



16731
January 30, 2002

[REDACTED]
[REDACTED]
[REDACTED]

RE: MV99002853
[REDACTED]
UNNAMED ([REDACTED])
\$1500.00

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV99002853, which includes your appeal as owner/operator of the unnamed Waverunner (jet ski) numbered [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$2700.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 173.27(a)(1)	Failure to have vessel's number, as required by 173.15, painted on or permanently attached to each side of the forward half of the vessel.	\$100.00
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate of Number or temporary certificate on board.	WARNING
33 USC 2033(b) (Rule 33)	Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length.	WARNING
33 USC 2020(b) (Rule 20)	Failure to comply with rules concerning lights and shapes (sunset to sunrise); no others exhibited which might be mistaken, impair, etc...	\$100.00
33 CFR 95	Operating a vessel while	\$1500.00

	intoxicated.	
19 USC 1581(d)	Failure to stop vessel for boarding when signaled by vessel employed by Customs.	\$1000.00

The violations were observed on June 4, 1999, when Coast Guard boarding officers conducted a routine boating safety inspection of your jet ski while it was underway in the MacKay River, near Brunswick, Georgia.

On appeal, you contest the alleged violations of 33 CFR 95 and 19 USC 1581(d). While you do not address the remaining violations, I have reviewed the entire record for substantial evidence in support of the Hearing Officer's conclusions. Your appeal is granted, in part, and denied, in part, for the reasons described below.

I will begin by addressing the Coast Guard's contention that you operated your jet ski under the influence of alcohol on June 4, 1999. 33 CFR 95.020 makes clear that, for the purposes of Coast Guard regulation, a person may be deemed intoxicated if "[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." The Coast Guard Field Sobriety Test Performance Report indicates that you had a moderate odor of alcohol on your breath, your face was flushed and your eyes were watery. The statements of three Coast Guard boarding officers further indicate that, during the boarding, you were uncooperative and disruptive. Furthermore, you admitted to having at least one alcoholic beverage prior to your operation of the vessel. Under 33 CFR 95.040 if an individual refuses to submit or cooperate in the administration of a timely chemical test when directed by a law enforcement officer, based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and the individual will be presumed to be intoxicated. That presumption is however, a rebuttable one. In the light of the facts contained in the record, I am not persuaded that the presumption was sufficiently rebutted.

You contend that on the evening of the incident you had "1 beer. . . 2 hours ago" and that you refused to submit to field sobriety tests because "this guy [boarding officer [REDACTED]] was embarrassing, harassing, and belittling" you in front of your family and friends. You assert that "you couldn't deal with officer [REDACTED]" after he requested that you submit to sobriety tests and contend that you would have taken "whatever test that they needed [you] to take when the police and his boss arrived." You further assert that you could not have been intoxicated because you climbed "on and off the jet ski and read out numbers and [held] up a ski while in the water." You also mention that, sometime during the boarding, the Coast Guard vessel hit your foot causing bruising and a skin abrasion. You indicate that, due to harassment by BM2 [REDACTED], you requested that EMS come and check the condition of your foot. You assert that it was not "something [you] would have. . . done if it hadn't been for the harassment that [you] were getting from officer [REDACTED]." You note that you told both the police and BM2 [REDACTED]'s Commanding Officer that you would be happy to take a sobriety test but

that “both said it was not necessary.” Finally, you contend that you signed the boarding report—indicating that you acknowledged all violations—even though you were not informed of the BWI charge because it was dark at the time and you could not see the violations listed on the document. You note that, while BM2 [REDACTED] discussed all the charges that you do not contest, he did not mention either the BWI charge or the fleeing charge, implying that you would not have accepted the violations had you been so informed.

The written evidence that you presented to the Hearing Officer clearly indicated that you have achieved compliance with 33 CFR 173.27(a)(1), 33 CFR 173.21(a)(1), and 33 USC 2033(b) (Rule 33). However, you have presented no evidence, other than your letters of August 7, 1999, September 1, 1999, and October 16, 1999, to rebut the Coast Guard’s presumption of intoxication. Your statements reflect a vastly different incident than those reflected in the statements of the three Coast Guard members present during the boarding. Those statements all evidence that you were uncooperative during the boarding and that an odor of alcohol was evident on your breath. The statements of BM2 [REDACTED], SA [REDACTED], and FN [REDACTED] collectively indicate that, when first asked whether you had been drinking, you avoided the question and began bantering about the Coast Guard “taking the fun out of jet skiing” by boarding vessels. Their reports indicate that you became increasingly uncooperative when asked to take sobriety tests. According to your version of the events, after beaching your vessel, against the direct orders of the Coast Guard, you began to complain about your injured foot, simply to avoid BM2 [REDACTED]’s harassment. The Coast Guard statements indicate, however, that when asked whether you needed EMS attention, you responded, “it depends on what you are going to do.” The Coast Guard boarding officers took this comment to imply that your request for medical attention centered on whether you would be compelled to submit to sobriety tests. To the contrary, you indicated that you would have been willing to take a sobriety test if it was administered by either a police officer or BM2 [REDACTED]’s Commanding Officer. The record indicates, however, that when you were asked to take a sobriety test by [REDACTED], the officer in charge of BM2 [REDACTED]’s station, you refused to do so. At that time, Mr. [REDACTED] reportedly explained to you, and you have not denied, that refusal to submit to a sobriety test would result in a presumption of intoxication.

It is clear that you were made aware of the Coast Guard’s presumption of intoxication during the boarding of your vessel, and that, even with knowledge of the presumption, you failed to take the required tests. It is my opinion that while the presumption created by your refusal to submit to the chemical test is a rebuttal one, that presumption simply has not been overcome by the evidence that you have provided on your behalf. By electing to not take the tests, you voluntarily placed yourself in the position of having the presumption operate against you. Once the presumption was created, the burden to provide substantial evidence to rebut the presumption rested with you. While your statements support your version of the incident, the Coast Guard Boarding Report and the signed statements of the Coast Guard Boarding Officers offer a view of the incident and of your behavior that is decidedly different. In light of the statements of the boarding officers and the CG-4100 Boarding Report, I am not persuaded that the Hearing Officer erred when he found the presumption was not sufficiently rebutted by your own self-serving statements. Furthermore, for the purposes of 33 CFR 95.020(c), as discussed above, there is enough evidence in the record to find you intoxicated absent the Coast Guard’s presumption. Therefore, I find the violation proved and will not mitigate the penalty.

You next contend that a violation of 19 USC 1581(d) did not occur. You assert that the Coast Guard's assertion that you were "fleeing" the scene was "ludicrous" and add that "in no way shape or form should. . .[you]. . .have received a ticket for fleeing a Coast Guard boat." 19 USC 1581(d) makes clear that "[a]ny vessel or vehicle which. . .is directed to come to a stop by any officer of the customs, or. . .any vessel employed in the service of the customs and displaying a proper insignia, shall come to a stop, and upon failure to comply a vessel or vehicle so directed to come to a stop shall become subject to pursuit and. . .be liable to a penalty of not more than \$5,000 nor less than \$1,000." In your letter of August 7, 1999, you assert that, after being in the water for 45 to 55 minutes, you informed the Coast Guard that you were taking your boat back to shore and that you asked them to follow you. You comment that you were only taking your boat "150 yards to [your] family" and further add that you "never once touch[ed] the gas" and that you "just idl[ed] back to shore." This is a serious offense and requires a minimum civil penalty of \$1,000.00. In view of the fact that the Hearing Officer originally incorrectly reduced this charge to a warning and the fact that no specific evidence indicates an intent on your part to evade the Coast Guard boarding, I will dismiss the charge.

Although you do not deny the violation of 33 USC 2020(b) (Rule 20), I find the penalty imposed inappropriate under the facts of this case. 33 USC 2020(b) makes clear that "[t]he rules concerning lights shall be complied with from sunset to sunrise." The record indicates that the Coast Guard initially stopped you because you were observed operating your vessel approximately 30 minutes before sunset without navigation lights. According to the language of the statute, you were not in violation at the time that the Coast Guard boarded you. Your letter of August 7, 1999 indicates that, before the boarding, you had begun to "load everything up" and that you were "headed back to shore" when the Coast Guard approached you. The record furthering indicates that, although your vessel was not equipped with navigational lights, you were kept in the water for approximately 45-50 minutes to facilitate the boarding. Although you did, in fact, operate your vessel after sunset, I am not convinced that you would have done so absent the Coast Guard boarding. Therefore, while I find the violation proved, I will mitigate the penalty to a warning.

Finally, I note that you were charged with a violation of 33 CFR 173.27(a)(1). Although you have not denied this violation, I will, however, mitigate the penalty assessed to a warning. As has already been stated, the record indicates that you have achieved compliance with the regulation at this time and, given the remedial nature of the civil penalty process, I am content that a warning is the appropriate penalty under the circumstances of this case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that you are the responsible party. I find the penalty of \$1,500.00 rather than the \$23,200.00 maximum permitted by statute appropriate in light of the seriousness of the violation. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$1,500.00** 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 (GC-HO)
Commander, Finance Center (OGR)