the spill and the same day surveillance flight calculated lower volumes of petroleum. The samples were also taken after initial spill response measures had been initiated for mechanical dispersion and recovery.



- 47. *"... the AMP Officer found that it is more likely than not that there was a localized risk of harm to the environment from the Spill and assigned a gravity value of +1 to criteria #9 in accordance with the Regulations which she considered reasonable and necessary to encourage improved compliance in future to protect the environment."*

HMDC JANUARY 10, 2022 REPLY SUBMISSION:

Additional relevant factors the Review Committee considered from the HMDC reply submission include but are not limited to the following:

- 34. *"HMDC would like to underscore it is not questioning that in the abstract, there is a certain amount of oil in water which is harmful to wildlife. HMDC is concerned that the AMP Officer's conclusion applying this abstract idea to the context of the spill as it existed on August 17-19, 2019 is not supportable. In particular, there is an absence of any evidence on the likelihood of wildlife encountering the oil given the ongoing remediation efforts, and whether or not the amount of oil in the water (due to the spill being a mixture from the outset and below detectable levels when sampled at the earliest opportunity to do so) indeed presented an increased risk of harm to wildlife as the AMP Officer suggests"*

REASONING:

In this case, a base penalty amount of \$40,000 was applied for a type "B" violation, that being an unauthorized spill. A spill constitutes a violation of subsection 161(1) of the Accord Act. The fact that the spill occurred is not under dispute. Documentation details the extent of the spill, and the measures undertaken by HMDC to mitigate its impact on the environment. By August 22nd, the sheen had fully dissipated. No observable effects on wildlife were documented. Water sampling data obtained on August 19, 2019 indicated either trace amounts were present or were non-detectable.

The Regulations stipulate that for type "B" violations, for category #9, *"whether the violation increased a risk of harm to people or the environment or a risk of waste"*, in respect of aggravating factors, there can be assigned a gravity value of "0", "+1", "+2" or "+3.

The Review Committee acknowledges that any unauthorized, uncontrolled spill of petroleum into the environment may pose some risk to wildlife and can have an immediate localized impact on the environment. Therefore, a "spill" is prohibited and regulated accordingly.

In the Review Committee's opinion, the conditions that would result in the application of a positive ("+") or aggravating gravity value in respect of item # 9 must be something beyond the fact that a spill occurred, and for which a base penalty has already been applied. Under the Administrative Monetary Penalties regulatory regime, the gravity value of increased risk of harm to the environment is one which can be applied to a myriad of contraventions of regulatory requirements ranging from record keeping failures, failures to obtain necessary authorizations, usage of improper equipment, and direct environmental offences such as a spill in the present case. In the view of the Review Committee, where the violation itself is environmental; the application of this factor is more challenging. The question must be "having regard to the circumstances of the violation" (s.4(2)(b) Regulations) whether there were circumstances associated with this spill that posed an elevated risk of harm to the environment.



The Review Committee notes the Guidelines do not contain any guidance that would assist the AMP Officer or the violator in understanding how gravity values of increased risk of environmental harm, which can range from 0 to +3, might be applied to a spill. In the absence of such guidance, in particular the identification of objective factors to be considered, there exists a risk of inconsistent and subjective determinations.

In the present case, the evidence indicates that there was a spill of mixed oil and water which was quickly dissipated. Water sampling data obtained on August 19th, data that was not considered by the AMP Officer prior to issuing the NoV, indicated that the amount of oil was either trace or undetectable as of that date. The Review Committee believes that the water sampling data obtained by HMDC was relevant to assessing whether there was an increased risk of harm.

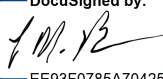
The CWS letter relied upon by the AMP Officer indicates that migrating birds are present year-round, that they were present in the area in the month prior and weeks afterwards but does not include specifics of wildlife observations made during the relevant period. While the letter received from CWS notes that a spill poses an increased risk of harm to birds, it does not include any information in respect of this particular spill. Documentation notes the presence of wildlife observers on vessels during the relevant period, however there were no details of their observations referenced in either the disclosure package or the NoV.

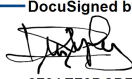
Considering all the evidence, the Review Committee finds that reliance on the CWS letter of July 16th, 2021 to apply a gravity value of +1 was not reasonable and did not meet the burden of proof specified in s. 202.6 of the Accord Act.

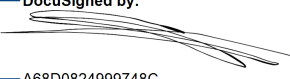
CONCLUSION:

The Review Committee, having found that the underlying factors that would support a gravity value of +1 with respect to increased risk of harm to the environment were not proven on a balance of probabilities, has determined that the gravity value of +1 was not correctly applied. Therefore, the +1 gravity value assigned by the AMP Officer in item 9 is replaced with "0", and the total penalty amount to be paid by Hibernia Management Development Corporation is \$28,000.

Review Committee:

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