



16731
February 02, 2009

[REDACTED]
[REDACTED]
[REDACTED]

RE: Case No. 2272838
[REDACTED]
[REDACTED]
Warning

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2272383, which includes your appeal as owner/operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$200.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 2009 (Rule 9)	Failure to avoid anchoring a vessel in a narrow channel.	\$200.00

The violation is alleged to have occurred on October 10, 2004, when Coast Guard boarding officers allegedly observed the [REDACTED] anchored in the middle of the Bogue Sound Channel, near Swansboro, North Carolina.

On appeal, although you do not specifically deny that the violation occurred, you express disappointment as to the Coast Guard's "decision to continue forward with the process to fine...[you]...\$200.00 for an incident which...[you]...feel...[you]...have been unfairly singled out to receive." At the same time, you note, as you did before the Hearing Officer, that although it was "never" your intent "to be disrespectful of any laws or individuals," you continue to be dismayed because you "remain the focus of this Coast Guard crew's attention." Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the alleged violation. The record shows that on October 9, 2004, Coast Guard personnel observed your vessel while it was anchored in the Bogue Sound Channel. Subsequently, Coast Guard personnel approached you and informed you that it was illegal for your vessel to be anchored in that manner and instructed you to move. On the following day, the record shows that Coast Guard personnel again observed your vessel tied to the "green day boarding 21 Bogue Inlet." Coast Guard personnel again approached you and informed you that it was inappropriate for your vessel to be "tied to a federal aid to navigation." Approximately one hour later, Coast Guard personnel again observed

your vessel anchored in the middle of the channel near marker number 47. As a result of this final observance, the instant civil penalty case was initiated.

As I have already stated, the record shows that both while the matter was before the Hearing Officer and now, on appeal, you have not denied that the violation occurred. Instead, you have offered explanations for your actions. Indeed, in your written response to the Hearing Officer's Preliminary Assessment Letter, although you acknowledged that "the incidents occurred as indicated in the Narrative Overview of the Activities," you asserted that you did not feel that your actions were "properly represented" in the Coast Guard's case file. To that end, you explained that the Coast Guard's initial observance of you anchored in the middle of the channel resulted from tides causing your vessel to drift into the channel, even though you anchored where you "thought was the edge of the red buoy markers." Irrespective of this acknowledgement, you assert that you "did not feel that...[you]...were in any way impeding the flow of traffic along the waterway when...[you]...were approached by the Coast Guard vessel." You further note that during this initial boarding, the boarding officer "seemed stressed" and became "aggravated" when you asked him how to prevent the violation from occurring in the future. While you further acknowledge that "[t]he second encounter occurred as described," you explain that you had only tied your vessel to the channel marker to prevent it from "swinging on the anchor rope during tide changes" and causing a violation. At the same time, you assert that you observed the Coast Guard vessel "move...past several boats anchored in the waterway to come and ask...[you]...to move." Finally, you assert that the "third incident happened almost too quickly to believe." In that regard, you assert that although you anchored in any area that you believe would allow you to remain anchored outside the channel, you quickly realized that your drift "would carry...[you]...into the channel." However, you contend that before you could attempt to move your vessel, you were approached by the Coast Guard and were given the "citation" at issue here. After expressing your belief that your vessel must "stand out" for some reason, you state that you "do not believe that...[you]...received the level of respect a citizen deserves when approached by those in a position of authority." You conclude by noting that although you "tried" to comply with the instructions of the Coast Guard boarding officers throughout the course of this incident and to be "respectful to the job they do," you were not accorded a similar level of respect by the Coast Guard boarding officer who "seemed short tempered and aggressive."

I begin by noting that 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 due process during informal adjudicative proceedings. The procedures in 33 CFR 1.07 have been sanctioned by Congress and have been 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).

In the case at hand, the Coast Guard has alleged a violation of 33 USC 2009 (Rule 9). 33 USC 2009(f) makes clear that “[e]very vessel shall, if the circumstances of the case admit, avoid anchoring in a narrow channel.” The record shows that on October 10, 2004, your vessel was observed to be anchored in a narrow channel. Although you do not deny that fact, you contend that you attempted to anchor your vessel outside the channel, it drifted into the channel and before you had time to correct the violation, a citation was issued. While you assert that you did, in fact, attempt to comply with Rule 9 on the day of the violation, you presumably miscalculated the effects of wind and tide on your vessel’s movement and errantly committed a violation. At the same time, however, you note that you do not believe that your vessel’s location impeded traffic in the channel in any way. While I note that there is evidence in the record to support a conclusion that your vessel’s location in the channel, did in fact, impede traffic through the channel, this factor has no effect on my determination as to whether the violation occurred. Since there is nothing in the record to suggest that your vessel could not safely be anchored outside the channel, the fact that your vessel was observed to be anchored in the channel, when combined with your admission, provides substantial evidence to support the Hearing Officer’s determination that the violation occurred. Irrespective of that fact, after a careful consideration of the evidence presented, I will mitigate the assessed penalty to a warning.

I will conclude by addressing your assertions regarding the conduct of the Coast Guard boarding officers throughout the course of this incident. As I have already stated, you contend that the boarding officers were rude to you during the initial boarding and imply, in effect, that they were “out to get you” thereafter. The record shows that your vessel was boarded three times over the course of two days and that, during each violation, at least one safe operation violation was observed. Although you contend that the boarding officers were “rude” to you during the respective boardings, the record shows—and you acknowledge—that the boarding officers did attempt to aid you in achieving compliance. While the boarding officer could have issued you a citation after your vessel was initially observed anchored in the channel, they did not do so. Rather, the boarding officers instructed you to move your vessel. Moreover, other than asserting that the boarding officers offered you a flippant reply when you asked them how you could avoid similar violations in the future, you have not provided any evidence to support a conclusion that you were mistreated by the Coast Guard boarding officers during the boardings at issue here. Moreover, I note that since the Coast Guard has plenary authority to board all vessels within the navigable waters of the United States and does not need probable cause or even a reasonable suspicion to stop and board a vessel, the reason for the Coast Guard boardings of your vessel, even if violations had not been readily apparent, is irrelevant here. *See* 14 USC 89(a); *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986).

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. The Hearing Officer’s decision with respect to the violation was neither arbitrary nor capricious and is hereby affirmed. However, I find it appropriate, based on the circumstances of the case, to assess a warning for the violation rather than the \$200.00 penalty assessed by the Hearing Officer, or \$6,500.00 maximum permitted by statute.

February 02, 2009

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action.

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