

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
United States Coast Guard
Thirteenth Coast Guard District

915 Second Ave
Seattle, WA 98174-1067
Staff Symbol: (m)
Phone: 206-220-7210
FAX: 206-220-7225

16711
June 10, 2005

Michele Longo Eder
Attorney at Law
4 SW High Street
P.O. Box 1530
Newport, OR 97365

Dear Ms. Eder:

This is in response to your letter dated May 10, 2005, in which you request an exemption for the Western Shrimp Alliance fleet from the requirement that "a watch be stood while drifting when a [NMFS] observer is on board." You state in your letter, that "while this is an appropriate rule for vessels that are actually underway, it is not practical or in practice by the fleet during drifting." Finally, you forward the recommendation of the Western Shrimp Alliance that a rule be implemented that requires the use of radar alarms as opposed to "attempting" to prohibit drifting. This letter will address these issues, highlighting decisional precedent in the federal courts.

First, with regard to the requirement of a live watch, federal law and federal regulations, 33 U.S.C. §§1602, 1603; 33 C.F.R. § 80.01, require all vessels subject to the jurisdiction of the United States, while on the high seas, to comply with the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS). Rule 5 of the International Regulations specifically states that "every vessel shall at all times maintain a proper look-out by **sight and hearing** as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision." Indeed, *Granholt v. The TFL Express*, 576 F.Supp. 435 (S.D.N.Y. 1983) recognized the breadth of the requirement of keeping a proper lookout, faulting a solo trans-Atlantic sailor for failing to keep a lookout while he slept at night, noting that the single-handed sailor was not exempt from the requirements of prudent seamanship. Similarly, the owner of a small pleasure craft, which collided with a barge in tow, was found negligent for failing to ensure that a proper lookout was maintained at all times; the court noted that "the obligation to maintain a proper lookout falls upon great vessels and small alike." *In the Matter of Interstate Towing Co.*, 717 F.2d 752 (2nd Cir. 1983). In addition, Rule 2 of the International Regulations states that "nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seaman, or by the special circumstances of the case."

Second, the common practice of the Western Shrimp Alliance fleet, as stated in you letter, of drifting at night while the crew sleeps, was specifically found to be an unacceptable practice by

the Court in *Lentz v. M/V Eastern Grace*, CIV. No. 85-1078-FR, 1988 WL 135809 (D.Or. Dec. 2, 1988). In this case, a fishing vessel off the coast of Newport, Oregon was involved in a collision during early morning hours while the crew slept; the owners of the fishing vessel testified that the custom and practice of fishermen in the area was to sleep at night while the vessel drifted, and that having a live watch would be financially undesirable. *Id.* at *2. While the court expressed sympathy to the financial problems that fishermen face, it asserted that “the obligation to maintain a proper lookout at sea is of such importance that the testimony that it is an economic hardship for small vessels to maintain a proper lookout does not ameliorate the negligence of the [vessel name omitted] in intentionally violating the duty to keep a lookout.” *Id.* at *5.

Finally, with regard to the recommendation that “use of radar alarms be required in lieu of attempting to prohibit drifting,” you mention that the “rule of the road” requiring every vessel on international or inland waters to maintain a proper lookout predates the existence of alarms on radar, inferring that radar alarms can now adequately relieve a vessel master of the responsibility to maintain a lookout. I would again refer you to the specific language of Rule 5, that “every vessel **shall at all times maintain a proper look-out by sight and hearing** as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.” This language does not imply that the master of a vessel is allowed to solely rely upon his radar system, but rather that he employ all available means, which would include the use of radar. In fact, the over-reliance on radar, to the exclusion of the watchful eyes of a seaman would be dangerous and in conflict with basic principles of prudent seamanship. Furthermore, such practice is in direct violation of the International Regulations.

Federal courts have held that liability for damage in marine collision cases is allocated among the parties proportionately to the comparative degree of their fault. *Granholm*, 576 F. Supp. at 450; *Lentz*, 1988 WL 135809, at *4. Further, when a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster; in such a case, the burden rests on the ship of showing not merely that her fault may not have been one of the causes, or that it probably was not, but that it could not have been. *In the Matter of Interstate Towing*, 717 F.2d at 756.

In suspension and revocation proceedings, adequacy of a lookout on board a vessel underway is a question of fact to be resolved under all existing facts and circumstances by the Administrative Law Judge. The issue of a proper lookout was addressed in Commandant Decision on Appeal No. 2046 (HARDEN). There it was stated that: "...the general rules of navigation call for an adequate lookout and the general standards of prudent navigators determine as negligent the operator or pilot who in the most favorable conditions of weather and visibility runs into a craft encountered in the usual course of operation without even being aware of its existence." *See also*, Commandant Decision on Appeal No. 2319 (PAVELEC).

As stated in Commandant Decision on Appeal No. 2390 (PURSER), although not an element of negligence, the fact that the violation of the 72 COLREGS (International Regulations) contributed to the collision is an aggravating circumstance which may be pleaded and proved. When a vessel collides with another following a violation of the statutory Navigation Rules, the causal connection is presumed without further proof. *The Pennsylvania*, 86 U.S. 125 (1873); Commandant Decision on Appeal 2358 (NBUISSET) and 866 (MAPP), and 2390 (PURSER).

As you are undoubtedly aware, the practice of drifting at night without a proper lookout could result in criminal and/or civil penalties. For example:

- Misconduct, negligence or inattention to duties by vessel captain resulting in loss of life is a Class C Felony punishable up to 10 years in jail and/or a \$250,000 fine. 18 U.S.C. § 1115
- Operating a vessel in a grossly negligent manner that endangers life, limb or property of a person is a Class A misdemeanor punishable up to 1 year in jail and/or a \$100,000 fine. 46 U.S.C. § 2302(b).
- Violation of the the International Regulations may result in a \$6500 civil penalty per violation. 33 U.S.C. §1608(a); 33 CFR § 27.3
- Operating a non-recreational vessel in a negligent manner so as to endanger life limb or property of a person may result in a \$25,000 civil penalty. 46 U.S.C. §2303(a).

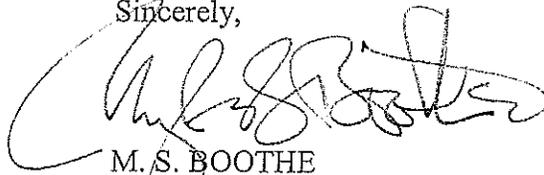
The Coast Guard would agree that fatigue can be a major problem aboard commercial fishing vessels. The master of a uninspected commercial fishing vessel is responsible for adequate manning and establishing adequate watches aboard the vessel. When establishing the manning and watch for a specific vessel the master must ensure that the watch system is sufficient to ensure compliance with the navigation rules and potential fatigue factors. You described a common practice where shrimp vessels turn off the main engine and leave the generator on while the entire crew sleeps with deck lights and mast lights left on, as well as alarms set on the radar. This practice is not only in direct violation of the International Regulations, but also presents an extremely hazardous situation, and indicates that the masters of vessels engaged in such practice should either adjust the watch rotations or add additional members to the crew in order that the vessel may be operated in a safe manner. The duty of keeping a proper lookout is "often termed the first rule of seamanship," S. Rep. No. 979, 96th Cong., 2nd Sess. 7-8 (1980), reprinted in 1980 U.S. Code Cong & Admin News 7068, 7075 (Discussing Inland Rule 5 which is identical to International Regulation 5).

In sum, an amendment to 33 U.S.C. § 1603 and 33 C.F.R. § 80.01 would be necessary to exempt Western Shrimp Alliance from complying with the lookout requirement. Moreover, even if it were possible for me to grant a waiver, I could not in good conscience endorse any practice that ignores such a basic seamanship rule as providing a proper lookout. If you have questions or

Response to exemption request from Western Shrimp Alliance
June 10, 2005
Page 4

concerns please contact Mr. Dan Hardin, Thirteenth Coast Guard District Fishing Vessel Safety Coordinator at (206) 220-7226.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. S. Boothe', written over a large, faint circular stamp or watermark.

M. S. BOOTHE
Captain, U.S. Coast Guard
Chief, Marine Safety Division
By direction of the Commander,
Thirteenth Coast Guard District

Copy: Senator Gordon Smith
Senator Ron Wyden
Representative Brian Baird
Representative Peter DeFazio
Representative Darlene Hooley
Representative David Wu
Coos Bay Trawlers
Shrimp Producers Marketing Cooperative
Western Shrimp Alliance
Bay Ocean Seafoods
Jesse's Illwaco Seafoods