



[REDACTED]  
[REDACTED]  
[REDACTED]

16780  
07 July 2008

RE: Case No. 2066888  
[REDACTED]  
[REDACTED]  
\$600.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2066888, which includes your appeal as owner/operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing an \$800.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
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.	\$50.00
46 CFR 25.30-20	Failure to have all required fire extinguishing equipment on board a vessel.	Dismissed
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.	\$150.00
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$600.00

The violations were first observed on March 22, 2003, when Coast Guard boarding officers conducted a boarding of your vessel while it was underway on the New Canal, near New Orleans, Louisiana.

On appeal, you contest only the alleged violation of 46 USC 2302(c) and, indeed, have provided a check to pay the penalties assessed for the other violations assessed during the relevant

boarding. With regard to the boating under the influence charge, you contend that the Hearing Officer's finding that you committed the violation was "based upon a very subjective assessment made by the boarding officer, with no objective standards for administrative field sobriety test and evaluating behavior, since there was no established benchmark of...[your]...behavior against which...[you]...could be measured." As a result, you conclude that you "recited the alphabet without mistake, and negotiated the warped decking boards along the dock as well as anyone could" and add that when you were subsequently transferred over to the custody of the New Orleans police department, a "BAC test [was] swiftly administered...[and]...resulted in a 0 reading." You further noted that the New Orleans Police Department did not "ticket" you after the relevant incident and, in so stating, imply that the instant Coast Guard action is, by virtue of that fact, unsupported by the evidence of record. You further attack the evidence presented by noting that "[t]here is no evidence of impaired operation of...[your]...boat" and insist that the Coast Guard lacked "probable cause" to conclude that you operated your vessel while under the influence of alcohol. You further assert that the operative operating while intoxicated regulations "is unconstitutional as applied, since it casts any accused as guilty without objective criteria...[and imposes]...a vague standard that fails to safeguard anyone's constitutional guarantee to due process." Finally, you note that the "charge is a grave strike against...[you]...and...[your]...record" and add that you "intend to mount a vigorous defense." In so stating, you request that I "set" your case for an "evidentiary hearing in a convenient forum...in New Orleans, so that...[you]...can appear to demand...[the Coast Guard's]...proof." Your appeal is denied for the reasons discussed below.

Before I address your appeal arguments, I believe that it would be beneficial to briefly address both the intent of the Coast Guard's civil penalty process and the applicable procedural regulations. The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety 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 administrative due process during informal adjudicative proceedings. The rules have been both 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 begin by addressing your request for a hearing. Your request in this regard fails to acknowledge the informal nature of the Coast Guard's civil penalty process. After a thorough review of the record, I am persuaded that prior to the assessment of the civil penalty in the instant case, the Hearing Officer followed all regulatory procedures and ensured that you were fully apprised of and had the opportunity to exercise your rights in this matter. The record shows that you were given the appropriate notice of the initiation of the Coast Guard's civil penalty action, advised of your right to request a hearing (while the matter was pending before the Hearing Officer), provide any written evidence and argument in lieu of a hearing, or pay the amount specified in the notice as being appropriate. The record shows that rather than requesting a hearing, you submitted written evidence that you believed was relevant to the issues at hand. The record further shows that the Hearing Officer carefully considered your correspondence

before issuing her Final Letter of Decision in this case. In accordance with 33 CFR 1.07-65(b), you also were advised of your right to appeal the Hearing Officer's decision, which the record shows you have done. Under 33 CFR 1.07, there are no provisions for a hearing on appeal. Moreover I note that since the penalty at issue is administrative in nature, and not criminal, you have no right to a formal court proceeding with respect to the violation. Accordingly, your request for a hearing while the matter is on appeal is denied.

I will next address your assertion with regard to the constitutionality of the Coast Guard's "Operating Under the Influence" regulations. First and foremost, I note that constitutional issues are not resolved at administrative proceedings. *See, e.g., Johnson v. Robinson*, 415 U.S. 361 (1974); *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233 (1968). As such, I am not vested with the authority to decide constitutional issues raised within this proceeding; that is exclusively within the purview of the Federal courts. Irrespective of that fact, I note that all of the regulations in 33 CFR Part 95, including the standard of intoxication regulation with which you take issue, were implemented via a proper Notice and Comment Rulemaking. The Coast Guard enacted the regulations—substantially unchanged for nearly 20 years—to combat the problems associated with drug and alcohol use by individuals operating recreational vessels. Indeed, the Advanced Notice of Proposed Rulemaking that announced the Coast Guard's intention to promulgate its "Operating Under the Influence" regulations (formerly referred to as "Operating While Intoxicated") are now codified at 33 CFR Part 95. In that Part, the Coast Guard announced that:

Data on recreational boating accidents compiled by the Coast Guard indicates that alcohol consumption is a causal or contributing factor in approximately ten percent of the more than 1200 fatalities which result from boating accidents each year.

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In the recreational boating area, the Coast Guard has concentrated on educational efforts to combat the problem. The Coast Guard and State enforcement officials have recognized that the consumption of alcoholic beverages among recreational boaters is widespread. Drinking is facilitated because there are no laws prohibiting consumption of alcoholic beverages while underway in a boat; picnic coolers or galley facilities are frequently available to store and serve alcoholic beverages; and, whether fishing, cruising, or sailing, there are lengthy periods of time when boaters, including the operator, are not fully occupied. The slow speed of most boating activity, compared to the operation of an automobile, and the relatively unconfined nature of most waterways have contributed to a lack of awareness of the risks involved. The educational effort has concentrated on making boaters aware that "Boating and alcohol don't mix."

*See Operation of Vessel While Intoxicated; Advance Notice of Proposed Rulemaking*, 51 Fed. Reg. 18,900, 18,900-901 (May 23, 1986) (to be codified at 33 CFR pt. 95). There can be no question that the operation of vessels by persons who are "under the influence" of alcohol presents a dangerous—and often deadly—situation that the Coast Guard rightfully addressed via the regulations in 33 CFR Part 95. Therefore, while it is, as I have already stated, beyond my authority to assess the validity of the regulation at issue, or any other regulation promulgated by

the Coast Guard—actions reserved to the federal courts—I note that your assertions with regard to the regulation, itself, are not likely to be persuasive.

I will now turn my attention to your assertions regarding the Coast Guard's probable cause to conduct a boarding of your vessel. On appeal, you imply that because the record does not contain any evidence "of impaired operation" of your vessel, there was not probable cause to allow the Coast Guard boarding officers to conduct a boarding of your vessel. After a thorough review of the record with your assertion in this regard in mind, I do not agree. The courts have long held that the Coast Guard may exercise plenary authority under 14 USC 89(a) to stop and board vessels on the navigable waters of the United States to conduct safety and documentation inspections even in the complete absence of suspicion of criminal activity. *See e.g. United States v. Kubiak*, 704 F.2d 1545, 1547-48 (11<sup>th</sup> Cir. 1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11<sup>th</sup> Cir. 1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5<sup>th</sup> Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5<sup>th</sup> Cir. 1978) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2928 (1980). Furthermore, 14 USC 89(a) makes clear that "[f]or such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance." As such, there can be no question as to the Coast Guard's authority to stop and board your vessel on the relevant evening.

A careful review of your appeal shows that you place considerable emphasis on the fact that you were not charged with a similar state offense when the Coast Guard turned you over to the custody of the New Orleans Police Department. You imply that the City's failure to charge you with a State "Intoxicated Operation" charge, proves that the Coast Guard lacked sufficient evidence to charge you with the alleged violation. Your assertions in this regard fail to acknowledge that the standard of proof necessary to impose a civil penalty at an administrative proceeding like this one is less than what is necessary for a finding of guilt at a state or federal criminal proceeding. Because of the more serious consequences associated with a criminal trial, due process requires that an individual can only be convicted by proof beyond a reasonable doubt of every element which constitutes the offense. This has generally been described as proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. This is the highest standard of proof in the American judicial system. However, at administrative proceedings, the burden of proof is not as strict. At Coast Guard administrative proceedings, the Coast Guard must prove its case only by a preponderance of the evidence. Preponderance of the evidence means the trier of fact, here the Hearing Officer, is persuaded that the points to be proved are more probably so than not. Stated another way, the trier of fact must believe that what is sought to be proved is more likely true than not true. More importantly, I note that the Coast Guard's actions in this case are in no way barred by any proceedings (or lack thereof) in a related state action. That is because the waters of the New Canal are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you, without regard to any action taken by the State of Louisiana. Indeed, neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from assessing a civil penalty in this case. In fact, the Federal government is not precluded from

imposing both criminal and civil sanctions for the same conduct. *See, One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489 (1972).

I will now address the violation, itself. As I have already noted, you contend that the record contains insufficient evidence to support a conclusion that you operated your vessel while under the influence of alcohol. In this regard, you assert that the record contains only “subjective” evidence of intoxication and insist, contrary to the statement of the boarding officer, that you performed properly on all Field Sobriety Tests (FSTs) administered. After a thorough review of the record, I do not find your assertions in this regard to be persuasive.

In “operating under the influence” cases such as this one “[a]cceptable evidence of when a vessel operator is under the influence of alcohol...includes, but is not limited to: (a) Personal observation of an individual’s manner, disposition, speech, muscular movement, general appearance, or behavior; or (b) A chemical test.” *See* 33 CFR 95.030. As the Hearing Officer properly noted, the applicable regulations further provide that an individual is considered to be under the influence of alcohol when “[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.” *See* 33 CFR 95.020(c). A careful review of the Hearing Officer’s decision shows that she found the violation proved based on evidence of your manner, disposition, speech, muscular movement, general appearance or behavior—evidence under 33 CFR 95.030(a). After a thorough review of the record, I do not believe that the Hearing Officer erred in so concluding.

First and foremost, I note that the boarding officer’s statement shows that, after questioning, you admitted to the boarding officer that you had consumed alcoholic beverages on the evening of the boarding. In addition, the record shows that, at the time of the boarding, you had a “strong” odor of alcohol on your breath, your speech was “mumbled and slurred,” and that your eyes were “bloodshot” and “watery.” More importantly, the Field Sobriety Test (FST) Report contained in the record shows that you performed poorly on all eight FSTs administered to you on the relevant evening. Indeed, the Report shows that you “hesitated” during both the “Alphabet Test” and the “Backwards Count” test, you started with the wrong finger and improperly counted your fingers during the “Finger Count” test, you failed to speed up and improperly counted during the “Palm Pat” test, you used three fingers and showed a searching pattern during the “Finger to Nose” test, you lacked smooth pursuit in both eyes during the “Horizontal Gaze Nystagmus” test<sup>1</sup>, you were unable to keep your balance, started too soon, stepped off the line, improperly counted and turned, and showed an improper number of steps during the “Walk & Turn” test, and you swayed, put your foot down and “missed # 5” during the “One Leg Stand” test. In light of this evidence, I do not find that the Hearing Officer was either arbitrary or capricious in determining that you were operating a vessel while under the influence of alcohol under 33 CFR

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<sup>1</sup> Because there is a causal connection between the ingestion of alcohol and the detectable presence of exaggerated horizontal gaze nystagmus in a person’s eyes, the HGN test is generally accepted as providing scientific evidence that can be indicative of intoxication. *See e.g., U.S. v. Horn*, 185 F. Supp. 2d 530 (D.Md. 2002); *U.S. v. Daras*, 1998 WL 726748 (4<sup>th</sup> Cir. 1998) (unreported); *Hulse v. State*, 961 P.2d 75 (Mont. 1998); *State v. Superior Ct.*, 718 P.2d 1358 (Ariz.App.1989); *Whitson v. State*, 863 S.W.2d 794 (Ark. 1993); *State v. Duffy*, 778 A.2d 415 (N.H. 2001); *State v. O’Key*, 899 P.2d 663 (Or. 1995); *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997); *Smith v. State*, 11 P.3d 931 (Wyo. 2000).

95.030(a) based upon the totality of the circumstances of the boarding, including your FST results and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation 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 \$600.00 penalty assessed by the Hearing Officer to be appropriate in light of the circumstances surrounding the violation.

Payment of **\$600.00** 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