



[REDACTED]
[REDACTED]
[REDACTED]

16780
February 02, 2009

RE: Case No. 2741247
[REDACTED]
[REDACTED]
\$200.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 27412747, which includes your appeal as owner/operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$200.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 25.30-5(b)	Fire extinguishing equipment on board vessel was not of an approved type.	Warning
33 CFR 175.25	No person may operate a recreational vessel in violation of a State statute or rule requiring children within that State to wear an appropriate Coast Guard approved PFD.	\$100.00
33 CFR 175.19(a)	Each Coast Guard approved Type I, II, or III personal flotation device as required by 175.15 or 175.17 was not readily accessible.	\$100.00

The violations are alleged to have occurred on July 22, 2006, after Coast Guard boarding officers conducted a boarding of the [REDACTED] while it was being operated on the Tchefuncta River, near Madisonville, Louisiana.

Although your initial appeal letter does not address the violations specifically, but rather, objects to the fact that a hearing was not scheduled in the matter, a subsequent document contained in the record shows that you contest only the PFD violations. To that end, you contend that your

seven year old son was not wearing a life jacket because you “had just launched...[your]...boat,” were in a “no wake zone and was in the process of putting sun screen on...[your]...son to prevent a sunburn.” In the same vein, you assert that “[s]ince...[your]...vessel was not underway and...[you]...were sitting in a no wake zone...[you]...don’t think this should be grounds for a ticket.” Your appeal is denied for the reasons set forth below.

Before I address the violations at issue, I will address both the intent of the Coast Guard’s civil penalty process and the procedural progression of the case. The Coast Guard’s civil penalty program is a critical element in the enforcement of numerous marine safety, security, and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. Procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded due process during informal administrative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and upheld in Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

I will now discuss the procedural progression of the case. The record shows that the Hearing Officer issued her Preliminary Letter of Assessment in the case on December 20, 2007. In addition to describing the alleged violations, stating the maximum penalties available for those violations, and informing you that the Hearing Officer had found *prima facie* evidence of the violations in the record, the Hearing Officer informed you that, in accordance with the procedures set forth in 33 CFR Part 1.07, you would have thirty days from receipt of that letter to either admit the penalties and pay the penalty amount initially assessed, submit written evidence in lieu of a hearing, or to submit a written request for a hearing in the case. The record shows that you failed, in all respects, to respond to the Hearing Officer’s initial notification and, as a result, after leaving the case open for significantly longer than the thirty-day period required by Coast Guard regulation, the Hearing Officer issued her Final Letter of Decision in the matter on March 30, 2008. Via that letter, the Hearing Officer informed you that because you had failed to respond to his Preliminary Letter of Assessment, the preliminarily assessed penalty was assessed as the final penalty in the case. The record shows that, upon receipt of the Hearing Officer’s Final Letter of Decision, you wrote to the Hearing Officer and bemoaned the fact that you had not been afforded a hearing in the case even though you had “called to request a hearing” and “got...an answering machine.” The record shows that after the Hearing Officer received your letter, she issued a general notification to you on May 21, 2008. In that letter, the Hearing Officer advised you, as had the Preliminary Letter of Assessment, that because your request for a hearing had not been raised in writing, it was not appropriately made. Since the applicable procedural regulations state that “[a] hearing must be requested in writing,” I do not find that the Hearing Officer erred in so stating. *See* 33 CFR 1.07-25(a). Irrespective of that fact, however, the Hearing Officer afforded you an additional 20 days to allow you to provide issues that you wished to see considered on appeal. You availed yourself to the Hearing Officer’s request and, via a letter dated, June 16, 2008, outlined the issues that you wished to see raised on appeal. Accordingly, I do not find that your due process rights have, in any way, been prejudiced by the administration of this case.

As the Hearing Officer informed you via her letter dated May 21, 2008, because the applicable regulations mandate that only issues that have been properly raised before the Hearing Officer and jurisdictional questions may be raised on appeal, and the record shows that you did not submit any issues to the Hearing Officer for consideration prior to the issuance of a final decision in the matter, your right to have such issues considered have been waived. *See* 33 CFR 1.07-70(a). Irrespective of that fact, however, in the interest of fairness, I have reviewed the entire record with the issues that you raised following the Hearing Officer's Final Letter of Assessment in mind to ensure that there is substantial evidence in the record to support the Hearing Officer's decision with respect to the violations.

In that vein, I will now address the violations at issue, beginning with the alleged violation of 46 CFR 25.30-5(b). 46 CFR 25.30-5(b) states that "[a]ll hand portable fire extinguishers, semiportable fire extinguishing systems, and fixed fire extinguishing systems shall be of an approved type." 46 CFR 25.30-10(g) identifies specific maintenance and inspection requirements to aid vessel operators in ensuring that required fire extinguishers remain in "good and serviceable condition." As such, if specified maintenance and inspection requirements are not met, the fire extinguisher will not be "good and serviceable" and, therefore, will not be of an approved type. 46 CFR 25.30-10(g)(4) further states that "[i]f there is evidence of damage, use or leakage...the container shall be replaced with a new one and the extinguisher properly serviced or the extinguisher replaced with another approved extinguisher." The Coast Guard Activity Summary Report, contained in the record, shows that when the boarding at issue here occurred, the boarding officers saw that your fire extinguisher was "used." Given this evidence, and the fact that the record shows that you have not denied that the violation occurred, I find that there is substantial evidence to support the Hearing Officer's determination that the violation occurred and I will not dismiss the warning assessed by the Hearing Officer for the violation.

I will now address the Personal Flotation Device (PFD) violations. The record shows that you have been charged with two distinct PFD violations: 1) that you were operating a vessel with an individual on board (your young son) who was required to wear a PFD at all times, and was not wearing one and 2) that your son's PFD was not "readily accessible." As I have already stated, on appeal, you contend that the PFD violations should not constitute "grounds for a ticket" because your vessel was not underway at the time that the boarding occurred (and was sitting in a no wake zone) and your son was only temporarily without a PFD because you were attempting to put sunscreen on him.

Under 33 CFR 175.25, if a "State statute establishes any requirement for children of a certain age to wear an appropriate PFD," that requirement "applies on the waters subject to the State's jurisdiction." Since Louisiana law (R.S. 34:851.24(F)(2)) mandates that every person twelve years or younger wear a Coast Guard approved life jacket or life preserver while onboard a vessel that is underway, and the record shows that your seven year old son was observed aboard the vessel while not wearing a PFD, if the record supports a conclusion that your vessel was "underway," the violation must be found proved. Under the Inland Rules, a vessel is "underway" when "it is not at anchor, or made fast to the shore, or aground." *See* 33 USC 2003(h). Since you admit that you "had just launched" your vessel and state that you were "in a no wake zone," the record shows that you were neither at anchor nor made fast to the shore. Accordingly, although you disagree, your vessel was "underway" under the laws of the United

February 02, 2009

States and the Hearing Officer was correct to conclude that a violation of 33 CFR 175.25 occurred and I will neither mitigate nor dismiss the \$100.00 penalty assessed by the Hearing Officer for the violation.

Finally, I will address the alleged violation of 33 CFR 175.19(a). 33 CFR 175.19 states that “no person may use a recreational boat unless each Type I, II, or III PFD...is readily accessible.” The Enforcement Summary Report, contained in the record, shows that at the time of the boarding, your “PFD for child was not in the immediate area” and that you “had to search for [the] child’s PFD.” Since you do not deny this occurrence, I find substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and I will neither mitigate nor dismiss the penalty assessed by the Hearing Officer for the violation.

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. For the reasons discussed above, the decision of the Hearing Officer was neither arbitrary nor capricious and is hereby affirmed. Moreover, I find the \$200.00 penalty assessed by the Hearing, rather than the \$2,200.00 maximum permitted by statute to be appropriate under the circumstances of the case.

Payment of **\$200.00** 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. Payment should be directed to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.0% 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, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center