



[REDACTED]
[REDACTED]
[REDACTED]

16780
Aug 16, 2006

RE: Case No. 1654872
[REDACTED]
Unnamed [REDACTED]
\$900.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 1654872, which includes your appeal as alleged operator of the recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$900.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 USC 2033(b)	Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length.	\$100.00
33 CFR 173.21(a)(1)	Use of a vessel without a valid Certificate or Number or temporary certificate on board.	WARNING
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$700.00
33 CFR 175.110(b)	No visual distress signals on board vessel less than 16 feet in length suitable for right use when boat was used between sunset and sunrise.	\$100.00

The violations were observed on July 6, 2002, when Coast Guard boarding officers went to the aid of the vessel [REDACTED] while it was broken down on the Noyo River, near Fort Bragg, California.

On appeal, you deny the violations and contend that you were not the operator of the [REDACTED] on the evening of the incident. To that end, you assert that "all charges [were] dropped in criminal court" and add that you had both a whistle and flares aboard the vessel. In addition, you state that you are appealing the decision of the Hearing Officer because you did not

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get a copy of the Coast Guard Form 4100 Supplemental Boarding Report. Your appeal is denied for the reasons discussed below.

Because all of the alleged violations may only be assessed against the operator of a vessel, I will first address your contention that you were not the operator of the [REDACTED] at the time of the boarding. After a thorough review of the case file, I believe there is sufficient evidence in the record to support the Hearing Officer's conclusion to the contrary. The record shows that the Coast Guard came to the assistance of the [REDACTED] on the evening of July 6, 2002, after the vessel broke down on the Noyo River. According to a statement contained on the Coast Guard Form 4100 Supplemental Boarding Report, during the tow, the boarding officer "noticed a strong smell of an alcohol substance coming from the operator." That boarding officer identified you as the operator of the [REDACTED] on both the Coast Guard Form 4100 Boarding Report and the Coast Guard Form 4100 Supplemental Boarding Report. Although you contend that you were merely a passenger aboard the vessel, you have not provided any evidence to support your assertion in this regard even though you acknowledged at the hearing that there were two other persons aboard the vessel who could have corroborated your version of the events. As a result, I do not believe that the Hearing Officer was either arbitrary or capricious in determining that you were the operator of the [REDACTED] on July 6, 2002.

Next, I will address your contention that the instant violations should, in effect, be dismissed because "all charges [were] dropped in criminal court" in California. Your contention in this regard is wholly without merit. The Coast Guard's actions in this case are in no way barred by any of the proceedings in the related state action. The waters of the Noyo River 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 by the State of California. Therefore, the fact that the California criminal case against you was dismissed has no bearing on the civil penalty case before me.

I will next address your contention that the instant civil penalty case should be dismissed because you did not get a copy of the Coast Guard Form 4100 Supplemental Boarding Report. The record shows that the Hearing Office's Preliminary Assessment Letter was mailed to you on October 29, 2002, and that a copy of the entire case file was enclosed with that letter. Based upon this evidence, alone, I have no reason to doubt that you were given a copy of the Supplemental Boarding Report when the case package was forwarded to you. In addition, because 33 CFR 1.07-70 states that "[t]he only issues which will be considered on appeal are those issues specified in the appeal which were properly raised before the Hearing Officer and jurisdictional questions" and the record shows that you did not raise this issue before the Hearing Officer, you have waived your right to have it considered now.

I will now address the violations beginning with the alleged violation of 33 USC 2033(b)(Rule 33). In relevant part, 33 USC 2033(b)(Rule 33) states that "[a] vessel of less than 12 meters in length...shall be provided with some...means of making an efficient sound signal." The record shows that the [REDACTED] is 14 feet in length. As a result, it is required to carry some means of making an efficient sound signal. The Supplemental Boarding Report shows that, at the time of the boarding, there was "no type of sound producing device on board." Although you contend, on appeal, that the vessel "had [a] whistle on board", you have not presented any

evidence to explain why you were unable to present the whistle to the boarding officers during the boarding. Furthermore, at the hearing you testified that in the days immediately following the boarding, you went to the boarding officer and presented a whistle to show that you had achieved compliance. Although I commend you for taking efforts to achieve compliance I, nonetheless, find substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred. Therefore, I find the violation proved and will not mitigate the \$100.00 penalty assessed by the Hearing Officer.

Next, I will address the alleged violation of 33 CFR 173.21(a)(1). 33 CFR 173.21(a)(1) states that "no person may use a vessel...unless it has on board...[a] valid certificate of number or temporary certificate issued by the issuing authority in the State in which the vessel is principally used". The Supplemental Boarding Report indicates that, at the time of the boarding, the vessel did not have its "registration on board". The Hearing Officer's notes from the hearing indicate that you showed a copy of the vessel's certificate of number to the boarding officer after the incident and that you stated that the "boat was properly registered". However, the record does not show that you denied that, at that time of the boarding, the certificate was not on board the vessel. Therefore, based upon the evidence contained in the record, I find the violation proved and will not dismiss the warning assessed by the Hearing Officer.

I will next address the alleged violation of 33 CFR 175.110(b). In relevant part, 33 CFR 175.110(b) states that "[b]etween sunset and sunrise, no person may use a boat less than 16 feet in length unless visual distress signals suitable for night use...are on board." As I have already stated, the record shows that the [REDACTED] is 14 feet in length. Therefore, when the vessel is operated between sunset and sunrise, it is required to have flares suitable for night use on board. The record shows that the boarding commenced at 10:10 p.m. on the evening of July 6, 2002. Although the record does not indicate the time of sunset on that date, I have no reason to doubt that it was dark at that time. The Supplemental Boarding Report for the incident indicates that, at the time of the boarding, there were "no visual distress signals on board". Again, the record shows that, at the hearing, you testified that you showed a package of Coast Guard approved flares to the boarding officer several days after the boarding. However, at the hearing you did not state that you did, in fact, have flares aboard the vessel at the time of the boarding. Although you now contend that there were flares aboard the vessel at the time of the boarding, based upon the evidence contained in the record, I find sufficient evidence to support the Hearing Officer's conclusion that the violation occurred and that you are the responsible party. Therefore, I will not mitigate the \$100.00 penalty assessed by the Hearing Officer.

Finally, I will address the alleged violation of 46 USC 2302(c). Pursuant to 33 CFR 95.030 "[a]cceptable evidence of intoxication 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." 33 CFR 95.020(c) further provides that an individual is considered intoxicated 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." A careful review of the record shows that there is substantial evidence in the record to support the Hearing Officer's conclusion that you were intoxicated at the time of the boarding. First, the record shows that you admitted that you were "under the influence" at the hearing. In addition, the Field Sobriety Test

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report for the incident shows that, at the time of the boarding, you had a “strong” odor of alcohol on your breath, that your speech was “mumbled”, “slurred”, and “confused”, that your face was “flushed”, and that your eyes were “bloodshot” and “watery”. Furthermore, the Field Sobriety Test Report shows that you failed seven of eight Field Sobriety Tests administered during the boarding and the boarding officer’s comments show that during the administration of those tests, you “could not follow task directions” and continually asked the boarding officer to “repeat everything”. Therefore, based upon your own admission and the personal observations of the Coast Guard boarding officer regarding your manner, disposition, speech, muscular movement, and behavior, I find that there is substantial evidence in the record to support a conclusion that you were intoxicated on the evening of the boarding. Since, as I stated above, there is sufficient evidence in the record to support the Hearing Officer’s conclusion that you were the operator of the [REDACTED], I find the violation proved and, given the severity of the violation, the penalty assessed by the Hearing Officer to be appropriate under the circumstances of the case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s conclusion that the violations occurred and that you are the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$900.00 penalty assessed by the Hearing Officer, rather than the \$1,950.00 preliminarily assessed, to be appropriate under the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$900.00** 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 1.00% 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