

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
Save San Francisco Bay Association)
for Review of the Failure to Seek)
Civil Monetary Penalties Against)
Matson Navigation Company by the)
California Regional Water Quality)
Control Board, San Francisco Bay)
Region. Our File No. A-159.)

Order No. WQ 77-11

BY THE BOARD:

On August 17, September 21, and October 19, 1976, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board), conducted a public hearing regarding an oil spill to the Oakland Outer Harbor in Alameda County involving the vessel, "S.S. Hawaiian", owned and operated by Matson Navigation Company (Matson). The spill occurred on June 4, 1976, during refueling operations on the vessel.

At the conclusion of the public hearing on October 19, 1976, the Regional Board defeated 4-3 a motion to refer the matter to the Attorney General to seek civil monetary remedies. On November 16, 1976, the State Water Resources Control Board (State Board) received a petition for review of this matter from the Save San Francisco Bay Association (Petitioner). Comments were also received from the San Francisco Bay Chapter of the Oceanic Society and the Sierra Club, San Francisco Bay Chapter, in support of and joining the petition.

BACKGROUND

The "S.S. Hawaiian", owned and operated by the Matson Navigation Company, is primarily a container cargo ship which also carries fuel oil in its wing tanks for its own use and as cargo oil which is deposited upon reaching the Hawaiian Islands. The vessel's cargo is loaded in San Francisco once every month and it takes on fuel only in San Francisco Bay.

On June 4, 1976, the vessel was moored at the Matson terminal in the Oakland Outer Harbor. The vessel's oil tanks were empty as it had just come out of dry dock, and it was being refueled from a Standard Oil Company barge.

On board the "S.S. Hawaiian" were two relief engineers known as bunkering engineers, Mr. Metro Czaple and Mr. Allison Adams. These bunkering engineers are Matson employees who are hired out of the Union hall to supervise fuel transfer operations and enable the vessel's regular engineer to take brief shore leave. Mr. Adams and Mr. Czaple testified that prior to commencement of fuel transfer from the Standard barge they checked the wing tanks on the vessel to make sure the valves were closed, Mr. Czaple checking the port tank valves and Mr. Adams checking the starboard tank valves.

After one hour and ten minutes of refueling, it was discovered that oil was spilling onto the deck from a vent from the #10 starboard tank and was discharging over the side of the vessel into the waters of San Francisco Bay. It should be noted the S.S. Hawaiian's wing tanks are filled by a manifold piping system with a valve between the manifold and each of the tanks located along the port and starboard sides of the vessel. If any of the valves leading to the individual tanks are left open, oil in the manifold can enter that tank. Tanks other than the #10 starboard were being filled at the time of the spill. Upon discovery of the spill, the refueling operation was immediately halted. Subsequent investigation revealed that the valve to the #10 starboard tank was not completely closed, thus allowing oil to fill and overflow the tank and discharge from the vessel. The exact reason why this valve was not completely closed was not specifically identified during the hearing and was the subject of considerable discussion on which we will later comment.

It was estimated that approximately 3,000 gallons of bunker type fuel was discharged to San Francisco Bay.

DISCUSSION AND FINDINGS

Before proceeding to the principal issue of this petition, that of whether oil was intentionally or negligently spilled, we must examine another issue raised by Matson. In their letter dated December 23, 1976, in response to this

petition, Matson contends that the Petitioner has no standing to challenge the Regional Board action. The petition states that the Petitioner represents 20,000 members dedicated to the protection of San Francisco Bay. The Petitioner is well known for its efforts and concern regarding protection of San Francisco Bay. For example, it is a matter of record that the organization participated actively in the establishment of the Bay Conservation and Development Commission. Further, the State Board previously accepted and acted upon another petition by the same organization (State Board Order No. WQ 74-9). To find that this organization is not an aggrieved person and does not have standing pursuant to Water Code Section 13320 would impose an injustice on persons concerned with environmental protection. We find this contention to be without merit.

Matson further contends that even if the petitioner is an "aggrieved" person with standing, any such standing was waived by its failure to appear and participate in the public hearing before the Regional Board. We note that neither the petitioner, the Sierra Club, nor the Oceanic Society presented comment or testimony at the three public hearings. Further, the minutes of the three Regional Board meetings during which this hearing was held disclose that petitioner's representative was present at all three Regional Board meetings. The public hearing process is intended to elicit comments and testimony regarding public issues such as oil spills. Such hearings are the opportunity for

public agencies, organizations and individuals to express their concern and suggested action regarding water quality matters. We have some concern that the petitioner failed to participate in the hearing process, but we do not find that such participation was legally required in order for the Association to petition the State Board to review the Regional Board's decision pursuant to Water Code Section 13320. That Code section specifically refers to the right of any "aggrieved person" to petition the State Board. On the other hand, Water Code Section 13330 regarding appeal to the courts of decisions of the State Board limits the right of appeal to any "aggrieved party". We believe this distinction has a purpose and that its purpose is to provide adequate opportunity for all who are aggrieved by Regional Board decisions to seek relief at the State Board level whether or not they have actively participated in Regional Board hearings. We believe it would be an impossible task to demand that citizens groups participate actively in all Regional Board enforcement actions in order to request review by the State Board. As our regulations (Title 23, California Administrative Code Section 2050(b)) indicate, had the petitioner requested that the State Board hold a further hearing regarding this matter petitioner would have been required to demonstrate why evidence which it proposed to present to the State Board could not have been presented to the Regional Board. However, no further hearing has been requested. The petitioner has merely asked that the State Board review the record before the Regional Board and, based upon that record, refer the matter of the spill to the Attorney General.

Finally, even if we assume that the Petitioner does not qualify as an aggrieved person within the meaning of Section 13320, we have repeatedly exercised our right to review Regional Board actions on our own motion and to independently review the evidence related to petitions for review. This occurrence involves a significant spill of oil to the Oakland Outer Harbor and is an important water quality related issue. Consequently, we herein review the Regional Board record to determine the appropriateness of the Regional Board's action.

Any person who intentionally or negligently causes or permits oil to be deposited in or on waters of the State may be civilly liable. (See Water Code Sections 13350(a)(3) and 13385.) While no contention is made that this spill was intentionally caused, considerable testimony was received regarding whether the spill was negligently caused. This is the point on which this matter must be decided. Negligence is either the omission of a person to do something which an ordinarily prudent person would have done under the circumstances or the doing of something which an ordinarily prudent person would not have done under the circumstances. Consequently, the acts or omissions of Matson and its employees, Adams and Czapple, as they relate to the spill must be examined. Although the record discloses that Adams and Czapple were relief engineers under a rather unusual agreement with the Union, at no time does Matson contend that they were not employees

of the Company. It is legally well established that a Company such as Matson is responsible for the negligent acts of its employees.

This oil spill was caused by the fact that the valve to the #10 starboard tank was not completely closed, thus, allowing oil to fill and overflow the tank and discharge from the vessel. However, as previously mentioned, the exact cause of the valve not being completely closed was not specifically determined. Matson argued in the hearing that as sufficient facts were not presented or established regarding the exact cause, negligence was not established. We disagree. The record contains lengthy examination and discussion of the possible causes of this failure. The exact cause need not be identified with certainty, in order for the Regional Board to decide that a spill was negligently caused and to refer the matter to the Attorney General for enforcement.

The Regional Board staff testified that there were three likely explanations for the valve to the #10 starboard tank being open: first, that the engineers, Adams and Czapple, did not completely close the valve before the fuel transfer began; second, that there was a mechanical defect or a foreign object stuck in the valve; and third, that the valve was closed and that someone accidentally or intentionally opened the valve afterward.

First, we examine the possibility that Adams and Czapple did not completely close the valve. A letter dated July 28, 1976, from C. E. Luddy, Manager, Marine Operations, Matson Navigation, to the Commander, Twelfth Coast Guard District, which was entered into the record by the Regional Board staff (T. October 19, 1976 hearing at 15) states "It is apparent that this spill was caused by the oversight of one of the bunkering engineers assigned to the vessel by the MEBA (Engineers Union). He failed to completely close the valve to the No. 10 starboard tank while filling No. 2A P/S." Mr. Adams testified under oath that he closed the #10 starboard valve prior to fuel transfer operations. Mr. Czapple testified in a deposition taken by Regional Board staff September 10, 1976, that he checked the valve after the spill and felt that it was closed. However, Czapple's statement to the Coast Guard immediately after the spill was that he found the valve to be open a quarter turn. (Coast Guard Report, Exhibit E to Regional Board Executive Officer's Report and Testimony of Fish and Game Warden Russell, T. October 19, 1976 hearing at 24.) In addition there was conflicting testimony regarding whether the valve would have had to be open more than a quarter turn for the #10 tank to fill and overflow in approximately an hour's time. Counsel for Matson acknowledged this discrepancy in the testimony, proffered the opinion that the valve leading to the #10 tank must have been open more than a quarter turn and noted that Adams and Czapple had their interest to protect in that their licenses could

be revoked if they were found negligent in connection with the spill. Board Member Hyde observed that "obviously the valve was not closed" and Board Chairman Martini commented that the credibility of Adams' and Czaple's testimony "might be a little questionable" (T. October 19, 1976, hearing at 70). Mr. Meeder Attorney for Matson, responded, "I think there is some doubt". Clearly, the valve leading to the #10 starboard tank was open to a certain degree; enough to permit it to fill and overflow. It was the responsibility of the bunkering engineers to check each valve to ensure that only those leading to tanks which were intended to be filled were open. The only evidence in the record indicating that the valve to the #10 starboard tank was closed by the bunkering engineers was their testimony. However, the credibility of this testimony was brought into question as described above and we find that it could reasonably be concluded on the basis of the evidence presented to the Regional Board that the valve was inadvertently left open by one of the engineers.

As a second possible explanation for the spill, the Regional Board staff suggested that there might have been a mechanical failure or a foreign object may have been stuck in the valve. This explanation was favored by one of the bunkering engineers, Mr. Adams and he testified as follows:

"MR. ADAMS: Well, if you are asking me for my opinion as to why the valve was off it's seat, I would have to estimate that there was something, maybe some object that had lodged under the valve

seat, that when you turn the valve down, gave you the impression it was being seated when actually it was not. This would be my estimate of what happened, and this has happened in the past, and it's going to happen in the future. These tanks are large tanks, and the fuel that we put in there is sometimes replete with foreign matter; the tanks themselves sometimes scale, pieces of scale can get in the valve; rags, anything can get in the valve that will cause it to give you the impression that it's closed when it isn't, and if I had to make an estimate, I would estimate that something of this nature occurred." (T., August 17, 1976 at 5.)

Mr. Czaple's testimony also indicated that he has found rags, welding rods, and broken bolts on the valves when they have been opened a little wider (T. of Deposition, September 10, 1976 at 9). Consequently, it is also a possible explanation, that a foreign object in the valve prevented its complete closure. However, in view of the testimony of both bunkering engineers that objects do get lodged in the valves, it would appear reasonable for Matson to develop a system to indicate when the valves are seated. Mr. Czaple in his deposition stated that some of the valves do have indicators but that the bunkering engineers do not use them but, rather "go by feel" because "some of those indicators are not exactly right". (T. of Deposition September 10, 1976, at 13.) Mr. Adams in his testimony indicated that there are no pressure gauges or other indicators to warn the bunkering engineers when the tanks being filled are getting near the top but that the engineers rely to control the flow of fuel within the ship on a "sounding" device which they periodically insert in the tanks they

are filling to determine the level of oil in those tanks together with the procedure of systematically checking the valves on the tanks which are not to be filled to insure that those valves are closed. Since under the circumstances the procedure of checking the valves to make sure they are closed is so critical to the prevention of spills, it would appear reasonable for Matson to have an indicator on each valve and to insure that the indicators work properly.

Third, the staff suggested the possibility that the valve was closed and that someone opened the valve after it was checked by Mr. Adams. While Mr. Czaple testified that this was a possibility, this explanation was not supported as a probable explanation by any of the persons at the hearing. Even if this were possible, Matson had care and control of this working area and should have prevented such an occurrence.

In addition to the above explanations, counsel for Matson testified that Commander Mortenson, a Matson consultant, suggested that there may have been some "gummy, or dry, or hard oil", on the valve stem which would have made physical closing of the valve very difficult and would have loosened when the oil started to flow. This again seems a possible explanation. However, indicators on the valves, as discussed above, would warn the bunkering engineers of faulty operation of the valve under these circumstances also.

Although none of the above reasons were conclusively shown to be the cause of the spill, either failure to close the valve, a foreign object stuck in the valve or Commander Mortenson's explanation of a gummy residue on the valve, seem to be the most probable explanations. Each of these causes were within the control of Matson and its employees. Consequently, we find that Matson did not act as an ordinarily prudent person should have under the circumstances.

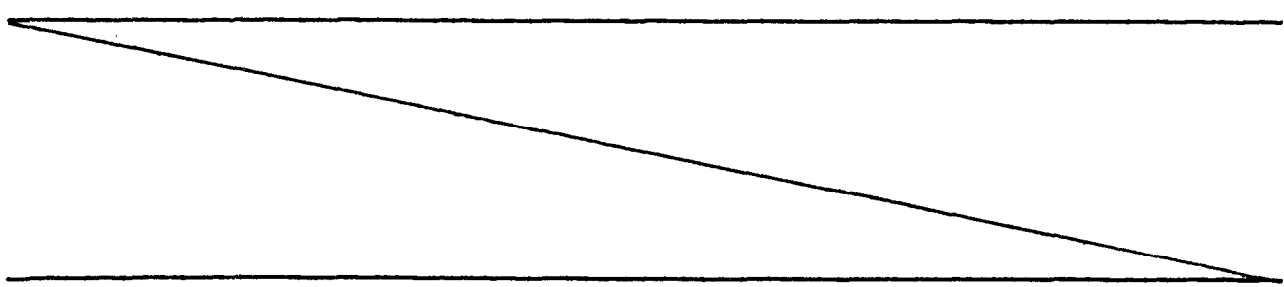
Matson also contends that even if negligence is found to have existed, the Regional Board properly exercised its discretion in not referring the matter for appropriate judicial action. The record discloses that the U. S. Coast Guard imposed a civil penalty which Matson paid and that civil action is currently being pursued by the Department of Fish and Game. Civil remedies for oil spills appear in several statutes and sometimes seem duplicative. However, while the Department of Fish and Game may seek restitution for loss of fish and wildlife, the Regional Board seeks enforcement action to protect many different and diverse beneficial uses of waters of the State. The nature of damages obtained by the Regional Board is well set out in People v. Superior Court (Port of Oakland), 127 Cal.Rptr. 122.

The record further discloses that the spill was promptly contained, and that the Department of Fish and Game and Matson

differ on the extent of damage caused by the oil spill and that Matson spent \$69,000 cleaning up the effects of the spill. While we commend Matson for taking prompt action in this matter, Water Code Section 13350(b) provides that the Court in determining the sum to be assessed, shall take into consideration all relevant circumstances including the extent of harm, the nature and persistence of the violation, the length of time over which the violation occurs and the corrective action taken. We think that these issues are primarily for the Court to consider and only secondarily for our consideration.

CONCLUSION

In view of all the circumstances, especially that Matson negligently caused or permitted the spill of oil, a pollutant, to waters of the State and the United States, we find that this matter should have been referred to the Attorney General for appropriate legal action. Although we are hesitant to conclude that the Regional Board action was inappropriate and improper, appropriate legal action must be sought for an oil spill of this magnitude and under these circumstances.



ORDER

IT IS HEREBY ORDERED that the Regional Board action was inappropriate and improper and we hereby refer this matter involving Matson Navigation Company to the Attorney General for appropriate legal action pursuant to Sections 13350(a)(3), 13385, and 13386 of the California Water Code.

Dated: *June 16, 1977*

/s/ John E. Bryson
John E. Bryson, Chairman

/s/ W. Don Maughan
W. Don Maughan, Vice Chairman

/s/ W. W. Adams
W. W. Adams, Member

/s/ Jean Auer
Jean Auer, Member