



16731
May 14, 2001

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV98001865
M/V [REDACTED]
[REDACTED]
\$500.00

Dear [REDACTED]:

The Hearing Officer, Coast Guard Pacific Area, Alameda, California, has forwarded the file in Civil Penalty Case MV98001865, including your appeal on behalf of Capt. [REDACTED], who served as the pilot aboard the Maltese Registered vessel [REDACTED] (Official Number [REDACTED]) on February 27, 1998. The appeal is from the action of the Hearing Officer in assessing a \$500 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC §2302(a)	Operating a vessel in a negligent manner that endangers life, limb or property of a person.	\$500.00

The violation is alleged to have occurred on February 27th, 1998 when the M/V [REDACTED] allided with Pier 3 of the [REDACTED] in the [REDACTED]. At the time of the allision, the M/V [REDACTED] was attempting to pass under the southern span of the [REDACTED] following its departure from the nearby [REDACTED]. Captain [REDACTED], a San Francisco bar pilot and licensed by the State of California, was directing the navigation of the M/V [REDACTED] at the time.

On appeal, you deny the violation and argue that there was a lack of substantial evidence to support the Hearing Officer's decision that Captain [REDACTED] was negligent in the operation of the M/V [REDACTED]. You assert that Captain [REDACTED]' defense was incorrectly categorized and contend that the case "involves the embarrassment of [REDACTED]'s navigation by her tug." You conclude that "the tug was solely at fault for the resulting allision." In addition, you assert that the Hearing Officer did not have jurisdiction over the matter because "exclusive jurisdiction" is given to "the States to control pilots and pilotage on foreign and U.S. flag vessels sailing State waters." You further contend that application of

Federal law “is erroneous as a matter of law and as such constitutes arbitrary and capricious agency action.” You maintain that “as a matter of fairness,” the “Coast Guard should be estopped from going against Captain [REDACTED] for a penalty. . .when the State Board of Pilot Commissioners has already acted.” Finally, you assert that the violation with which Captain [REDACTED] is charged is “vague and ambiguous and therefore unenforceable.” You contend that Captain [REDACTED] was not operating the vessel at the time of the incident but rather, was merely an advisor to the Master. Your appeal is denied for the reasons described below.

First, I believe a brief recitation of the facts surrounding this incident is in order. On February 27, 1998, in the late evening hours, Captain [REDACTED] was acting as the pilot of the M/V [REDACTED]. Using two tugs, the [REDACTED] and the [REDACTED], Captain [REDACTED] attempted to make a 180° left turn off the [REDACTED] to enable the vessel to head out to sea from the [REDACTED] using the 1,000 ft. wide southern crossing under the bridge. The tide was ebbing with a current of approximately 3 k. At approximately 1937, the M/V [REDACTED] allided with the center support of the [REDACTED], resulting in significant damage to both the bridge and the vessel.

Since jurisdictional issues may obviate review of other, substantive issues, I will first address your contention that the Coast Guard does not have subject matter jurisdiction to discipline a pilot licensed by the State of California pursuant to its administrative civil penalty process. Essentially, you argue that since 1789, the states have had exclusive jurisdiction over pilots and pilotage on state waters except in two situations not relevant to the facts of this case. This exclusivity is currently embodied in 46 USC §8501(a) and was the underlying premise of the 1974 case of *Soriano v. United States*, 494 F.2d 681, 1974 AMC 283. Arguing against a case relied upon by the Coast Guard holding that state pilots operating under their state authority are, in fact, subject to the Coast Guard’s civil penalty procedures, you claim that *Williams v. Department of Transportation*, 761 F.2d 1573 (11th Cir. 1986) “fails to advert to the specific language of preemption in 8502, 8503, and 9306.” Finally, under 46 USC §8501(a), you argue that a preclusion of the statute of the state’s exclusive rights must be specifically stated in the statute and that, as a consequence, “*Williams* is palpably wrong”. I disagree with your jurisdictional analysis for the reasons given below.

While *Soriano* clearly places limits on the Coast Guard’s authority to regulate State-licensed pilots, I am not persuaded that either 46 USC §8501 or *Soriano* restrict the Coast Guard’s civil penalty action in this case. Rather, I see *Williams* as being dispositive. *Soriano* and the other cases that you cited in your brief all pertain to the Coast Guard’s authority to suspend/revoke merchant mariner licenses, including those held by pilots, under the authority of 46 USC §239 (now 46 USC §7703). Under this section, the Commandant was authorized to establish rules and regulations regarding licensed officers for certain acts while “acting under the authority of their federal license”. The federal regulation at issue in *Soriano* defined this term rather broadly as including situations where the federal license was only required as a condition of employment. The *Soriano* court held that the Coast Guard regulation was invalid because it exceeded the authority provided by the statute. However, as *Williams* makes clear, *Soriano* does not stand for the proposition that State-licensed pilots are totally exempt from Coast Guard regulation, even for acts committed while not serving under the authority of their federal license. In *Williams*, a

State-licensed pilot sought to enjoin the Coast Guard from issuing a letter of warning following administrative civil penalty action that alleged negligent operation of a vessel under 46 USC §1461(d), the predecessor statute to 46 USC §2302(a). At the time, Captain Williams was not operating under the authority of his federal license. The Court of Appeals for the Eleventh Circuit ruled in favor of the Coast Guard and allowed the assessment of the penalty. Addressing the very issue you raise on behalf of Captain [REDACTED], the Court ruled that 46 USC §211 (the predecessor to 46 USC §8501) did not grant states the exclusive power to regulate pilots, but merely allowed state regulation until Congress provided otherwise. After examining 46 USC §1461(d), the Court found Congressional intent that pilots were at all times to be included within the ambit of the prohibition. In a footnote, the Court specifically found that Congress had clarified this area when 46 USC §211 was recodified as 46 USC §8501(a). Section 8501(a) begins with the clause of “[e]xcept as otherwise provided in this subtitle”. According to the Eleventh Circuit, since 46 USC §2302(a) is within “this subtitle”, Congress specifically provided the Coast Guard with the authority to take civil penalty action against pilots for negligence, regardless of what license they were operating under at the time. Thus, I do not find *Williams* “palpably wrong”. In fact, I find it controlling and I will uphold the Coast Guard’s jurisdiction to bring this civil penalty action against Captain [REDACTED].

I will now address your contention that the case file contains insufficient evidence to support the Hearing Officer’s decision to assess a civil penalty. Captain [REDACTED] is charged with negligently operating the M/V [REDACTED] on the night of February 27, 1998 under 46 USC §2302(a). As used in 46 USC §2302, negligence is the failure to use that care which a reasonable and prudent person would exercise under similar circumstances. It is the operator’s breach of that standard or reasonable care that results in the endangerment of life, limb, or property of a person and which constitutes a violation of 46 USC §2302. In addition, maritime law holds pilots, like Captain [REDACTED], to a higher standard of care than ordinary mariners because they assert that they are aware of the area’s topography, are familiar with any dangers in that area, and are competent to avoid those dangers and successfully navigate vessels through complex situations. See *Parks, The Law of Tug, Tow, and Pilotage* (2nd Edition, pp. 1022-1026). Finally, as noted by the Coast Guard investigating officer, there is a well-settled legal principle that a presumption of negligence arises when a vessel allides with a fixed object because under normal conditions and absent extraordinary factors, vessels under prudent navigation do not allide with stationary objects. *The Louisiana*, 70 U.S. 164, 173, 18 L. Ed. 85 (1866); *The Oregon*, 158 U.S. 186, 192-93, 39 L. Ed. 943, 15 S. Ct. 804 (1895); *Sehimeyer v. Romeo Co.*, 117 F.2d 996, 997 (9th Cir. 1941). The presumption stems from the well-established principle of admiralty law that a vessel, that is properly managed and controlled, does not normally allide with stationary objects. The presumption “has the effect of a prima facie case, placing the burden on the operator of the vessel to rebut the inference of negligent navigation.” *United States v. Merchant Mariner’s Document No. 438-78-4714, Decision of the Vice Commandant No. 2288, p. 7* (1983). Once the Coast Guard’s case establishes facts sufficient to invoke the presumption of negligence, the burden of going forward with sufficient evidence to negate the presumption shifts to the alleged violator. *Weyerhaeuser Company v. Atropos Island*, 777 F.2d 1344, 1348 (9th Cir. 1985). The operator must then refute the strong presumption by demonstrating that he acted as reasonable care required.

I find that the Hearing Officer was correct to conclude that Captain [REDACTED] was negligent in his operation of the M/V [REDACTED] on the night of February 27, 1998. The record clearly shows that Captain [REDACTED], as the pilot of the M/V [REDACTED], was in control of the vessel's navigation from the time it left the [REDACTED] until it allided with the [REDACTED] fendering system. As the pilot of the vessel, Captain [REDACTED] had the responsibility to ensure his complete knowledge of the vessel's maneuvering characteristics and any peculiarities or abnormal circumstances that could affect the vessel's safe navigation. I note that Captain [REDACTED] discussed the maneuver with the master and reviewed the Pilot Card. A pilot also has the duty to thoroughly know the area in which he is navigating, to anticipate current effects, and to set the vessel's speed with due consideration for the prevailing conditions. There is no doubt that Captain [REDACTED] was an experienced mariner with great familiarity with the area. I believe, however, that the case file contains ample evidence that Captain [REDACTED] should not have attempted to make a 180-degree turn to port immediately after leaving the [REDACTED]. There was a strong ebb tide that would have a significant effect on the vessel's navigation, a fact known by Captain [REDACTED] based on his conversation with the captain of the tug [REDACTED]. The M/V [REDACTED] was a single-screw vessel not equipped with bow thrusters. Because of its light draft, the vessel rode high and responded sluggishly. Captain [REDACTED] was aware of the sluggish handling long before the tug [REDACTED] went into "irons". Because of the close proximity of the bridge, this maneuver left little or no margin for error. Amazingly, Captain [REDACTED] never discussed his intent to make an immediate 180-degree turn off the dock with either of the tugs. Only after the M/V [REDACTED] was pulled free of the dock did the tug captains realize his intention. Finally, Captain [REDACTED] could have turned the vessel at nearby Dillon Point which would have afforded him the opportunity to turn the vessel under better circumstances and allowed him the luxury of better maneuvering speed as he approached the bridge. Based upon these facts, I find that not only was the presumption of negligence sufficiently invoked, but sufficient evidence of negligence itself was entered in the record.

Once the presumption is invoked, it is the responsibility of the respondent to go forward and produce more than cursory evidence on the presumptive matter. In fact, it must be shown that the M/V [REDACTED] was without fault. In Captain [REDACTED]' defense, you assert that the tug [REDACTED] was solely at fault for causing the allision with the bridge fendering system. It is the responsibility of the Hearing Officer to determine the credibility and reliability of evidence and witness statements. In this case, the Hearing Officer did not find credible evidence that the [REDACTED] was the sole fault of this incident. Neither do I. Initially, there is absolutely no evidence to indicate mechanical problems with any of the involved vessels or failures to communicate. Captain [REDACTED] was, at all times, issuing commands to each of the tugs that were being obeyed. It was Captain [REDACTED] who issued the command to the [REDACTED] for her to back full astern when the M/V [REDACTED] was perpendicular to the dock. It was at this time that the [REDACTED] began to fold. Eventually, the [REDACTED] wound up ahead of the M/V [REDACTED], facing it bow on. While you claim the [REDACTED] "placed herself" in this position, the evidence is clear that it was a direct result of the order given by Captain [REDACTED]. He, and he alone, was the person in charge of performing this maneuver. In Enclosure 3 to the Coast Guard's investigative file, I note that at no time did Captain [REDACTED] place any blame on the [REDACTED]. He also indicated

that his command of hard starboard while in Position 5 was given for the purpose of stopping the swing of the vessel. There is no mention in this statement about a concern of running over the [REDACTED]. Nor is there any indication in this statement that the [REDACTED] was pushing on the port bow of the M/V [REDACTED] as it attempted to once again come to port. In fact, Captain [REDACTED] stated on page 5 of his statement that at this point, the vessel was “being set down on the bridge by the current.” Based on the foregoing, I do not find that this incident was the sole fault of the tug [REDACTED]. Rather, it was the direct consequence of the commands and actions of Captain [REDACTED] as he left the dock.

In your appeal, you also raise the point that the Hearing Officer incorrectly categorized your defense as an unavoidable incident. While I acknowledge that that was not your contention, I nonetheless find that the Hearing Officer’s incorrect classification of your defense was harmless error and not prejudicial to Captain [REDACTED]’ rights. Even if the Hearing Officer had not made this error, Mr. [REDACTED]’ argument would not have prevailed.

You also contend that a state pilot is not a person operating a vessel within the meaning of 46 USC §2302(a). You cite California law indicating that a pilot is a “servant” of the vessel and its owner and operator. Contrary to your contention, a pilot is more than a mere “advisor” or “servant” to the vessel master. The popular misconception that a pilot is a mere advisor to the master is without substantial foundation either historically, or legally. This is perhaps best summed up as follows:

Since the pilot is clothed with an aura of competency, he must bear the burden of fulfilling that obligation with proficiency. He is required to possess qualities of expertness and dexterity in the domain of his pilotage area and he must use careful navigation skill in the performance of his duties. Upon his failure to possess the requisite skills, or if possessing them he neglects to use them, he is held liable for any injury or damage caused thereby Stated simply, since he is considered an “expert” or a “specialist”, he is held to a higher degree of care by reason of his proficiency. Parks, The Law of Tug, Tow, and Pilotage, p, 1025 (1982).

There is no question that the master of a vessel is in command of that vessel and is at all times ultimately responsible for its safety. However, there also is no question that the pilot, while acting in that capacity, is in direct control of the ship’s navigation and supersedes the master in that respect until such time as the master, asserting his overall command authority, relieves the pilot of his duties and authority, or, by his action countermands his orders. Although he may be relieved by the master, the pilot is the master *pro hoc vice* charged with the safety of the vessel and cargo and the lives of those onboard. There is a substantial volume of case law supporting this position. See, e.g., *Cooley v. Board of Wardens*, 12 HOW (US) 299 (1891); *Ralli v. Troop*, 157 U.S. 386, (1894); *Union Shipping v. U.S.*, 127 F.2d 771, 775 (2d Cir. 1942); *Barbey Packing v. The Stavros*, 169 F. Supp 987, 901 (D. Ore. 1959); *U.S. v. SS President Van Buren*, 490 F.2d 504, 506 (9th Cir. 1973).

I realize that the word “pilot” is not specifically mentioned in 46 USC §2302. However, the word “operator” is contained within the section. As mentioned above, there is no doubt that Captain [REDACTED] was operating the M/V [REDACTED] at the time of the allision. This point is also made clear in the *Williams* case discussed above. Any constitutionally infirmity regarding any alleged failure on the part of the Coast Guard to better define the term “person operating a vessel” is beyond the power of this administrative process.

I will now discuss your final contention that the federal proceedings against Captain [REDACTED] should be barred under the doctrine of collateral estoppel and double jeopardy. You contend that because the California Board of Pilot Commissioners (most specifically the IRC) disciplined Captain [REDACTED] for negligence or misconduct, the Coast Guard is estopped from disciplining him for the same actions. You contend that the State Board is the virtual representative of the Coast Guard and that, therefore, their “involvement in investigating and disciplining pilot negligence or misconduct is ‘sufficiently similar’ to collaterally estop the Coast Guard. . . from going against Captain [REDACTED]” on the same issues decided by the State Board. I disagree with your contention and agree with the Hearing Officer’s decision that the Coast Guard’s action in this case is in no way barred by any proceeding in the related state action. The waters surrounding the [REDACTED] are subject to concurrent Federal and state jurisdiction. As a consequence, the Coast Guard has jurisdiction to assess a civil penalty against Captain [REDACTED] without regard to any action by the State of California, especially one that was against the license issued to Captain [REDACTED]. Nor does a federal prosecution of the same conduct, subsequent to state prosecution, offend the double jeopardy clause. The dual sovereignty possessed by the state and the federal government over matters involving pilots allows the exercise of concurrent jurisdiction by both entities. The dual sovereignty doctrine holds that the double jeopardy clause “does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense. *United States v. A Parcel of Land, Etc.*, 884 F.2d 41,43 (1st Cir. 1989). The facts in this case certainly do not rise to the level of criminal action.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that Mr. [REDACTED] is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of \$500.00 rather than the \$1100.00 maximum permitted by statute appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$500.00** 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 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % 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,

//S//

DAVID J. KANTOR

Deputy Chief,

Office of Maritime and International Law

By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center