

**UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

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**UNITED STATES COAST GUARD**

**Complainant**

**vs.**

**TERRY MAX GRAHAM**

**Respondent**

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**Docket Number CG S&R 04-0069  
CG Enforcement Activity No: 1982128**

**INITIAL DECISION AND ORDER**

**Issued: November 16, 2005**

**Issued by: WALTER J. BRUDZINSKI, Administrative Law Judge**

**Investigating Officer:**

**LT Bart A. Marcules  
USCG Eighth District Judge Advocate Office  
LT Thomas L. Lake  
Marine Safety Office, Louisville**

**Respondent:**

**David M. Spotts, Esq.  
Attorney for Respondent**

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## I. PRELIMINARY

This matter came to be heard by Complaint filed on January 30, 2004, by the United States Coast Guard (“Coast Guard” or “CG”) against the Coast Guard issued License held by Terry Max Graham (“Respondent”), in the discharge of its duty to promote safety of life and property at sea. See 46 U.S.C. 7701(a). The Coast Guard initiated this administrative action under the authority of 46 U.S.C. 7703 and its underlying regulations under 46 CFR Part 5 and 33 CFR Part 20. The Coast Guard alleges that Respondent committed Negligence on July 15, 2001, by: (1) committing an act or failing to perform an act that contributed to a collision between the vessel Elaine G (D501444) and a recreational vessel (KY 7808 PP); (2) by failing to post a lookout; and (3) failing to operate the Elaine G at a safe speed. In its Complaint, the Coast Guard seeks revocation of Respondent’s Coast Guard issued Merchant Mariner’s License.

Following an initial grant for an extension of time, Respondent, on April 5, 2004, filed his Answer to deny the jurisdictional allegation that he was operating under the authority of his license at the time of the incident and to deny all factual allegations of Negligence and assert numerous affirmative defenses. After an initial period to resolve certain discovery related issues, this matter, which was initially set to be heard on November 4, 2004, was heard on February 15, 2005, at the U.S. Courthouse, Courtroom 305, 100 East Fifth Street, Cincinnati, Ohio, 45202. On that date, the hearing convened as scheduled with LT Bart A. Marcules and LT Thomas L. Lake representing the Coast Guard and Respondent, Terry M. Graham was present with his attorney, Mr. David M. Spotts, Esq.

The Complaint contains essentially three (3) Factual Allegations and specifically states, on July 15, 2001, at mile 568 on the Ohio River, Respondent:

1. was negligent by committing an act or failing to perform an act that contributed to a collision between the vessel Elaine G (D501444) and a recreational vessel (KY 7808 PP);
2. negligently operated the vessel Elaine G (D501444) by failing to post a lookout; and
3. negligently operated the vessel Elaine G (D501444) by failing to operate at a safe speed.

At the hearing the Coast Guard called two (2) witnesses and introduced into evidence thirteen (13) exhibits (identified as A through M). Respondent called one (1) witness and introduced into evidence thirty-four (34) exhibits (identified as one (1) through thirty-four (34)).<sup>1</sup>

The parties also filed a Joint Stipulation that was identified as ALJ 1. Refer to Attachment A for a list of Witnesses and Exhibits.

It is worthy to note that while Respondent objected to the introduction of certain CG Exhibits (E, H, J, and L), Respondent specifically waived his rights to admit the “[investigative] hearing testimony of Captain Graham” and also, to “consider the investigative report of Lieutenant Adkins.” TR. 314-15; see also 46 CFR 5.101(3)(b) (stating that no admission made by a person during a Part 4 or 5 investigation may be used against that person except for impeachment), 20

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<sup>1</sup> CG exhibits are identified as “CG Ex.” using alphabetic letters. Respondent Exhibits are identified as “Res. Ex.” using numerical numbers. All citations to the official transcript are designated by “TR.” followed by the applicable page number.

CFR 20.808 (stating that written testimony must be sworn to, or affirmed, under the penalty of perjury and that the witness must have been available for oral cross-examination), 20 CFR 20.1311 (stating that no person may testify regarding admissions made by Respondent during a 46 CFR Part 4 investigation, except for impeachment).

On February 1, 2005, the parties filed the following Joint Stipulation of Agreed Facts:

1. During the early morning hours of July 15, 2001, the M/V Elaine G, a 151 foot uninspected towing vessel was downbound on the Ohio River near river mile 568, pushing 14 uncovered empty hopper barges.
2. The vessel was equipped with all appropriate and required navigational equipment including two (2) radars and two (2) VHF radios. The radars are located on the port and starboard side of the helm. The radars are visible to the operator sitting or standing at the helm. At all times, both radars were working and being used properly. The ranges on the radars were set at 1.5 mile and  $\frac{3}{4}$  mile.
3. The M/V Elaine G's tow consisted of 14 empty hopper barges arranged in a three (3) wide and five (5) long configuration with an open space on the port string closest to the tow boat. All barges were uncovered empty. The overall length of the tow, excluding the M/V Elaine G was 998 feet.
4. The recreational vessel involved in the accident is a 1987 Wellcraft 180 Runabout. The vessel is 17 feet 2 inches long and has a beam of 7 feet 2 inches. Two (2) operational cell phones were recovered from the vessel's glove box. The vessel was rated for seven (7) passengers or 1050 pounds and was not equipped with radar, radar reflector, sound appliance, VHF radio or operable horn and no signal flares were found.
5. On July 15, 2001, the M/V Elaine G had a crew of eight (8) personnel. The crew consisted of one (1) master, one (1) operator of uninspected towing vessels (serving as a pilot), four (4) deck hands, one (1) cook, and one (1) engineer.
6. The master aboard the M/V Elaine G was the Respondent, Captain Terry Max Graham. Captain Graham holds a fourth issue of a Coast Guard license, serial number 856013, endorsed "Master of steam or motor vessels of not more than 1600 gross tons upon Western Rivers, operator of uninspected towing vessels upon Western Rivers, also radar observer "rivers" to expire June 2003". Captain Graham was 43 years old, had operated towing vessels for approximately 18 years and was a vessel Captain for The Ohio River Company for approximately 2.5 years. Captain Graham was assigned to the M/V Elaine G for approximately 1.5 years and was aboard the vessel for 21 days prior to the casualty.
7. Captain Clinton Pauley was a licensed operator "pilot" employed aboard the M/V Elaine G on July 15, 2001. Mr. Pauley holds a second issue of Coast Guard license, serial number 841506. Captain Pauley was 50 years old and operated towing vessels for approximately 7 years, all with the Ohio River Company. Captain Pauley operates

different vessels for the company and was aboard the M/V Elaine G for approximately 4 days prior to the casualty.

8. At all times pertinent, the M/V Elaine G was displaying all her proper navigation lights including one on top of the pilot house, a green running light on the starboard side and a red running light on the port side, and two amber towing lights on the stern. The tow was lite with a green running light on the forward starboard corner, a red running light on the forward port corner and a special flashing amber light on the forward center line. A seven watt white steering light on a 7-8 foot pole located all the way forward to the center of the tow. The tow also had 2 foot by 2 foot low intensity lights at each barge coupling on the port and starboard sides (4 on each side). The vessel was sounding a fog signal.
9. At all times pertinent to this incident, the vessel was operating in complete darkness with her navigation lights on and functioning properly. At the time of the watch exchange, Captain Pauley could see the tow and navigation lights on the tow.
10. Captain Graham came up into the pilot house at approximately 0510 and engaged in a bridge management conference with Captain Pauley and thereafter assumed the watch. Captain Graham and Captain Pauley exchanged the normal information including the state of visibility, vessel activity, and the lack of any radar or visual contacts at the time of the exchange. Captain Pauley had activated the automatic fog signal prior to the watch exchange. At the times pertinent, Captain Graham and Captain Pauley could see the peep light and some distance ahead of the tow.
11. The M/V Elaine G, was fully lighted, being operated by a sober competent crew, and was sounding a fog signal. At the time of the exchange, the vessel was proceeding at a speed of approximately 5-6 miles per hour and the tow was positioned on the course line near the center of the river slightly favoring the right descending bank. Some minutes after Captain Graham assumed the watch, Captain Graham heard a voice off the starboard side of the towboat. He immediately sounded the general alarm and brought the engines to all stop and then all back to stop the way and remain in the vicinity of the call. Due to the darkness, Captain Graham backed the tow onto the left descending back "Kentucky bank", on the Ohio River near mile 568. At 0550, Captain Graham contacted the United States Coast Guard, Group Ohio Valley by VHF radio and reported the vessel was stopped and investigating a call. Captain Graham and the crew of the Elaine G acted appropriately following the call for help.
12. At approximately 1300 hours, Coast Guard Marine Safety Office Louisville personnel arrived on scene approximately seven (7) hours after the initial report. The Indiana Department of Natural resources Conservation Officers also responded. The IDNR Officer confirmed that the radars were operating properly and were properly tuned by observing and being able to track two (2) personnel watercraft and a fiberglass recreational vessel on both radars. Captain Graham was tested by a portable breath testing device that showed that he was negative for alcohol and later submitted to a drug test and the results were negative.
13. At the time of the incident, the Wellcraft was underway, but not making way and was overloaded with six (6) drug impaired occupants and a large dog. The vessel's engine was operational. Besides a cooler with pop and beer there was a bucket of tools and an anchor with 50 feet of line, 7 fishing rods, a 12 volt hand held light attached to the starting battery, two (2) spare gas tanks, a spare 12 volt battery and various other items on

board. None of the occupants were wearing personal floatation devices when found. The 12 volt light that was attached to the battery connected to the engine had its switch in the “off” position. It was functional when connected to the battery. The spare battery was tested at 11.7 volts. The recreational vessel was not displaying any navigational lights. The occupants were not actively engaged in fishing. Further, the vessel was not equipped with any portable sound device and the vessel’s onboard sound device was not functional. The lack of an appropriate sound appliance resulted in a violation of Rule 35(b) in that the small recreational vessel was not sounding any sound signal. The recreational vessel violated Rule 23(c)(i) by failing to exhibit proper navigational lights while being underway at night. Pursuant to Rule 9(b), the recreational vessel had an obligation to stay clear of the path of the M/V Elaine G, was not maintaining a proper lookout pursuant to Rule 5, and violated provisions of Rule 19(c) by failing to take into consideration prevailing circumstances and conditions of night operation. The operator of the recreational vessel was operating under the influence of drugs and/or alcohol.

14. The recreational vessel was overloaded and underway in the middle of the Ohio River in complete darkness without any lights, flares, or sound appliances with six (6) drug, alcohol and fatigue impaired occupants each under the influence of a deadly combination of cocaine, various pain killing medications, opiates and alcohol. The effect of the prescription and illegal drugs, fatigue, and alcohol were extreme fatigue or loss of consciousness. All six (6) men and the dog were out on the Ohio River all night and in the case of the operator, Mr. Burgen and Mr. Valentine, were “boating” on the River for approximately 16 hours.

ALJ 1.

At the hearing, it was clear that the parties’ understanding regarding paragraph number 2 of the above Joint Stipulation, and in particular, the phrase, the radars were “being used properly” was in conflict. TR. 91-112; see also 20 CFR 20.809 (stating that a stipulation binds all parties to it). In addition to the Stipulation, the issue regarding “use of radars” directly affected the Coast Guard’s expert witness testimony of Captain Tilford and his Report of Opinion, CG Exhibit L. Under the Joint Stipulation, the Coast Guard’s understanding of the phrase “being used properly” meant that “the radar was working perfectly fine” but conversely argues that Respondent may not have “taken into consideration” or “understood” certain effects or limitations that radars may possess, including the so called, “hopper barge effect.” TR. 59-63, 95. Respondent argued that “being used properly” encompassed all of these issues and that the

stipulation was written to remove radar as “an issue in this case.” TR. 101,105. Respondent further stated that he notified the Coast Guard on January 28, 2005, upon receipt of Captain Tilford’s Report, which contained references and conclusions on the use of radar (CG Ex. L). Respondent stressed that he contacted the Coast Guard to ensure that no misunderstanding would arise at the hearing with regard to the stipulation and the presentation of any radar related testimony or exhibits. TR. 101-04. The Coast Guard did not reply to Respondent prior to the hearing.

The parties’ misunderstanding of Joint Stipulation paragraph number 2 resulted in several conferences at the hearing and ultimately, Respondent was given the opportunity to present his own “radar” expert witness at a future place and time. At the hearing, the parties agreed to redact a portion of Captain Tilford’s Report (CG Ex. L). Testimony concerning “radar” by Captain Tilford was admitted with weight given as provided in this Decision and Order. After the hearing and with an opportunity to respond, Respondent notified the Undersigned that he would not request an additional hearing to present separate expert witness testimony on the “use of radar.”

## **II. FINDINGS OF FACT**

1. At the time of the incident, Respondent, Captain Terry Max Graham was the holder of a Coast Guard issued License, fourth issue, as Master of Steam or Motor Vessels of not More Than 1600 Gross Registered Tons (domestic tonnage), 3,000 Gross Tons (ITC tonnage) Upon Western Rivers; Master of Towing Vessels Upon Western Rivers. His

License contains an Endorsement for Radar Observer-River. Respondent's present License, number 1037705, and radar endorsement expires on July 8, 2008 and May, 2008, respectively. CG Ex. A, M at 10; TR. 311-12.

2. Captain Graham is forty-three (43) years old and has operated towing vessels for approximately eighteen (18) years. He was employed by The Ohio River Company for approximately two and one-half (2.5) years and was assigned to the M/V Elaine G for approximately one and one-half (1.5) years prior to the incident in question. CG Ex. M at 10; Joint Stipulation No. 6. For the trip in question, Captain Graham had been on board the M/V Elaine G for twenty-one (21) days prior to the collision. CG Ex. M at 10; ALJ 1 at Joint Stipulation No. 6.
3. The M/V Elaine G, official number, D501444, is an uninspected towing vessel owned by Midland Enterprises, Inc. and built in 1965. The M/V Elaine G has a breadth of 40.0 feet and is 151.0 feet long with a depth of 8.6 feet. The Elaine G is diesel powered with 652 gross and 442 net tonnages. CG Ex. M at 2, I; ALJ 1 at Joint Stipulation No. 1.
4. The M/V Elaine G is engaged primarily in pushing open and covered hopper barges with a primary route from Pittsburgh, PA to Louisville, KY and return. CG Ex. M at 2.
5. The M/V Elaine G is equipped with "standard navigation equipment" that includes two (2) radar units and two (2) VHF radios. CG Ex. M at 2.
6. On the day of the collision, the M/V Elaine G had a crew of eight (8) personnel consisting of a Master (Captain Graham), a Pilot (Captain Clinton Pauley), four (4) deckhands, a cook, and an engineer. CG Ex. M at 10; ALJ 1 at Joint Stipulation No. 5. A normal watch rotation consists of a licensed operator and two (2) deck hands. CG Ex. M at 13.

7. Captain Clinton Pauley is a Coast Guard licensed operator holding his second issuance as, “Master of Western Rivers Steam or Motor Vessels of not More Than 1600 Gross Tons, Operator of Uninspected Towing Vessels Upon Western Rivers, Also Radar Observer-Rivers.” CG Ex. M at 11; ALJ 1 at Joint Stipulation No. 7.
8. Captain Pauley is fifty (50) years old and has operated towing vessels for The Ohio River Company approximately seven (7) years and was on-board the M/V Elaine G approximately four (4) days prior to the collision. CG Ex. M at 11; ALJ 1 at Joint Stipulation No. 7. Captain Pauley was the operator of the M/V Elaine G for the 0000-0600 watch on July 15, 2001. CG Ex. M at 12, F.
9. The M/V Elaine G collided with a recreational vessel that was registered in the State of Kentucky, number, KY 7808 PP. The recreational vessel is a 1987 fiberglass Wellcraft 180, model W17, “runabout” powered by an inboard/outboard gasoline engine owned by Thomas Kimerberlin, Jr. The recreational vessel is seventeen (17) feet, two (2) inches in length and seven (7) feet and two (2) inches in beam. It has a capacity of seven (7) passengers or one thousand fifty (1050) pounds. The recreational vessel was not equipped with VHF radio, radar, radar reflectors, sound appliance or operable horn. There were no signal flares found aboard the vessel when it was recovered. CG Ex. M at 9, I; Res. Ex. 29, 30; ALJ 1 at Joint Stipulation No. 4.
10. While the recreational vessel was titled to Mr. Kimerberlin, Jr., Mr. Robert Valentine, who perished in the collision, had an arrangement with Mr. Kimerberlin, Jr. as of March 2001, where Mr. Valentine took possession of the vessel and was thereafter making payments for its eventual outright purchase. CG Ex. M at 9.

11. The recreational vessel had two (2) operational cell phones that were recovered from the vessel's glove box. ALJ 1 at Joint Stipulation No. 4.
12. Based on the weight of the occupants, equipment and other items, it is estimated that the recreational vessel weighed approximately 1279 pounds at the time of the collision. CG Ex. M at 16.
13. On July 14, 2001, the day before the collision, the M/V Elaine G moved through the Markland Locks at mile marker 531.4 heading down bound on the Ohio River. At that time, the M/V Elaine G was pushing fifteen (15) barges, of which, fourteen (14) were empty and one (1) was loaded. CG Ex. J, M at 12. During the evening hours of July 14, 2001 and into the early morning hours of July 15, 2001, the M/V Elaine G loaded and off-loaded several barges reaching an ultimate tow configuration at the time of the collision that consisted of fourteen (14) open and empty hopper barges arranged three (3) wide by five (5) long tow with an open space on the port string closest to the M/V Elaine G. CG Ex. A, B, J and M at 2, 3-8, 12; Res. Ex. 14-15; ALJ 1, Joint Stipulation No. 1, 3.
14. The empty hopper barges ranged from 195 to 200 feet long. The center lead barge (OR 2110) had its front raked end facing forward. The port and starboard lead barges had their front raked ends facing backwards (or aft). At the time of collision the empty hopper barges' draft was approximately one and one-half (1.5) feet.

The overall length of the towed barges, excluding the M/V Elaine G, was 998 feet. ALJ 1 at Joint Stipulation No. 3. The distance from the bow of the M/V Elaine G to her Bridge is approximately twelve (12) feet, making the overall distance from the M/V Elaine G's Bridge to the front of the lead barge at over 1000 feet. CG Ex. M at 2, 8, J.

15. The M/V Elaine G was properly equipped with all appropriate and required navigational equipment that included two (2) radar units (port and starboard) and two (2) VHF radios.

ALJ 1 at Joint Stipulation No. 2.

16. At all times pertinent, the M/V Elaine G was operating in complete darkness with her navigation lights activated and functioning properly. ALJ 1, Joint Stipulation No. 8. The M/V Elaine G was fully lit, operated by a competent crew, and was sounding an automatic fog signal. ALJ 1 at Joint Stipulation Nos. 8 and 11.

17. The M/V Elaine G and tow displayed the following navigational lights:

Light on top of the pilothouse; a green running light on the starboard side and a red running light on the port side; two amber towing lights on the stern. The tow was lit with a green running light on the forward starboard corner, a red running light on the forward port corner, a special flashing amber [light] on the forward centerline, and a seven watt white "steering light" on a seven to eight foot pole located all the way forward in the center of the tow. The tow also had 2 foot x 2 foot low-intensity lights at each barge coupling on the port and starboard sides (four on each side).

CG Ex. M at 12; ALJ 1 at Joint Stipulation No. 8.

18. According to the Indiana Department of Natural Resources Report, CG Ex. I, given the configuration of the M/V Elaine G and her tow, the radar units on board exhibited a blind spot of approximately 357 feet in front of the lead barge. A physical blind spot of approximately 440 feet in front of the lead barge was present as viewed from the pilothouse. CG Ex. I. This varies greatly with the Coast Guard's calculations as presented in CG Ex. M at 19-20, which states a minimum radar blind spot distance of 426 feet and a pilot's blind spot of 624 feet.

19. Captain Pauley confirmed that a visual blind spot exists in front of the tow and could be as large as “four [4] links” or “four [4] barge lengths.” CG Ex. C at 137, 147.
20. Weather information from the nearest National Weather Service Station, located approximately thirty-six (36) miles from mile marker 568 on the Ohio River reported the weather at 0551 EDT on July 15, 2001 to be fifty-one (51) degrees Fahrenheit, no winds, clear visibility, and ninety (90) percent relative humidity. CG Ex. M at 9.
21. On the morning of July 15, 2001, at approximately 0510, Captain Graham entered the pilot house to relieve Captain Pauley and engaged in a bridge management conference to assume the watch. Both Captains exchanged the normal information, which included the state of visibility, vessel activity, and the lack of any radar or visual contacts. Res. Ex. 17, 20; ALJ 1 at Joint Stipulation No. 10. The watch relief occurred in the vicinity of Spring Creek Light at mile marker 566.7 at approximately 0510 to 0515. CG Ex. B, M at 13; Res. Ex. 14.
22. During the morning watch exchange, Captain Pauley stated, “[w]e had surface fog” but could see the tow and the navigational lights on the tow, which included the “peep” light positioned on the tow and “some distance ahead of the tow.” CG Ex. F; Res. Ex. 1; ALJ 1 at Joint Stipulation Nos. 9 and 10. Captain Pauley stated that prior to and during the watch relief “there were no lights or sounds or radar returns that would have indicated any contacts.” CG Ex. F; Res. Ex. 1.
23. Captain Pauley reported that he began to see fog in the vicinity of mile marker 563 at the Cooper Bar Light. Captain Pauley activated the automatic fog signal just prior to watch relief as Captain Graham was ascending to the pilothouse. CG Ex. M at 13, CG Ex. C at 130-31.

24. Captain Pauley stated that he activated the automatic fog signal “out of the abundance of caution.” CG Ex. C at 148.
25. Captain Graham stated that he “couldn’t see the banks. I could see so far ahead of me.” CG Ex. C at 79.
26. The M/V Elaine G radar sets are visible to the vessel operator either sitting or standing at the helm. The radars were set at 1.5 and 0.75 miles respectively. CG Ex. M at 13, C at 133; Res. Ex. 17; ALJ 1 at Joint Stipulation No. 2.
27. Captain Pauley stated that the radars had indicated “ghosts” from “power lines crossing the river” and the “stack of power plants.” With regard to what effect unloaded barges have on radar returns (“hopper barge effect”), he stated, “Unloaded barge returns make the tow display wider and longer than loaded barges on radar displays.” CG Ex. F; Res. Ex. 1. Captain Pauley did not make any adjustments to the radar units. CG Ex. M at 13.
28. Captain Pauley believes that the recreational vessel at issue should have been detected by the M/V Elaine G’s radar units. CG Ex. C at 151.
29. During the 0000 to 0600 watch on July 15, 2001, Captain Pauley acted as his own lookout from his position in the pilothouse and stated that he was navigating “with the radar mainly.” CG Ex. M at 12, Ex. C at 135, 139.
30. The Ohio River Company policy concerning posting a lookout states, “In most cases, the vessel operator shall be sufficient to perform look-out duties.” CG Ex. M at 12 (citation to Exhibit 106, page 8).
31. Captain Graham stated that company policy for posting a lookout was, “if it’s congested area or if there’s something going on.” CG Ex. C at 80.

32. Captain Pauley stated that he would not typically place an additional lookout at the front of the tow under foggy conditions “cause I can see probably as much from the wheel house as they would see on – on the head.” CG Ex. C at 142.
33. Approximately one (1) hour prior to the collision, Captain Pauley detected a pleasure craft in the vicinity of mile marker 561, (Clifty Creek Light) and that he could visibly see the lights on the pleasure craft but was not sure whether or not the pleasure craft was distinguishable on radar from a nearby buoy. CG Ex. M at 13, C at 132-33.
34. Captain Graham stated that when he was in conditions of limited visibility or at night with limited visibility he would be watchful with his eyes but keep “a good track of my radars.” CG Ex. C at 66. It was Captain Graham’s experience and expectation that the radar units on board the M/V Elaine G would detect the presence of pleasure crafts. CG Ex. C at 66-67.
35. At the time of the collision, the M/V Elaine G was turning 600 rpm and was traveling down bound on the Ohio River at a speed of approximately five (5) to six (6) miles per hour. The M/V Elaine G and tow was positioned near the center of the Ohio River with a ‘slight favor’ to the right descending bank (State of Indiana side). CG Ex. M at 14, C at 133, G, I; ALJ 1 at Joint Stipulation No. 11.
36. Captain Pauley stated that the M/V Elaine’s speed is calculated by “a computer that’s hooked to a GPS.” CG Ex. C at 133.
37. Approximately ten (10) minutes after Captain Graham assumed the watch or at approximately 0525, he heard a distress call from a voice heard off the starboard side of the M/V Elaine G. He immediately sounded the General Alarm, brought the engines to

All Stop and then All Back to stop making way and remained in the vicinity (mile marker 568) of the distress call. CG Ex. M at 10, 14, G; ALJ 1 at Joint Stipulation No. 11.

38. Due to the nature of the collision and darkness, Captain Graham and the M/V Elaine G crewmembers could not locate the source of the call. CG Ex. M at 14; ALJ 1 at Joint Stipulation No. 11.

39. Not long thereafter, Captain Graham backed the M/V Elaine G and tow onto the left descending bank, “Kentucky bank” of the Ohio River near mile marker 568. CG Ex. M at 14, 15; ALJ 1 at Joint Stipulation No. 11.

40. At 0550, Captain Graham contacted United States Coast Guard Group Ohio Valley by VHF radio and reported that he had stopped his tow and was investigating the distress call. Coast Guard personnel arrived on the scene approximately seven (7) hours later. CG Ex. M at 15; ALJ 1 at Joint Stipulation Nos. 11 and 12.

41. Conservation Officers from the Indiana Department of Natural Resources (“IDNR”) also responded to the scene. An IDNR officer later confirmed at the scene that the radar units on board the M/V Elaine G were operating properly and were properly tuned by observing and tracking two (2) personal watercraft and a fiberglass recreational vessel. The IDNR officer also observed a “ghost” area of radar return directly in front of the tow assembly (“hopper barge effect”). CG Ex. M at 15; ALJ 1 at Joint Stipulation No. 12.

42. The Indiana Department of Natural Resources prepared a “Report on the Accident Reconstruction Dated July 23, 2001.” CG Ex. I.

43. Captain Graham was tested with negative results for the presence of alcohol and drugs. CG Ex. M at 16; ALJ 1 at Joint Stipulation No. 12.

44. The recreational vessel at the time of the collision was underway, but not making way (not anchored) and was overloaded with six (6) drug impaired occupants and a large dog. The vessel's engine was operational at that time. The recreational vessel was not displaying any navigation lights and the occupants were not actively engaged in fishing activity. The vessel was not equipped with any portable sound devices and the onboard sound device was not functional. The occupants were not wearing any personnel floatation devices when found. CG Ex. M at 16-18, Res. Ex. 2-13, 24; ALJ 1 at Joint Stipulation No. 13.

45. The overloaded recreational vessel was in the middle of the Ohio River in total darkness without any lights, flares, or sound appliances. The occupants were each under the influence of drugs, which included cocaine, pain killing medications, opiates, and alcohol. The use of drugs and alcohol could result in extreme fatigue or loss of consciousness. The occupants were out on the Ohio River at least all night and in the case of Mr. Burgen and Mr. Valentine, they were out for approximately sixteen (16) hours. CG Ex. M at 16-18; Res. Ex. 2-13, 24; ALJ 1 at Joint Stipulation No. 14.

46. The recreational vessel was recovered at approximately mile marker 571 on July 18, 2001. CG Ex. M at 16.

47. The following is a list of some of the items and equipment that was found onboard the recreational vessel when recovered:

A cooler with pop and beer, a bucket of tools, an anchor with fifty (50) feet of line, seven (7) fishing rods, a spare twelve (12) volt battery that was tested at 11.7 volts, a twelve (12) volt hand held light attached to the vessel's starting battery (with its switch in the "off" position), two (2) spare gas tanks and various other items.

CG Ex. I, M at 16-18; Res. Ex. 22; ALJ 1 at Joint Stipulation No. 13.

48. Mr. Burgan, a victim onboard the recreational vessel, had purchased a stern light for apparent installation on the vessel. When the vessel was recovered, there was “no stern light in place and no locking mechanism on the stern light base.” CG Ex. M at 17.
49. When the recreational vessel was recovered, its engine throttle was “pulled completely to the rear with the hub of the throttle pulled out, meaning that the lower unit was disengaged.” The ignition key and the navigational light switch were in the “on” position. The bow light lenses (red and green) were not in place and an examination of one of the bulbs by the Indiana State crime Lab indicated that it was not lit at the time of the collision. CG Ex. M at 17, 18; Res. Ex. 25, 27.
50. The M/V Pat McBride, commanded by Captain Sam Wolf was also coming downriver approximately 1.5 miles behind the M/V Elaine G at the time of the collision. CG Ex. M at 21; Res. Ex. 26 at 22. Captain Wolf testified by deposition testimony that the fog varied from patchy to shut-out conditions depending on which direction you were looking. Captain Wolf stated that if the fog did not clear, he would probably tie up at the Trimble County Power Plant at mile marker 570. CG Ex. M at 21; Res. Ex. 26 at 17-18, 76-77, 94, 126-27.
51. After the collision, Captain Graham and Captain Wolf communicated by VHF radio. Captain Graham informed Captain Wolf that he had heard voices in the water and was stopping his vessel. Captain Graham later asked Captain Wolf for assistance in breaking up the tow of the M/V Elaine G in order to investigate for further debris. CG Ex. M at 21; Res. Ex. 26 at 33-35, 73. Captain Wolf replied to Captain Graham that he would lend assistance “after the weather cleared up a little more.” Res. Ex. 26 at 35, 73.

52. Captain Wolf stated that he did not see any pleasure craft as he assumed watch on the morning of July 15, 2001, but that he “sometimes” would see fishing boats in that area of the river. Res. Ex. 26 at 24, 119. Captain Wolf later encountered fishing boats following the collision between the M/V Elaine G and the recreational vessel as he was putting in the M/V Pat McBride near the bank. Res. Ex. 26 at 35-37, 91-92. Captain Wolf sighted the fishing boats by use of the M/V Pat McBride’s radar unit. Res. Ex. 26 at 36.
53. Captain Wolf also stated that when Captain Graham initially contacted him by VHF radio that “the area that we was in, there is camps along the bank, and people come up on weekends and party.” “At the time, I really still thought [that the voice heard by Captain Graham] was probably people on the bank.” Res. Ex. 26 at 31.

### **III. ULTIMATE CONCLUSIONS OF LAW AND FINDINGS OF FACT**

1. Captain Terry M. Graham is the holder and at all times pertinent was acting under the authority of his Coast Guard issued License, as Master of Steam or Motor Vessels of not More Than 1600 Gross Registered Tons (domestic tonnage), 3,000 Gross Tons (ITC tonnage) Upon Western Rivers; Master of Towing Vessels Upon Western Rivers. His License contains an Endorsement for Radar Observer-River. Respondent’s present License, number 1037705 and radar endorsement expires on July 8, 2008 and May, 2008 respectively.
2. On July 15, 2001, the M/V Elaine G and tow operated by Captain Terry M. Graham was proceeding down bound the Ohio River at six (6) miles per hour at or near mile marker 568 in conditions of limited visibility, in that it was dark, at night, with little or no

illumination from the shore, and in foggy conditions. The M/V Elaine G collided with the recreational vessel (KY 7808 PP), which was not anchored and not making way but was located near the middle of the River. The collision resulted in the loss of life of the six (6) individuals on board the recreational vessel.

3. The First Allegation charging Captain Graham with Negligence by committing an act or failing to perform an act that contributed to a collision between the vessel Elaine G (D501444) and a recreational vessel (KY 7808 PP) is found **NOT PROVED**.
4. The Second Allegation charging Captain Graham with Negligence by failing to post a lookout under the Rules of the Road, Rule 5 Lookout is found **PROVED**.
5. The Third Allegation charging Captain Graham with Negligence by operating the M/V Elaine G in violation of the Rules of the Road, Rule 6 Safe Speed is found **NOT PROVED**.

#### **IV. DISCUSSION**

This administrative Suspension and Revocation proceeding is remedial and not penal in nature and is “intended to help maintain the standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5. “The purpose of Suspension and Revocation proceedings is to promote safety at sea.” 46 U.S.C. 7701.

The Coast Guard initiated this Suspension and Revocation proceeding initially to revoke the Merchant Mariner License of Respondent Terry M. Graham by asserting three (3) factual allegations under the charge of Negligence. In its Post Hearing Brief, the Coast Guard now requests that a six (6) month outright suspension be awarded for only the second and third

allegations involving rules of the road violations. The Coast Guard concludes for “each negligent act, a 12-month suspension outright for this case.” This is in contrast to the Coast Guard’s Complaint that charged three (3) Factual Allegations of Negligence and proposed a sanction of revocation.

The Coast Guard’s Complaint states the following:

On July 15, 2001, at mile 568 on the Ohio River, Respondent:

1. was negligent by committing an act or failing to perform an act that contributed to a collision between the vessel Elaine G (D501444) and a recreational vessel (KY 7808 PP);
2. negligently operated the vessel Elaine G (D501444) by failing to post a lookout; and
3. negligently operated the vessel Elaine G (D501444) by failing to operate at a safe speed.

The burden of proof, except for affirmative defenses lies with the Coast Guard in this Suspension and Revocation (“S&R”) proceeding. 33 CFR 20.702. The Coast Guard bears the burden of proof by the preponderance of the evidence. 33 CFR 20.701. The standard for the preponderance of evidence is applicable to this Coast Guard Suspension and Revocation hearing. Steadman v. SEC, 450 U.S. 91 (1981); Appeal Decision 2474 (CARMENKE) (1987).

With regard to the First Factual Allegation of Negligence, the Coast Guard did not submit any witness testimony or exhibits nor make any argument that would bear directly upon the Coast Guard’s burden to come forth concerning this allegation. The record demonstrates that the Coast Guard’s case in chief was aimed squarely at the Second and Third allegations (lookout and safe speed). TR. at 114. It is also important to note that the Coast Guard, in their Post Hearing

Brief argued only for the Second and Third allegation and now seeks a sanction based only on those two (2) negligent acts. Given the above, the Coast Guard has not met its legal burden with regard to the First Allegation of Negligence and therefore, it is hereby **DISMISSED**. The remaining two (2) allegations of Negligence are discussed below.

#### A. JURISDICTION

A threshold issue going forward in this proceeding is whether or not Respondent was acting under the authority of his document at the time of collision. The record demonstrates that shortly after assuming the watch, Captain Graham heard a voice in the water off the starboard side of the vessel. At that point, the M/V Elaine G and tow had already collided with the recreational vessel. Given that the M/V Elaine G is herself 151 feet long and was pushing barges with an overall length of 998 feet, calculations demonstrate that the distance from the pilot house of the M/V Elaine G to the front of the tow is over 1,000 feet. In addition, calculations provided by the Indiana Department of Natural Resources and the Coast Guard would add an additional 357 to 624 feet due to inherent blind spots that exist for the M/V Elaine G's radar units and the view point from the bridge or wheelhouse.

The issue at hand is not only when did the M/V Elaine G, which was traveling at six (6) miles per hour collide with the recreational vessel in relation to when Captain Graham relieved the watch but also, due to the allegations being held in Negligence, was Captain Graham acting under the authority of his license when there existed a reasonable opportunity in relation to the allegations charged, for him to either take or not take reasonable actions as a prudent mariner.

The Coast Guard must demonstrate by the preponderance of the evidence that Captain Graham was acting under the authority of his license in order to prevail on the allegations of Negligence. 46 U.S.C. 7703. A person employed in the service of a vessel is considered to be acting under the authority of a license when required by an employer as a condition for employment. 46 CFR 5.57. It is also uncontested that Respondent was employed under the authority of his license. See also 46 U.S.C. 8904. The Coast Guard argues the following in support of its position:

Respondent testified that he relieved Captain Pauley at “approximately 05:10 to 05:15.” CG Ex. C at 56. Captain Pauley also testified that Captain Graham relieved him at 05:10 or “something like that.” Id. at 151. At the time of watch relief, Captain Pauley stated the M/V Elaine G and tow was “just leaving the buoy line coming out of Cooper’s Bar” approaching Spring Creek. Id. at 145, 153. This corresponds to an approximate position on the Ohio River at mile marker 565.5. Id. at 153, CG Ex. B.

Shortly after assuming the watch, Captain Graham testified that he heard voices in the water off the starboard side whereby he took action to stop the M/V Elaine G and tow and sounded the General Alarm. This was at approximately 05:25 at or near mile marker 568. CG Ex. G, C at 73. Captain Graham stated that the M/V Elaine G and tow was traveling at “approximately six mile[s] an hour” at the time of the collision. CG Ex. C at 63-64; see also TR. at 34-35, CG Ex. M at 14, G, I; Joint Stipulation No. 11.

The Coast Guard concludes as follows:

A vessel traveling at six (6) miles an hour would cover 528 feet in one minute. The distance between mile marker 565.5 (watch relief) and 568 (first known position following the collision) is 2.5 miles, or approximately 13, 200 feet. The time required to travel this distance is approximately twenty-three (23) to twenty-five (25) minutes.

The time difference between 05:10 (watch relief) and 05:25 (first call for help is heard) is fifteen (15) minutes. Assuming that the collision actually occurred several minutes prior to hearing the first cry for help, the estimated time is about thirteen (13) minutes after Captain Graham assumed the watch. In thirteen (13) minutes and traveling at a rate of six (6) miles per hour, the M/V Elaine G and tow would travel 6,864 feet or approximately just over one (1) mile. Given the above, the Coast Guard concludes that at the point and time of collision, which falls well within the calculated times and distances to travel from mile marker 565.5 to 568, Captain Graham was at the helm operating the M/V Elaine G and tow.

Respondent contends that the collision could not have taken place at mile marker 568 due to the fact that additional time and distance was traveled between the time Captain Graham first heard a voice off the starboard side and the time he eventually stopped the M/V Elaine G at mile marker 568. Respondent argues that the exact location at the time of collision may never be known and that the Coast Guard's own investigation failed to conclude whether or not the collision occurred on Captain Graham's watch. Respondent quotes the Coast Guard's Investigative Report when it stated, "The opportune moments to detect the recreational vessel

before it entered into the blind spots may have come during, or just before the watch relief.” CG Ex. M at 21.

Respondent further contends that the Coast Guard’s formal Complaint alleges that the collision occurred “at Ohio River mile 568.” Respondent implies that the Coast Guard’s Complaint is defective and having made no amendment to the contrary, no act of Negligence can flow from that point as the collision could not occur at that point.

While it is clear that the exact time and location of the collision may never be known, the preponderance of evidence standard does not require an exact measurement. Respondent’s well pled arguments by themselves are not persuasive when set against the physical time and distance calculations presented by the Coast Guard. It is also clear that while the Coast Guard used mile marker 568 in its Complaint, its arguments, evidence, and the conduct of this proceeding demonstrate that mile marker 568 was used as a known point from whence events were referenced. See Appeal Decision 2581 (DRIGGERS) (1996).

This proceeding is not “rigidly bound by the procedural rules governing criminal and civil trials.” Appeal Decision 2639 (HAUCK) (2003) (citing Kuhn v. C.A.B., 183 F.2d 839 (D.C. Cir. 1950). “The purpose of the pleadings is to provide notice and not make a ritualistic recitation of the details.” Appeal Decision 2585 (COULON) (1997). “Findings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the [Respondent] has actual notice and the questions are litigated.” Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2422 (GIBBONS)

(1982). An allegation “must be adequate to enable the respondent to identify the act or offense alleged so that a defense can be prepared.” Appeal Decision 2585 (COULON) (1997). Thus, a technical and narrow reading of the Complaint will not be dispositive in this matter.

Given the specific facts of this matter, the estimated time of watch relief, the time when Captain Graham first heard a voice in the water off the starboard side, the respective lengths of the M/V Elaine G and tow, the inherent blind spots for visual and radar detection, and the rate of travel (six (6) miles per hour), one can reasonably find by the facts presented in this case and by the preponderance of evidence that Captain Graham was not only on watch at the time of collision but that there existed some finite period of time from whence actions may have been taken on that faithful morning. Findings “need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification.” Appeal Decision 22642 (RIZZO) (2003), Appeal Decision 2492 (RATH) (1989), Appeal Decision 2282 (LITTLEFIELD) (1982), Appeal Decision 2395 (LAMBERT) (1985).

I have carefully reviewed the record, the exhibits and witness testimony, which include the hearing transcript, post hearing briefs, and the parties’ arguments. I have evaluated each and find that the Coast Guard has met its burden by the preponderance of the evidence to show that Captain Graham was acting under the authority of his license at the time of the collision.

## B. NEGLIGENCE

The Coast Guard's factual allegations regarding Negligence center around two Navigational Rules, Rule 5, Lookout and Rule 6, Safe Speed.

Negligence is defined as:

The commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstance, would not fail to perform.

46 CFR 5.29

In order to “prove the charge of negligence, it is necessary to prove that [Respondent’s] conduct, in some manner, failed to conform to the standard of care required of the reasonably prudent master under the same circumstances confronted by [Respondent].” Appeal Decision 2642 (RIZZO) (2003), Appeal Decision 2321 (HARRIS) (1983), Appeal Decision 2282 (LITTLEFIELD) (1982).

It should be made clear from the onset that in Coast Guard Suspension and Revocation proceedings, causation and for that matter damages, are not central elements that are required to be proved in order to determine whether or not Respondent was negligent. Appeal Decision 2585 (COULON) (1997), Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2395 (LAMBERT) (1985). Contributory negligence is not a defense in this Suspension and Revocation Proceeding. Appeal Decision 2639 (HAUCK) (2003). The negligence of third parties is not a defense in this Suspension and Revocation proceeding. Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2319

(PAVELEC) (1983). “It is not the function of suspension and revocation [proceedings] to determine liability.” Appeal Decision 2438 (TURNER) (1986).

The only issue present herein is whether or not Respondent’s actions or non-actions were negligent. Id.; see also Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2175 (RIVERA) (1980).

It nonetheless remains “incumbent on the Investigating Officer to establish the standard of care which is relevant to the circumstances involved and to show how that standard has been breached by respondent.” Appeal Decision 2599 (GUEST) (1998).

i. Standard of Care

The Inland Navigation Rules, which are more commonly known as the Rules of the Road or COLREGS (International Regulations for Prevention of Collisions at Sea) were presented by the Coast Guard as a standard of care. The Inland Navigation Rules are codified under the Inland Navigational Rules Act of 1908, Pub. Law 96-591, 94 Stat. 3415 at 33 U.S.C. 2001-38.

Respondent raises an initial argument that the Inland Navigation Rules (“Navigational Rules” or “Rules of the Road”) as a standard of care would certainly be appropriate for cases involving Violation of Law or Regulation or even Misconduct. However, in this instance, where the allegations flow from Negligence, Respondent argues that the Rules of the Road can not form the proper legal standard as a basis of what a reasonable and prudent mariner of the same station,

under the same circumstances would or would not perform. Respondent stresses that it is not the fact that a right or wrong decision was made but that Negligence goes to whether or not reasonable care was or was not exercised “according to the standards of the ordinary practice of good seamanship.” Res. Post Hearing Brief at 5.

At first blush, Respondent’s argument raises a valid point, one in which the Coast Guard did not address, either in its case in chief or in its briefs. In addition, taking a close look at the Coast Guard’s case in chief shows a strategy or formulation that one could argue rests in Violation of Law or Regulation rather than Negligence. The Coast Guard called only two (2) witness, first, LCDR Adkins, whose total sum testimony was that the M/V Elaine G was traveling at six (6) knots, which was then corrected by the Investigating Officer as six (6) miles per hour and second, Captain Tilford, who was admitted only as an expert in the Rules of the Road and radar. The Coast Guard chose to rely on its Marine Casualty Investigative proceedings and introduced numerous exhibits from that investigation and hearing. It is noted that Suspension and Revocation proceedings are procedurally distinct from pre-hearing investigations. See Appeal Decision 2639 (HAUCK) (2003), Appeal Decision 2216 (SORENSEN) (1980).

The present issue arises under the allegation of Negligence and concerns whether or not the Coast Guard has met its burden to demonstrate the proper legal standard for Negligence and whether or not that standard was breached. In this instance, the Coast Guard used the Rules of the Road, and specifically, Rule 5 Lookout and Rule 6 Safe Speed as a standard of care. The Rules of the Road are codified at 33 USC 2001-38 under the Inland Navigational Rules Act of

1980, Pub. L. 96-591, 94 Stat. 3415 and are published in a Coast Guard Navigational rules Manual under COMDTINST M16672.2D (2001).

The Rules of the Road unquestionably provide a standard of care that mariners are required to exercise. See Appeal Decision 2438 (TURNER) (1986) (stating that in “suspension and revocation proceedings, a violation of a navigation rule itself is negligence”). Here, I find that the Coast Guard has presented a proper standard of care through the stated regulations and the expert witness testimony of Captain Tilford. See also, Appeal Decision 2585 (COULON) (1997) (finding that “posted signs” and witness statements established a standard of care), Appeal Decision 2359 (WAINE) (1984) (finding that the navigation rules established a standard of care and a “clear violation of laws intended to promote safety is unquestionably negligence by any standards”) (citations omitted), Appeal Decision 2321 (HARRIS) (1983) (stating that a master has a standard of care for the responsibility for the safety and care of the vessel and crew, which he violated by sailing an unseaworthy vessel).

I find the expert witness testimony of Captain Tilford credible regarding the Rules of the Road and radar as discussed and applied in this decision. See infra ii. Inland Navigational Rules at 31. However, his testimony and opinion as directly related to certain facts of the case carry minimum to no weight because he was not familiar with the geographical location and specific conditions facing Captain Graham on the day in question. TR. at 116, 119-21, 124-29, 140. Also, Captain Tilford does not have the level of experience with tugs pushing barges as does Captain Graham. TR. 41-50, 179. While Captain Tilford relied on supplied documents to reach his expert opinion, I do find however, that his expert witness testimony is helpful to the decision-

maker in establishing the proper legal standards, as based on the Rules of the Road for the allegations presented. See generally, Appeal Decision 2294 (TITTONIS) (1983) (stating that “expert witness testimony, even though uncontradicted may be disregarded after careful consideration because of its improbability or because of the interests of the witness”) (citing Appeal Decision 2030 (RIVERA)(1980). An Administrative Law Judge is not bound by witness opinions “but must make his own determination based on facts and law.” Appeal Decision 2296 (SABOWSKI)(1983).

ii. Inland Navigational Rules

Captain Mark A. Tilford testified as the Coast Guard’s expert witness with discipline in the Navigational Rules and radar. TR. at 50. Captain Tilford served twenty-four (24) years in the Coast Guard having an initial rating as a sonar technician and is now a consultant to the maritime industry. He is a Coast Guard certified instructor and teaches radar, Navigational Rules, licensing and firefighting. TR. at 48-49. Captain Tilford holds a Coast Guard issued License as Master of Vessels less than 1600 gross tons, Mate of vessels of unlimited tonnage upon Western Rivers, Great Lakes and Inland Waters of the United States. TR. at 46, CG Ex. K. Captain Tilford authored a book (with subsequent revision) on the Navigational Rules, entitled “The Mariner’s Guide to the Inland Rules and A Mariner’s Guide to the International Rules.” TR. at 50. Captain Tilford has little to no experience in the operation of towboats and his level of experience is significantly different than Captain Graham’s. TR. at 179.

Captain Tilford testified that the Rules of the Road have evolved over the centuries and are designed “not only to avoid the risk – avoid collision, but more cautiously, their approach drives a mariner to try and avoid even the risk of collision.” TR. at 55. He concedes that the Rules of the Road are “fairly vague” in that “they tell you, you should do something but never really tell you how to do it.” TR. at 56. The Rules of the Road are all inter-related and “mariners often fall short in their understanding and application of the rules.” TR. at 84. There is a very close relationship “between lookout and safe speed. Very close.” *Id.* For instance, Captain Tilford testified that under normal conditions, if you do not have a lookout, it would not affect safe speed. However, if conditions change, you can offset the need for a lookout simply by slowing down. TR. at 86.

Respondent introduced Captain David E. Hammond as an expert witness. Captain Hammond has worked in the tow boat industry for thirty-seven year (37) years and is a licensed Master, unlimited tonnage, for Inland Waters, a First Class Pilot’s License, Master of Towing Vessels and a designated examiner. Captain Hammond has great experience with sailing on the Ohio River and has “navigated that stretch of river literally hundreds of times.” At one point in his career, Captain Hammond was the Master of the sister ship of the M/V Elaine G. TR. at 223. Captain Hammond is an expert on the Rules of the Road and his testimony is considered credible as provided for in this Decision and Order.

## 1. Negligent Violation of Rule 5 – Lookout

The Inland Navigational Rule for Part B, Steering and Sailing Rules, Subpart 1 – Conduct of Vessels in Any Condition of Visibility for Rule 5, Look-out states:

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 the risk of collision.

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The “determination of what constitutes a proper lookout is based on the facts and circumstances of each case.” Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2503 (MOULDS) (1990) (stating that “the specific facts and circumstances of each situation determine if a separate, dedicated lookout is required”). The “adequacy of a lookout is a question of fact to be determined in light of the existing facts and circumstances.” Appeal Decision 2639 (HAUCK) (2003), Appeal Decision 2421 (RADER) (1986), Appeal Decision 2319 (PAVELEC) (1983).

A review of the Legislative History as expressed in Senate Report No. 96-979 (1980) permits watch officers to serve as lookouts under certain conditions. The Report however states that “Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards.” S. Rep. No. 979, 96<sup>th</sup> Cong., 2d Sess. 7-8 (1980).

Captain Tilford commented that Rule 5 encompasses a human element by “sight and hearing” but also includes the phrase, “all means available.” He stated that the drafters did not want to restrict “available means” to any one component but to consider that all means available would be expansive and would include not only radar but also, “VHF-FM communications, proper charts, notice to mariners, binoculars, anything that could assist the mariner in evaluating his environment, his surroundings, and maintain his – help him maintain his situation awareness is part and parcel of all means available.” TR. at 57.

Captain Tilford also testified that on Western Rivers, the “only qualification for the lookout is the determination of the captain” and basically that involves “competency, ability to communicate ... [and] not encumbered by any other duties.” TR. at 191-92.

From the record, it is clear that not only Captain Graham but also Captain Pauley acted as his own lookout during the voyage at hand. Captain Graham’s view of the company policy is that a dedicated lookout should be posted “if it’s congested area or if there’s something going on.” CG Ex. C at 80. It was also Captain Graham’s view that the particular area of the Ohio River where the accident took place was not a dangerous place. CG Ex. C at 89. Captain Graham stated that it’s a “good stretch of river; it’s wide.” He stated that there’s no reason to actually have to stop, “unless there is something going on, you know, a bass tournament or a bunch of motor boats ....” CG Ex. at 89.

Captain Hammond testified that it was his expectation and experience that traffic density for that area of the River was “zero.” He also indicated that there was little illumination by any

lights from shore. TR. at 247, 254. Captain Hammond did testify however that the area had a “few cabins”, and on the right descending bank a “little city, like a little trailer park, you know, campsite.” TR. at 248.

Captain Wolf, who was following the M/V Elaine G that morning, also stated that campsites were located along that portion of the River. When Captain Graham first notified him that he was stopping due to hearing voices, Captain Wolf initially thought that Captain Graham was actually hearing voices from the shore. Captain Wolf also stated that he “sometimes” would see fishing vessels in that area.

There was also considerable testimony concerning radar and its inherent design limitations, including the effects of the so called “hopper barge effect.” Both Captain Tilford and Captain Hammond provided in depth expert testimony in this area. Suffice it to say, it is clear from the record that the radar units on board the M/V Elaine G at the time of the incident were operating as designed. There is nothing in the record to suggest otherwise and in fact, the radar units on board the M/V Elaine G were shown to properly detect and track a buoy and other small vessels. Captain Graham is trained in the use of radar and has the appropriate qualifications issued by the Coast Guard. Captain Graham stated that he was observing the radar units during the watch turnover and also after assuming the watch on the morning of July 15, 2001.

While it may never be known whether or not the recreational vessel would have been detected based on the condition of the vessel and its occupants, it is clear for whatever reason that Captain Graham was never made aware of the presence of the recreational vessel.

The record also demonstrates that inherent blind spots exist not only in the M/V Elaine G's radar units but also from the viewpoint that Captain Graham would have from the wheelhouse or bridge. See Appeal Decision 2581 (DRIGGERS) (1996) (stating that a "significant blind spot in front of the flotilla and the lack of a bow lookout" on its face constitutes *prima facie* evidence of an improper lookout). Here, taking into account the natural limitations of radar, including its inherent blind spots, it is reasonable based on the record, taken as a whole that under the prevailing circumstances and conditions, Captain Graham could not act as an adequate lookout. While it is also probable that a lookout, if directed, would not have adequate time to reach the front of the tow assembly prior to the collision, the record demonstrates that Captain Graham never contemplated or made any decision in this regard. This constitutes a violation of Captain Graham's duty to act as a prudent and reasonable mariner under the prevailing circumstances and conditions.

As a "matter of law," it is within the province of this Administrative Law Judge, and not the "experts" to determine whether or not Respondent, as the facts presented in this case, did or did not properly post a lookout. See Appeal Decision 2581 (DRIGGERS) (1996). Further, the custom or standard or practice of the industry is "not the standard imposed by the navigation rules." Id. A "custom in violation of a positive statutory enactment will not be enforced." Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2261 (SAVOIE) (1981), Appeal Decision 2070 (PAYNE) (1976).

After reviewing the complete record taken as a whole, including witness testimony and statements, and admitted evidence, I find that the totality of circumstances under the

preponderance of evidence as stated below demonstrate that Respondent violated his standard of care by not making any attempt or decision to post a lookout as dictated by the prevailing circumstances and conditions that were present at or near mile marker 568 on the Ohio River on the morning of July 15, 2001.

The record demonstrates that Respondent, who is an experienced mariner, was operating the M/V Elaine G with limited visibility, at night and in darkness under foggy conditions. All of which worked to diminish Respondent's ability to adequately and properly exercise his duty to maintain a proper lookout while he was the Master on the Bridge. The existence of inherent blind spots and the knowledge that recreational boaters could frequent this area, combined with the fact that campsites were established along the River are all factors that Respondent failed to give proper or adequate consideration in the exercise of prudent seamanship. In addition, the proposition that both Captain Pauley and Captain Graham, while being on the Bridge at the same time during watch turnover constituted an "enhanced" lookout condition is nonetheless undermined by the same inherent flaws, designs, blind spots, prevailing circumstances and conditions present on the morning of July 15, 2001.

An additional factor, as discussed further below, demonstrates that Respondent was faced with limited options due to the apparent fact that the M/V Elaine G was operating at a speed for minimum bare steerage. Thus, it was even more incumbent on Respondent, instead of relying on industry customs or standards, to exercise prudence by posting a lookout given the prevailing circumstances and conditions. Furthermore, the action or inaction of the pleasure craft is not a consideration in this remedial action in finding the charge of Negligence proved. Neither does

the subjective or anticipated actions, concerning what another vessel may or may not do, place additional conditions on whether or not a lookout should have been posted under Rule 5. See Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2296 (SABOWSKI) (1983).

Here, Respondent had a duty to provide an adequate lookout given the prevailing conditions and circumstances. By failing to consider or take such actions, he failed to act in a prudent and reasonable manner. See Appeal Decision 2503 (MOULDS) (1990) (holding that the failure to post a lookout in a blind bend, at night, in restricted waters while overtaking a vessel was a failure to properly post a lookout), Appeal Decision 2482 (WATSON) (1989) (holding that an operator serving as helmsman in restricted visibility is not a proper lookout).

Given all the above, I find the allegation of Negligence for the violation of Rule 5, Lookout, as stated under the Rules of the Road, 33 USC 2005 is found **PROVED** by the preponderance of the evidence.

## 2. Negligent Violation of Rule 6 – Safe Speed

The Inland Navigational Rule for Part B, Steering and Sailing Rules, Subpart 1 – Conduct of Vessels in Any Condition of Visibility for Rule 6, Safe Speed states:

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstance and conditions.

In determining a safe speed the following factors shall be among those taken into account:

- (a) By all vessels:
  - (i) the state of visibility;

- (ii) the traffic density including concentration of fishing vessels or any other vessels;
  - (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
  - (iv) at night, the presence of background light such as from shore lights or from back scatter of her own lights;
  - (v) the state of wind, sea, and current, and the proximity of navigational hazards;
  - (vi) the draft in relation to the available depth of water.
- (b) Additionally, by vessels with operational radar:
- (i) the characteristics, efficiency and limitations of the radar equipment;
  - (ii) any constraints imposed by the radar range scale in use;
  - (iii) the effect on radar detection of the sea state, weather, and other sources of interference;
  - (iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;
  - (v) the number, location, and movement of vessels detected by radar; and
  - (vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

33 U.S.C. 2006

The Commandant in TITTONIS stated;

Prior to the advent of safe speed as a concept (COLREGS, 1972), the rule for proceeding in fog (restricted visibility) was to proceed at a moderate speed and be able to stop the vessel in half the distance of the visibility. Union Oil Co. v. The San Jacinto, 409 U.S. 140. The term "safe speed" now replaces the term "moderate speed" which only related to conditions of restricted visibility. The intent of the change of concept was to expand its applicability and to allow higher speeds in appropriate circumstances. "Safe" is used in the relative sense. What is a safe speed must be determined on a case by case basis after analyzing the facts according to the factors listed in the rule. There can be no general rule for such a concept because of the many variables involved in any situation.

Appeal Decision 2294 (TITTONIS) (1983), see also Appeal Decision 2296 (SABOWSKI) (1983).

Captain Tilford discussed the various factors contained in Rule 6 Safe Speed. He testified to the state of visibility and the application of the "half distance rule." Captain Tilford explained that the "half distance rule" "comes from a century old case" where a "vessel's safe

speed in restricted visibility ... is the speed at which [] vessels can stop in half the distance of visibility.” TR. at 72. He stressed that under the “half distance rule” the vessel must actually come to a stop and not simply declutch its engines.

Captain Tilford also applied the various capabilities and limitations of radar, as he had done for Rule 5 Lookout to the factors relating to Safe Speed. He stated that radar can be used as a ranging device to augment visibility in limited or restricted visibility. It was Captain Tilford’s opinion that Captain Graham did not use his radar as a “ranging device ... to determine the exact range of visibility” on the morning of July 15, 2001. TR. at 73. Captain Tilford listed other factors for consideration: the effects of sea state, weather and other conditions of precipitation, size and composition of the target vessel for radar equipped vessels, and traffic density as applied to all vessels.

Captain Tilford opined that Captain Graham violated Rule 6 Safe Speed because he failed to consider “that there were small boats in the area;” that he was operating in “restricted visibility;” and that he did not consider the effects and limitations of radar given that the “distance of detection was reduced.” TR. at 62-63. Captain Tilford stated that a “big consideration in his decision” was that Captain Pauley told Captain Graham at watch relief that he visually saw a fishing vessel but did not pick it up on radar. Captain Tilford stated, “[s]o right there you know there’s small vessels in the area and I can’t see them on the radar.” TR. at 83. Captain Tilford later conceded that Captain Pauley’s actual statement was that he could not recall whether or not he was able to distinguish a small, lit pleasure craft from a buoy, which was detected by the M/V Elaine G’s radar. TR. at 184.

Further, on cross-examination, Captain Tilford testified that his opinions were based on the information provided by the Coast Guard and not necessarily specific information at the time and location of the incident. For instance, Captain Tilford testified he did not take into consideration that it was dark (at night) when he was testifying about the state or extent of visibility. He did state however, that “night certainly complicates restricted visibility.” Captain Tilford was also not aware whether or not the recreational vessel was moving or at anchor. TR. at 127-28. Captain Tilford went to conclude using the “half-distance rule,” as based on the chart distance from the middle of the river to the nearby bank that if “the visibility was somewhere around 1,000 feet, there was no safe speed. The only safe speed for that vessel that morning was zero.” TR. at 131. Captain Tilford then elaborated that if the M/V Elaine G could not stop, then “he ... was right to proceed” and “shove in somewhere.” TR. at 132, 183. It was Captain Tilford’s firm opinion that it is “automatic” if you are moving when a collision occurs, then you were in violation of Rule 6 Safe Speed. TR. at 148-49. He testified “that if a vessel is in a collision, and it was moving, with very little exception, it was not at safe speed,” TR. at 70.

Captain Tilford also testified that the M/V Elaine G had to maintain a speed above minimum bare steerage, especially when proceeding down bound on the Ohio River. It was his opinion that failure to do so could result in loss of control of the vessel and tow. TR. at 179-82.

Captain Hammond testified that the down bound current is approximately one (1) to (2) miles per hour near mile marker 567 and that absolute minimum bare steerage for the M/V Elaine G is four (4) miles per hour, so as to maintain proper thrust on the rudder for control purposes. This equates to a minimum steerage speed of six (6) miles per hour. TR. at 240-41.

Captain Hammond also noted that Captain Pauley had reduced the speed of the M/V Elaine G from ten (10) miles per hour to six (6) miles per hour around Madison, Indiana at mile marker 558. TR. at 238-39.

It is unquestioned that the M/V Elaine G and tow were moving at six (6) miles an hour going down bound on the Ohio River. As indicated previously, the state of visibility was poor, it was dark, with very little illumination from the shore and foggy conditions were present.

The determination of what constitutes safe speed must be analyzed on a case by case basis taking into consideration the facts and circumstances contained in the record. Appeal Decision 2468 (LEWIN) (1988). Here the testimony and record indicate that the M/V Elaine G was moving at a speed of minimum bare steerage. The Coast Guard did not produce any evidence that a vessel of this size and tow configuration could safely reduce speed below four (4) miles an hour with a given two (2) miles per hour down bound current. Captain Hammond, who has great experience with this type of vessel and is experienced in towing along the Ohio River testified that short of pulling over into a safe harbor, the M/V Elaine G was operating at minimum bare steerage. TR. 239-43. Captain Wolf, operating the M/V Pat McBride stated that the closest place to safely tie up would have been at the Trimble County Power Plant at mile marker 570, which is past the area where the collision occurred. Res. Ex. 26 at 94.

As previously noted, “prior to the advent of safe speed as a concept (COLREGS, 1972), the rule for proceeding in fog (restricted visibility) was to proceed at a moderate speed ....” Appeal Decision 2294 (TITTONIS) (1983). Furthermore, the Commandant stated in LEWIN

that “the majority rule appears to be that "inability to keep steerageway is not an excuse for exceeding moderate speed." Appeal Decision 2648 (LEWIN) (1988) (citations omitted). Given the advent of the modern Navigation Rules and that the “safe speed” concept replaces the concept of “moderate” speed with the stated purpose to “expand its applicability and to allow higher speeds in appropriate circumstances...,” it is reasonable to conclude that one can safely operate at bare minimum steerage and remain within the concept of “safe speed.” Based on the facts as presented in this case, I find that the M/V Elaine G was operating at a safe speed given the prevailing conditions but also with consideration and the knowledge that she should have had an adequate lookout. Pertinent to this finding is the fact that the Coast Guard did not provide on the record any substantial evidence to demonstrate that Captain Graham could operate at a slower speed without compromising the ability to control the M/V Elaine G and tow.

Furthermore, as testified by Captain Tilford, the Rules of the Road have many direct and indirect relationships. While Rule 19, Conduct of Vessels in Restricted Visibility was not discussed nor is it alleged as a violation, section (e) of that Rule states that under certain conditions, a vessel “shall reduce her speed to the minimum at which she can be kept on course.” This also provides another indication of the flexibility and nature of the Rules of the Road and that minimum bare steerage can reasonably be considered within the concept of maintaining safe speed.

The half-distance rule as discussed and applied by Captain Tilford and supported by the Coast Guard as a basis that Captain Graham violated Rule 6 Safe Speed is incorrect. The half-distance rule is a recognized interpretation for the “statutory rule for determining the proper speed at which a vessel should proceed in a fog.” Appeal Decision 2630 (BAARSVIK) (2002)

(citing Union Oil Co. v. The San Jacinto). The Commandant stated in BAARSVIK that “[s]uch rule is premised on the notion that when a ship is traveling under foggy weather conditions in waters in which other ships might be proceeding on intersecting course, the speed of each ship must be such as to enable her to stop within half distance separating the ships when they first sight each other.” Id. The Commandant further stated “As applied to vessels sighting each other head to head, this means that each must be able to stop within half the visible distance. As applied to a vessel approaching another at anchor, it means that she must be able to stop before reaching the anchored vessel.” Id. (citing Griffin on Collision). When a vessel approaches another vessel at anchor, the half-distance rule “becomes, in effect, the ‘full-distance rule’ – the point being that the underway vessel must be able to stop at engines full astern before colliding.” Id.

Here, the facts as demonstrated in the record show that the recreational vessel, while not at anchor, was also not making way nor was it visible to Respondent. Further, it was Captain Tilford’s testimony that he calculated the distance from the middle of the channel to the nearest river bank as a means to calculate the distance applicable under the half distance rule. This is incorrect in both application and law.

Given the above, I find that the Coast Guard has not met its burden by the preponderance of evidence that Captain Graham was negligently operating the M/V Elaine G and tow in violation of Rule 6, Safe Speed, as stated under the Rules of the Road, 33 U.S.C. 2005. The second allegation of negligence is hereby found **NOT PROVED** by the preponderance of the evidence.

## V. SANCTION

Captain Graham is an experienced Master and the record does not reveal any blemishes on his maritime record. The parties stipulated that his actions and that of the crew were deemed appropriate following the collision with the recreational vessel. ALJ 1 at Joint Stipulation No. 11.

In addition, the Coast Guard agreed that the recreational vessel violated Rule 23(c)(i) by failing to exhibit proper navigational lights while being underway at night, violated Rule 9(b) for failing to stay clear of the path of the M/V Elaine G, violated Rule 5 for not maintaining a proper lookout and violated Rule 19(c) by failing to take into consideration prevailing circumstances and conditions of night operation. The operator(s) of the recreational vessel were operating under the influence of drugs and/or alcohol. ALJ 1, at Joint Stipulation No. 13. “The consequence, such as a collision or an allision, though unnecessary to support a decision finding negligence, may be an aggravating factor, or the lack thereof be a mitigating factor ....” Appeal Decision 2129 (RENFRO) (1978).

Captain Tilford testified that Captain Graham should have a reasonable expectation that vessels on the river would show proper lights, operate within the Rules of the Road and that the recreational vessel had an obligation to give way. TR. at 143-44.

The Coast Guard, in its Post Hearing Brief proposed a sanction of six (6) months outright suspension for “each negligent act.” The suggested range of an appropriate order under the

charge of negligence in 46 CFR 5.569 varies from two (2) to six (6) months for a type of offense described as “Negligently performing duties related to vessel navigation.” Table 5.569. The Table and suggested range is provided for information and guidance with the intended purpose to promote uniformity in orders issued. “An order within the range would not be considered excessive” and mitigating or aggravating circumstances could warrant departure. 46 CFR 5.569(d). See also Commandant v. Moore, NTSB Order No. ME-177 (2005).

It is the nature of this administrative proceeding to “promote, foster and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959). These proceedings are remedial and not penal in nature and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5.

Given the nature of the incident and consideration of all of the facts, including those applicable to the recreational vessel and its occupants, I find that aggravating circumstances surrounding the events that cost the lives of six individuals should not rest squarely on Captain Graham. Here, the Coast Guard proposed a sanction within the guidelines as based on the facts and circumstances contained in the record. Upon review of all of the evidence, documents, witness statements and exhibits taken as a whole, I find that the proposed sanction is reasonable under the circumstances presented.

## VI. ORDER

IT IS HEREBY ORDERED that Captain Terry M. Graham's Coast Guard issued License No. 1037705 is hereby suspended outright for the period of six (6) months. Captain Graham is ORDERED to surrender his license to nearest Coast Guard Marine Safety Office or The Eighth District Judge Advocate General Office or the Marine Safety Office, 600 Martin Luther King, Jr. Place, Rm. 360, Louisville, KY 41202-2230.

PLEASE TAKE NOTICE that issuance of this Decision and Order serves as the parties' right to appeal under 33 CFR Part 20, subpart J. A copy of Subpart J is provided as Attachment E - Appeal.

Done and dated this 16<sup>th</sup> day of November, 2005

New York, NY

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**Walter J. Brudzinski**  
Administrative Law Judge  
U.S. Coast Guard

## **ATTACHMENT A -WITNESS AND EXHIBIT LIST**

### **ALJ EXHIBIT**

1. Joint Stipulation by the parties (6 pages)

### **WITNESSES FOR THE COAST GUARD**

1. LCDR William D. Adkins
2. Captain Mark A. Tilford

### **EXHIBITS FOR THE COAST GUARD**

- A. Captain Graham's Coast Guard issued License (1 page)
- B. Map of the Ohio River at Spring Creek Light (1 page) and Cooper Bar (1 page)
- C. Transcript, Formal Investigation dated July 25, 2001 (206 pages, note: page 109 was missing and a copy of page 119 was in its place)
- D. Transcript Formal Investigation dated July 26, 2001 (143 pages)
- E. Audio Transcription re: Interview with Captain Pauley, dated July 15, 2001 (24 pages)
- F. Affidavit of Clinton Pauley (3 pages)
- G. Computer log, M/V Elaine G (3 pages)
- H. Transcript, Interview with Samuel E. Wolf , dated July 20, 2001 (12 pages)
- I. INDR Accident Report dated July 23, 2001 (17 pages)
- J. Diagram of tug and tow configuration (1 page)
- K. Curriculum Vitae, Captain Mark Tilford (3 pages)
- L. Report of Opinion by Captain Mark Tilford (5 pages)
- M. Coast Guard Formal Investigative Report (29 pages)

### **WITNESS FOR RESPONDENT**

1. Captain David E. Hammond

### **EXHIBITS FOR RESPONDENT**

1. Affidavit of Clinton Pauley (3 pages)
2. Toxicology Report – AIT Laboratories, T. H. (2 pages)
3. Toxicology Report – AIT Laboratories, J. L. (2 pages)
4. Toxicology Report – AIT Laboratories, W. Y. (2 pages)
5. Toxicology Report – AIT Laboratories, B. B. (2 pages)
6. Toxicology Report – AIT Laboratories, R. V. (2 pages)
7. Toxicology Report – AIT Laboratories, J. B. (2 pages)
8. Post Mortem Examination – T. H. (5 pages)

EXHIBITS FOR RESPONDENT continued

9. Post Mortem Examination – J. L. (4 pages)
10. Post Mortem Examination – W. Y. (7 pages)
11. Post Mortem Examination – B. B. (4 pages)
12. Post Mortem Examination – R. V. (4 pages)
13. Post Mortem Examination – J. B. (4 pages)
14. Map of the Ohio River at Spring Creek Light (1 page)
15. Map of the Ohio River at Cooper Creek (1 page)
16. Curriculum Vitae, John Deck, III. (6 pages)
17. Pictures – copies M/V Elaine G and signs (12 pages)
18. Picture – M/V Elaine G – external (1 page)
19. Picture – M/V Elaine G – bridge (1 page)
20. Picture – watch-change protocol sign (1 page)
21. Picture – M/V Elaine G – external with markings (1 page)
22. IDNR – Located Evidence List (1-30) (2 pages with 1 extra page, total of 3 pages)
23. Brochure – Life Lines (4 pages)
24. Commonwealth Medical Legal Services Report, dated September 10, 2001 (4 pages)
25. Mercury – Mercruiser Report dated September 27, 2001 (5 pages)
26. Videotaped deposition of Captain Samuel Wolf (156 pages)
27. Certificate of Analysis - Indiana State Police dated September 26, 2001 (1 page)
28. Deposition of LCDR William D. Adkins (35 physical pages)
29. Copy capacity placard showing maximum capacity and specifications – Wellcraft Marine (2 pages)
30. Picture of capacity placard (1 page)
31. Captain David Hammond’s Analysis and Report (5 pages) and one page curriculum vitae for Captain David Hammond.
32. Affidavit of William P. Schroeder (6 pages)
33. Curriculum Vitae and Report of John Deck III (24 pages)
34. Navigation and Vessel Inspection Circular No. 2 02, dated December 11, 2001 (18 pages)

**ATTACHMENT B - COMPLAINANT'S PROPOSED FINDING OF FACTS AND  
CONCLUSION OF LAW**

NOTE: Responses provided to proposed findings and conclusions stand for the acceptance or rejection of the general notions and propositions presented. Refer to the Findings of Fact and Ultimate Conclusions of Law as contained in the Decision and Order for the actual findings in this matter.

1. On July 15, 2001, Respondent, Capt. Terry Max Graham, was the holder of Merchant Mariner's License Number 856013, and currently holds his renewal, Merchant Mariner's License Number 1037705.

**ACCEPTED**

2. On July 15, 2001 at mile 565.5 Respondent relieved Capt. Pauley his pilot and assumed the watch as the sole lookout.

**ACCEPTED** noting that locations are estimates based on the record.

3. On July 15, 2001 at 5:25 at mile 568 on the Ohio River the Respondent collided with a 1987 Wellcraft that was occupied by 6 adults and a dog.

**ACCEPTED** noting that times and locations are estimates based on the record.

4. The Respondent covered between 6,864 to 13,200 feet from the time he relieved the pilot to the time of the collision.

**ACCEPTED** noting that times and locations are estimates. See A. Jurisdiction.

5. The Respondent had assumed the watch with enough distance between him and the pleasure craft that the pleasure craft was still outside of the sight and radar blind spots.

**REJECTED**, not conclusive or supported in the record as the *exact* location of the recreational vessel with regard to times to assume the watch are unknown. See A. Jurisdiction.

6. The weather conditions were such that one was required to navigate mainly by radar and use a fog signal due to areas of shutout fog, and all of these factors demonstrate that there were impediments to keeping a proper lookout.

**REJECTED** not conclusive or supported in the record with regard to “required to navigate.” Record does not support the notion of “shutout fog.” See Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

7. The Elaine G’s tow was 998 feet long creating a 765 ft. visual blind spot to the water, 529 ft. for the higher radar to the water, and 570 ft. for the lower radar to the water all of these factors created an impediment to keeping a proper lookout.

**ACCEPTED IN PART, REJECTED IN PART** as presented in Findings of Fact 18 in the Decision.

8. The tow consisted of empty hopper barges causing the hopper barge effect, which can hide small boats and is an impediment to keeping a proper lookout.

**ACCEPTED** with limited weight and relevance. See Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

9. Radar has inherent flaws in picking up vessels like fiberglass fishing boats and other small objects in the river, which is an impediment to keeping a proper lookout.

**ACCEPTED** with limited weight and conclusion presented. See Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

10. The Elaine G was operating in complete darkness with shutout fog in the area, which impaired the Respondent’s night vision.

**REJECTED** not conclusive or supported in the record with regard to “shutout fog.” See Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

11. The Respondent did not take into full account the weather, conditions of visibility, traffic density including small vessels, limitations of the Elaine G’s equipment, and proximity of navigational hazards.

**ACCEPTED** as provided in Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

12. The Respondent knew there were small fishing vessels on the Ohio River on the morning of July 15, 2001.

**REJECTED** not conclusive or supported in the record with regard to knowledge. See Discussion, 1. Negligent Violation of Rule 5 – Lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

13. The Respondent could not have stopped his vessel within the half distance that he could see.

**REJECTED** not conclusive or supported in the record with regard to stopping distance and application of the half distance rule. See Discussion, 2. Negligent Violation of Rule 6 – Safe Speed.

14. A lookout on the bow of a lead barge would have increased the visibility range by approximately 1610 ft.

**REJECTED** not conclusive or supported in the record with regard to range of visibility. See Discussion, 1. Negligent Violation of Rule 5 – Lookout and Findings of Fact Number 18.

#### PROPOSED CONCLUSIONS OF LAW

1. The United States Coast Guard is charged with enforcing the regulations governing mariner's licenses, certificates, or documents issued by the Coast Guard. (46 CFR § 5.3).

**ACCEPTED**

2. The respondent was acting under authority of his document because he was required by 46 U.S.C. §8904 to possess a document to operate the Elaine G. (46 CFR § 5.57).

**ACCEPTED** as being non-contested by the parties.

3. Contributory negligence is not a defense in suspension and revocation proceedings, thus only respondent's actions and omissions are relevant. (CDOA 2474, CARMENKE; CDOA 2414; HOLLOWELL; CDOA 2581, DRIGGERS).

**ACCEPTED** as provided. See B. Negligence.

4. Custom or practice in an area such as normally not using a lookout is not justifiable. (CDOA 2414 HOLLOWELL).

**REJECTED** as an outright conclusion.

5. The actual Damage or Collision are not elements of negligence in administrative proceedings, yet they may be used as aggravation. (CDOA 2402, POPE; CDOA 2581, DRIGGERS).

**ACCEPTED** as provided. See B. Negligence, V. Sanction.

6. The Respondent was negligent in that a proper lookout was not maintained while respondent was standing watch including the time of the incident at mile 568 of the Ohio

River. (33 U.S.C. §2005; 46 C.F.R. § 5.29; S. Rep: No 96-979, 96<sup>th</sup> Congress (1980); CDOA 2581, DRIGGERS).

**ACCEPTED** as provided. See Discussion, 1. Negligent Violation of Rule 5 – Lookout.

7. The respondent during his watch and at the time of the incident at mile 568 of the Ohio River was negligently operating the Elaine G at an unsafe speed in accordance with the Rules of the Road. (33 U.S.C. §2006; 46 C.F.R. § 5.29).

**REJECTED** see Discussion, 2. Negligent Violation of Rule 6 – Safe Speed.

**ATTACHMENT C -RESPONDENT’S PROPOSED FINDING OF FACTS AND  
CONCLUSION OF LAW**

NOTE: Responses provided to proposed findings and conclusions stand for the acceptance or rejection of the general notions and propositions presented. Refer to the Findings of Fact and Ultimate Conclusions of Law as contained in the Decision and Order for the actual findings in this matter.

1. The M/V Elaine G is a 31 year old, 151-foot, uninspected towing vessel engaged in pushing hopper barges on the Ohio River. This vessel’s primary route is from Pittsburgh, Pennsylvania to Louisville, Kentucky, and return. The vessel picks up and drops of barges at various power plants and fleets between Pittsburgh and Louisville. (ALJ Exhibit 1, Paragraph 3, Coast Guard Exhibit M.)

**ACCEPTED**

2. On July 15, 2001, the M/V Elaine G had a crew of eight (8) personnel. The crew consisted of one (1) master (“Respondent”), one (1) operator of uninspected towing vessels (serving as a pilot), four (4) deck hands, one (1) cook, and one (1) engineer. (ALJ Exhibit 1, Paragraph 5, Coast Guard Exhibit M)

**ACCEPTED**

3. The crew of the Elaine G was comprised of professional mariners who were properly licensed and trained, and were experienced. In particular, the

Captain and Pilot were experienced river towboat operators, who were licensed, and who also had attended special radar training, and had earned radar endorsements on their licenses. (Respondent's Exhibit 36, Page 16, Number 2)

**ACCEPTED**

4. The master aboard the M/V Elaine G was the Respondent, Captain Terry Max Graham. Respondent holds a fourth issue of a Coast Guard license, serial number 856013, endorsed "Master of steam of motor vessel of not more than 1600 gross tons upon Western Rivers, operator of uninspected towing vessels upon Western Rivers, also radar observer "rivers" to expire June, 2003". Respondent was 43 years old, operated towing vessels for approximately 18 years and was a vessel Captain for The Ohio River Company for approximately 2.5 years. Respondent was assigned to the M/V Elaine G for approximately 1.5 years and was aboard the vessel for 21 days. (ALJ Exhibit 1, Paragraph 6, Coast Guard Exhibit M)

**ACCEPTED** noting that Respondent's present license, number 1037705 expires July 8, 2008 and his Radar Endorsement expires in May 2008.

5. Pilot Clinton Pauley ("Mr. Pauley") was a licensed operator "pilot" employed aboard the M/V Elaine G on July 15, 2001. Mr. Pauley held a second issue of Coast Guard license, serial number 841506, Mr. Pauley was 50 years old and operated towing vessels for approximately 7 years, all with the Ohio River

Company. Mr. Pauley served aboard different vessels for the company and was aboard the M/V Elaine G for approximately 4 days. (ALJ Exhibit 1, Paragraph 7, Coast Guard Exhibit M)

**ACCEPTED**

6. The Elaine G was properly manned by a full complement of crew, who were operating under appropriate operational procedures provided by the vessel owner. In particular, the watch change protocol was adequate, and was properly followed resulting in a complete exchange of information to enable a seamless transition from the Pilot on watch to the Captain relieving. (Respondent's Exhibit 36, Page 16-17, Number 4)

**ACCEPTED** as discussed. See discussion A. Jurisdiction

7. The Elaine G was crewed by a full complement of sober, trained and licensed professional river boat men, who were not impaired by substance, lack of sleep, and were standing watch in appropriate locations at the time of the accident. (Respondent's Exhibit 36, Page 3, Number 3)

**ACCEPTED** to the extent of tests performed and as demonstrated in the record.

8. The Elaine G is equipped with modern commercial grade professional navigation and electronics equipment, including marine radios and two separate

marine radar units. (Respondent's Exhibit 36, Page 3, Number 2) At all times, both of the Elaine G's radars were working and being used properly. (ALJ Exhibit 1, Paragraph 2, Coast Guard Exhibit M)

**ACCEPTED IN PART, REJECTED IN PART** refer to Section I.

Preliminary for discussion concerning the "use of radar."

9. The accident boat was a 1987 Wellcraft, model 180. The boat is powered by a 130 horsepower gasoline engine driven through an outdrive. The boat was 17 feet six inches in length, 74 inches in breadth, with an empty draft of 18 inches at the stern with the outdrive raised. It has a Coast Guard Capacity Plate affixed which limited the maximum capacity to seven passengers or 1050 pounds of passenger and gear. Two (2) operational cellular phones were aboard the Wellcraft in her glove box. The Wellcraft was not equipped with radar, radar reflector, sound appliance, VHF radio, operable horn and/or signal flares. The Wellcraft was unseaworthy. (ALJ Exhibit 1, Paragraph 4) The boat had been out of use and had been recently repaired and placed back into service two days prior to the accident. (Respondent's Exhibit 36, Page 3, Number 4)

**ACCEPTED** as discussed, refer to CG Ex. M at 9 regarding data used for the Wellcraft vessel.

10. At all times pertinent, the M/V Elaine G was properly displaying all her navigation lights including one (2) mile light on the top of the pilot house, a (3)

mile green running light on the starboard side and a (3) mile red running light on the port side, and two (2) mile amber towing lights on the stern. The tow was lit with a (2) mile green running light on the forward starboard corner, a (2) mile red running light on the forward port corner and a (2) mile special flashing amber on the forward center line. A seven watt white steering light on a 7-8 foot pole located all the way forward to the center of the tow. The tow also had 2 foot by 2 foot low intensity lights at each barge coupling on the port and starboard sides (4 on each side). The Elaine G had her guard lights on. (ALJ Exhibit 1, Paragraph 8, Coast Guard Exhibit M)

**ACCEPTED**

11. On the morning of July 15, 2001, the Elaine G's lights and fog signals should have been heard and seen by any vessel in the Elaine G's vicinity for miles. (ALJ Exhibit 1, Paragraph 8)

**ACCEPTED** for the general proposition stated noting that lights and signals could be heard and seen "for miles" is not conclusive in the record.

12. Pilot Pauley stood a scheduled watch from 1200 hours to 0600 hours day and night. On the morning of July 15, 2001, the Elaine G was downbound on the Ohio River, Pilot Pauley acted as his own lookout during the entire watch until Captain Graham came into the pilothouse and together they acted as an enhanced lookout during the watch exchange. (Coast Guard Exhibit C, Pauley pages 157-59)

**ACCEPTED IN PART, REJECTED IN PART** see Discussion, 1.

Negligent Violation of Rule 5 – Lookout regarding enhanced lookout.

13. On the morning of July 15, 2001 near mile 560-561, Pilot Pauley reduced the speed of the Elaine G from approximately 10 miles per hour to bare steerage way of approximately 5 miles per hour over the bottom. The Elaine G made no other speed changes. (Hammond testimony and Respondent's Exhibit 33)

**ACCEPTED** to the extent as contained in the evidence presented. See Discussion, 2. Negligent Violation of Rule 6 – Safe Speed.

14. At approximately 0420 hours, Mr. Pauley observed a small boat apparently at anchor, near the bank in the vicinity of a black buoy near Cliffy Creek Light at Ohio River Mile 561. Mr. Pauley visually observed the boat from approximately a mile away and could visually see the navigation lights on the vessel. He could not remember if the vessel was distinguishable from the buoy on his radar. This vessel was not the same vessel involved in the collision. No other recreational or commercial vessels were observed ahead that morning visually or by radar by the Elaine G or the tow boat Pat McBride which was approximately one and a half (1 ½ ) miles behind the Elaine G. The traffic density ahead known, detected or reasonably foreseeable was zero to minimal. It was reasonable for those aboard the Elaine G to believe there was no traffic ahead in her path. (ALJ Exhibit 1, Respondent's Exhibit 33, Coast Guard Exhibit M at page 13, K and Coast Guard Exhibit C, Pauley)

**ACCEPTED IN PART, REJECTED IN PART** as to the extent of reliance of foreseeability. See Discussion, 1. Negligent Violation of Rule 5 –

Lookout regarding enhanced lookout.

15. At all times pertinent to this incident, both the Elaine G, the Wellcraft and the Pat McBride were operating in complete darkness. (Para. 9, ALJ Exhibit 1) The lower gauge at Markland Locks and Dams show the River stage to be at 12.5 feet which would result in a down river current of approximately 1-2 miles per hour. (Coast Guard Exhibit M, page 9 at 8)

**ACCEPTED**

16. Because of the presence of some patchy surface fog, Pilot Pauley activated the automatic fog signal and whistle light at approximately 0510 hours when the vessel was near the Spring Creek Light near Mile 567.7 This was an appropriate safety practice. The Pat McBride did not activate its fog signal until approximately 0550 and never posted a lookout on the head of the tow. (ALJ Exhibit 1, Paragraph 8, Coast Guard Exhibit C, Page 90 and Coast Guard Exhibit M)

**ACCEPTED** noting that conditions varied between the vessels and operators.

17. From approximately 0510 hours on July 15, 2001, the Elaine G was sounding a fog signal that could be heard at a distance of at least 2 miles. The whistle had a 1 mile white whistle light that illuminated at each signal. (ALJ Exhibit 1, Paragraph 10, Coast Guard Exhibit M)

**ACCEPTED** noting that the record is not conclusive regarding distance

heard.

18. The occurrence developed and took place in the early morning between 0500 and the hearing of voices at 0515 to 0550. (Respondent's Exhibit 36, Page 4, Number 9)

**ACCEPTED** noting that times are estimates in the record.

19. Somewhere near the Spring Creek light located at Mile 567.7 on the Ohio River, Captain Graham came up into the pilothouse and he and Mr. Pauley exchanged watch information including the state of visibility, vessel activity, traffic density and the lack of any radar or visual contacts other than the lit recreational vessel along the bank. (Page 50 of Transcript, ALJ Exhibit 1, Paragraph 10)

**ACCEPTED**

20. During the watch exchange, Captain Graham and Pilot Pauley acted as a joint enhanced lookout. They could see far enough ahead to safely operate the Elaine G and stop her in a safe distance. The watch information exchange took an unknown amount of time, but more likely than not lasted anywhere from 5 to 10 minutes. (Hammond testimony, Respondent's Exhibit 33 and Tilford testimony and Pauley Coast Guard Exhibit C at page 128, lines 20-24, 151, line 11)

**ACCEPTED IN PART, REJECTED IN PART** as to the extent of reliance on foreseeability and the phrase "safely operate." See Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2.

Negligent Violation of Rule 6 – Safe Speed.

21. At the time of the watch exchange, the Elaine G's position was not noted in the log book as there is no requirement to log this information, but the location was more likely than not was in the middle of the Ohio River, in the vicinity of the Spring Creek Light. The exact time of the watch relief is unknown. (ALJ Exhibit 1, Paragraph 10)

**ACCEPTED**

22. There were no actual eyewitnesses to the collision. The fact that there may have been a collision was manifested in debris from the Wellcraft found adjacent to the Elaine G tow after she stopped at Mile 568 and witness marks on the lead center barge OR-2110 which had characteristics which would correlate to the damage on the Wellcraft. (Respondent's Exhibit 36, Page 4, Number 10)

**ACCEPTED**

23. The occupants of the Wellcraft were not competent at the time of the occurrence to operate the recreational boat on the Ohio River at night, and in conditions of patchy fog. While testimony indicated they had prior experience fishing at night on the river, the evidence also indicated that each of them was under the influence of cocaine and other substances at the time of the occurrence. Such an impairment more likely than not compromised any experience, judgment, and/or responsibility which they might otherwise have. (Respondent's Exhibit 36, Page 17, Number 6 and Coast Guard Exhibit C)

**ACCEPTED** as generally proposed, the condition and state of the Wellcraft and its occupants is a not a focus of this proceeding.

24. From the time Captain Graham assumed the watch, he was not distracted in any way and kept his eyes on the River and radar. He remained in the pilothouse and was maintaining a diligent lookout by sight, sound and radar. There was no indication of anything unusual. Minutes after assuming the watch, Captain Graham heard a call from outside the starboard side of the pilot house. (Coast Guard Exhibit C at pages 50, 51, 59, 63, 98, 100, 114 and 121)

**ACCEPTED** for the general proposition stated.

25. Captain Sam Wolf assumed the watch aboard the Pat McBride at approximately 0525 hours and noticed on his radar that the Elaine G was stopped approximately one and a half miles ahead. He never posted a lookout on the head of the tow. He was near Mile 566.7 at that time. (Respondent's Exhibit 26)

**ACCEPTED**

26. At all times pertinent, the Wellcraft was underway but not making way and was severely overloaded. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

27. The Wellcraft had no operating navigation lights. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED**

28. The occupants of the Wellcraft were not actively engaged in fishing and none of the occupants were wearing personal floatation devices. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** noting that the occupants were not wearing personal floatation devices *when found* and as discussed and weighed in the Decision and Order.

29. The Wellcraft was not equipped with any portable sound device and the Wellcraft's onboard sound device was not functional. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

30. Some of the equipment on board the Wellcraft that added to her overloading was two operational cell phones, a cooler with pop and beer; bucket of tools; an anchor with 50 feet of line; 7 fishing rods; a 12 volt hand held light attached to the starting battery; two (2) spare gas tanks; a spare 12 volt battery; and, various other items on board. There may have been other equipment onboard that was lost and not recovered. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

31. The Wellcraft was unlit and silent before the collision. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

32. The Wellcraft's engine was operational and it was equipped with a functional search light, that was turned off. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

33. The Wellcraft was not anchored. (ALJ Exhibit 1, Paragraph 13)

**ACCEPTED** as discussed and weighed in the Decision and Order.

34. All the occupants of the Wellcraft including the operator were engaged in illegal drug use and were severely impaired by a combination of fatigue, illegal and prescription drugs and alcohol. (Page 24, Paragraph 6-A)

**ACCEPTED** as discussed and weighed in the Decision and Order.

35. The positions and maneuvers of the Wellcraft prior to the collision are unknown, but it was stipulated by the parties that on the morning of July 15, 2001, the Wellcraft was drifting in a 1-2 mph down river current underway in the middle of the Ohio River in complete darkness without any lights, flares, or sound appliances with six (6) severely fatigued, drug and alcohol impaired occupants each of whom was using and was under the influence of a deadly combination of cocaine, various pain killing medications, opiates and alcohol. The effect of the prescription and illegal drugs, fatigue, and alcohol was extreme fatigue or loss of consciousness. All six (6) men and the dog were out on the Ohio River all night and in the case of the operator, Mr. Burgen and Mr. Valentine, were "boating" on

the River for approximately 16 hours. (ALJ Exhibit 1, Paragraphs 13-14)

**ACCEPTED** as discussed and weighed in the Decision and Order.

36. Captain Graham was fully rested and prepared to assume the watch and was not impaired in any way. (Coast Guard Exhibit M)

**ACCEPTED** as discussed and weighed in the Decision and Order.

37. Both Captains Graham and Pilot Pauley are competent radar observers, who were trained at Coast Guard certified radar schools. These skilled and certified radar observers testified that they were observing both radar units. Captain Graham testified that he did not see a small craft on radar. Pilot Pauley, who was relieved, just prior to Captain Graham hearing the calls for help, also did not observe the Wellcraft on radar, although he had observed one small craft and buoys on radar earlier on his watch. Captain Graham carefully assessed the limitations of the radar in evaluating the visibility, speed and lookout situation. (Respondent's Exhibit 36, Coast Guard Exhibit C at pages 59, 63, 85, 98, 100, 141, 142 and 157)

**ACCEPTED IN PART, REJECTED IN PART** Captain Pauley stated that he could not distinguish the small craft on radar from the buoy. CG Ex M at 13, Ex. C at 132-33. The assessments made by Captain Graham are contained under Discussion for each allegation charged.

The condition of overloading reduced the amount of surface area of the Wellcraft available to the radar. The effect is not unlike the stealth boat

developed by the Navy for radar avoidance. (Respondent's Exhibit 36, Page 15)

**ACCEPTED IN PART, REJECTED IN PART** second statement not proved in the record.

38. Coast Guard post incident calculations indicate that there was a radar blind spot on the Elaine G directly ahead. These calculations were done by the Coast Guard Technical Branch after measuring the Elaine G, her tow and the Wellcraft. There was shadowing of the lead barge cargo coaming (*sic*) of approximately 740 feet. Officer Stoll testified the he observed several small boats and personal watercraft on the Elaine G's radar when he came aboard in response to the occurrence. (Respondent's Exhibit 36, Page 15 and Coast Guard Hearing Testimony at Page 13 and Coast Guard Exhibit M)

**ACCEPTED IN PART, REJECTED IN PART** see Findings of Fact 18 regarding blind spot calculations.

39. The Elaine G was maintaining a proper lookout pursuant to Rule 5 of the Inland Navigation Rules. The Captain and/or Pilot were standing watch in the pilothouse and were observing visually, by radar, standing by on the appropriate radio channels, as well as by hearing which was how the Respondent first became aware of the occurrence. While there was no separate lookout posted at the head of the tow, this is an appropriate discretionary prerogative of the Captain/Pilot on watch. He exercises his discretion based upon all conditions known and foreseeable to him, and makes a determination as to whether an additional lookout posted on the head of the tow, or any other location, is needed and/or would

enhance safety of the operation of the vessel and tow under the conditions present. (Respondent's Exhibit 36, Page 17-18 and Respondent's Exhibit 26, 28, 33 and 34 and Coast Guard Exhibit C and Hearing Transcript of Graham at pages 85-86, 100 and Pauley at pages 141-142)

**ACCEPTED IN PART, REJECTED IN PART** see Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

40. After hearing the call from outside the pilot house, Captain Graham brought the engines to all stop and went out to the starboard side of the pilothouse to determine the location of the call. He returned to the pilothouse and sounded the general alarm and put the engines in neutral slow to the way of the Elaine G. The vessel came to a stop, the Elaine G drifted in the current for twenty to thirty (20-30) minutes while the entire crew used search lights to attempt to locate the call and check the tow. Captain Graham and the crew did all they could to locate the source of the calls. No one ever identified the source of the call or saw anyone in the water. Captain Graham and the crew of the Elaine G acted appropriately following the call for help. (ALJ Exhibit 1, Paragraph 11)

**ACCEPTED IN PART, REJECTED IN PART** Captain Graham stated that he attempted to maintain his position and did not drift in the current. CG Ex. C at 75.

41. Captain Graham called the Coast Guard at 0550 hours and moored the Elaine G onto the “Kentucky side”, on the Ohio River at Mile 568. The position

of the Elaine G at Mile 568 on the Kentucky side was confirmed by IDNR using GPS. (ALJ Exhibit 1, Paragraph 11 and Coast Guard Exhibit D and Stoll testimony at pages 21-22)

**ACCEPTED**

42. It is more likely than not that the opportune moments the crew of the Elaine G had to detect the Wellcraft occurred before Captain Graham assumed the watch. The Wellcraft, if discernable visually or by radar, should have been identified by Pilot Pauley on his watch. (Coast Guard Exhibit M, Page 21, Paragraph 1-H)

**REJECTED** as it is unclear to the *exact* time and location of the collision and inconclusive regarding what Captain Pauley “should have identified.” See Discussion, A. Jurisdiction, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

43. The factual witnesses involved testified to only rough approximations of critical times related to this incident. Since uninspected towing vessels are not required to keep official logs, the exact time of the watch relief, the Elaine G’s location, and the time of the first call are estimates. It is more likely than not that the approximate times given by the witnesses could be several minutes off in either direction. (Coast Guard Exhibit M)

**ACCEPTED**

44. The evidence concerning the fog was that it was patchy and variable. However, Captain Graham was able to see a clear path down the middle of the

River. There was substantial evidence that the Elaine G was fully equipped and properly manned to operate under such conditions. The Captain/Pilot also had the prerogative to interrupt and/or discontinue operations in their discretion, if they felt doing so was appropriate. Their decision to operate in the manner they were doing at the time of the occurrence was reasonable under the conditions present at that time. It was prudent to operate the fog signal even where the Elaine G had adequate visibility, as a warning to other vessels, including small recreational boats. (Respondent's Exhibit 36, Page 18, Number 8.1 and Hammond testimony and Respondent's Exhibits 26, 33, 34 and 36 and Coast Guard Exhibit C at page 98, line 19)

**ACCEPTED IN PART, REJECTED IN PART** as to "reasonable" as discussed in the Decision and Order, IV. Discussion. See also Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

45. At all times, Captain Graham complied with the Coast Guard approved Ohio River Company policies applicable to the operation of the Elaine G, including the lookout policy that states, "in most cases, the vessel operator shall be sufficient to perform lookout-duties". (See Coast Guard Exhibit 106, Page 81 to the Coast Guard Report and finding h. of Lt. Adkins' report and deposition testimony of Lt. Adkins, Exhibit 28 page 84-94 and Captain David Hammond testimony and Respondent's Exhibits 33, 34 and 36)

**ACCEPTED** as discussed and weighed in the Decision.

46. Even if Captain Graham had ordered a lookout to go forward at the time he assumed the watch, it is more likely than not that the lookout could not have gotten to the head of the tow in sufficient time to be of any assistance in this instance. (Adkins deposition page 94 testimony and Hammond testimony)

**ACCEPTED** noting the speculative condition presented and as discussed and weighed in the Decision.

47. The Elaine G's radars were at all times operating properly there was a ghost area of radar directly ahead of the tow but this was known and appreciated by Captain Graham and Pilot Pauley. It was determined by IDNR investigators that the radars were properly tuned by observing and being able to track two (2) personal watercraft and a fiberglass recreational vessel on both radars. There was no blind spots (radar or visual down the sides of the Elaine G. The blind spot forward was only as wide as the tow. (Coast Guard Exhibit M, Page 15(aa) and Coast Guard Exhibit D Stoll at page 13)

**ACCEPTED IN PART, REJECTED IN PART** Captain Graham's statements regarding "ghost areas" not supported by citations provided. Refer to comments on "use of radar" provided earlier and in the Discussion.

48. The Wellcraft had a number of options available to avoid a collision prior to impact. If the vessel operator was unable to start the engine due to a weak battery or flooding with fuel other options were readily available. A spare battery was discovered aboard the vessel. It could easily have been connected to the boat's electrical system if the need was present. Further, two (2) adequately

sized boat oars were onboard the vessel and could have been used to avoid the Elaine G. (Coast Guard Exhibit M, Page 24, Paragraph 5-A)

**REJECTED** as statement is unsupported and speculative.

49. None of the occupants of the Wellcraft were wearing personal floatation devices when found. The use of a PFD may have saved their lives because the cause of death in each case was drowning and the coroner determined they had no other injuries that were sufficient to cause their deaths. The coroner concluded that none of the external injuries found on the victims were severe enough to have been a direct and sole cause of death. (Coast Guard Exhibit M, Page 27, Paragraph 8)

**REJECTED** noting that the Coroner stated the deaths were consistent with drowning and no finding is given with regard to whether or not a PFD may have saved any lives given that nature of the collision.

50. The Wellcraft was recovered with the ignition key on; however, there was no identified mechanical reason which would prevent the engines from being operable. The Wellcraft could attain speeds of 30 miles per hour which would have easily avoided the Elaine G. (Coast Guard Exhibit M, Page 17, Subpart, k and l and ALJ Exhibit 1, Paragraph 14)

**ACCEPTED IN PART, REJECTED IN PART** noting that the speed and subsequent statement is speculative and not supported by the citations provided.

51. At approximately 1300 hours, Coast Guard Marine Safety Office Louisville personnel arrived on scene approximately seven (7) hours after Captain Graham's initial report. There was no search and rescue effort by the Coast Guard which was inadequate according to the Coast Guard investigating officer. (Deposition testimony of Adkins)

**ACCEPTED** as discussed and weighed in the Decision.

52. Captain Graham was tested by a portable breath testing device that showed that he was negative for alcohol and later submitted to a drug test and the results were negative. (ALJ Exhibit 1, Paragraph 12)

**ACCEPTED**

53. The time and location of the collision is unknown other than to say that it took place sometime between 0505 and 0515, but it could not have occurred at Mile 568 because this is where the Elaine G moored after her search and rescue effort. (David Hammond and Coast Guard Exhibit D and testimony of Stoll at pages 24 and 73)

**REJECTED** noting that times and locations are estimates, refer to Discussion, A. Jurisdiction

54. It is not known whether some of the occupants of the Wellcraft had left the Wellcraft prior to the collision or whether the Wellcraft had been taking on water prior to the collision. (Respondent's Exhibit 36, Coast Guard Exhibit D and Stoll at page 73)

**REJECTED** noting that the actions or non actions of the vessel are not known nor are they pertinent to this proceeding.

55. The operator of the Wellcraft violated Rule 35(b) in that the Wellcraft was not sounding any sound signal. (ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding.

56. The operator of the Wellcraft violated Rule 23(c)(I) by failing to exhibit the proper navigation lights while being underway at night. (ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding. Rule citation is 23(c)(i).

57. The operator of the Wellcraft violated Rule 9(b), by failing to stay clear of the path of the M/V Elaine G. (ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding.

58. The operator of the Wellcraft violated Rule 5 by not maintaining a proper lookout. (ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding.

59. The operator of the Wellcraft violated the provisions of Rule 19(c) by

failing to take into consideration prevailing circumstances and conditions of night operation. (ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding.

60. The operator of the Wellcraft was illegally operating under the influence of drugs and/or alcohol. (Para. 13, ALJ Exhibit 1)

**ACCEPTED** noting that the actions or non actions of the vessel or its occupants are not pertinent to this proceeding.

61. There was no foreseeable reason to expect or believe that an overloaded and unlighted pleasure craft would be adrift in the navigable channel on the morning of July 15, 2001. (Respondent's Exhibit 34, Number 10a)

**REJECTED** foreseeability not determined as a Finding of fact. See Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

62. There was no foreseeable reason to believe or anticipate that a pleasure craft, if encountered, would be unwilling or unable to yield and/or keep out of the way of an approaching tow as required by law. (Respondent's Exhibit 34, Number 10b)

**REJECTED** foreseeability not determined as a Finding of fact. See Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

63. There was no foreseeable reason to believe that a crew member posted at the head of the tow and assigned lookout duties would be able to observe or detect an unlighted object, and interpret and communicate that information to the pilothouse with sufficient detail and time to enable a watch officer at the helm to take effective evasive action to avoid collision. (Respondent's Exhibit 34, Number 10c and Respondent's Exhibit 35)

**REJECTED** speculative statement, foreseeability not determined as a Finding of Fact. See Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

64. Under the existing circumstances and conditions, it would have been inappropriate for the vessel to subject a crew member to the risks and hazards which he would have been exposed to had he been required to stand watch at the head of the tow on the morning of July 15, 2001. (Respondent's Exhibit 34, Number 10d)

**REJECTED** record taken as a whole does not support this conclusion as a Finding of Fact. See Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

65. The publication entitled Riverways, issued by the Commander, Second Coast Guard District, is addressed to pleasure boat owners. Across the bottom of the two joined and foiled sheets on the pamphlet is a warning: "A tow boat operator's vision is blocked ahead for several hundred feet... stay clear." A sketch across under the word shows in profile of tow boat pushing a line of 4 barges,

with a line of site drawn from an eye-level at the tow boat's wheelhouse, tangent to the upper most point of the cargo cover on the lead barge, and then continued to the water surface ahead. This evidence establishes that the Coast Guard knew of and accepted the practice of tow boat operators acting as their own lookouts with substantial blind spots. (Respondent's Exhibit 23)

**ACCEPTED IN PART, REJECTED IN PART** knowledge and acceptance by the Coast Guard is not at issue.

66. The sole cause of the collision was the actions of the Wellcraft.

**REJECTED** causation is not an issue in this proceeding. See Discussion, B Negligence, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

#### CONCLUSIONS OF LAW

1. Suspension and revocation proceedings are intended to be remedial in nature. They fix neither criminal nor civil liability. These proceedings are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.

**ACCEPTED**

2. The adequacy of a lookout onboard a vessel underway and safe speed are questions of fact to be resolved under all existing facts and circumstances.

**ACCEPTED**

3. An operator of a towing vessel may serve as a lookout after carefully assessing the situation by taking into account all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density and proximity of navigational hazards. It is not the intent of the Navigation Rules to require additional personnel forward, if none is required to enhance safety.

(Respondent's Exhibit 34)

**ACCEPTED**

4. Rule 6 (Safe Speed) has six (6) factors that shall be taken into account to determine safe speed. They include, the state of visibility, the traffic density, the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions. At night the presence of background light such as from shore lights or backscatter of her own lights, the state of the wind, sea and current, and the proximity of navigational hazards and the draft in relation to the available depth of water. (Rule 6)

**ACCEPTED** noting that the first section under Rule 6 applies to all vessels.

5. Rule 6 has additional factors to be considered by vessels with operational radar. These include the limitations of the radar, any constraints imposed by the range scale in use, the effect of interference, the possibility that small vessels or other floating objects may not be detected at an adequate range, the number of location and movement of vessels detected by radar, and the more exact

assessment of the visibility that may be possible when radar is used to determine range of vessels or other objects in the vicinity. (Rule 6)

**ACCEPTED**

6. Prior to the advent of safe speed as a concept, (1972), the Rule for proceeding in fog (restricted visibility) was to proceed at a moderate speed. The term “safe speed” now replaces the term “moderate speed” which only related to conditions of restricted visibility. The intent of the change of concept was to expand its applicability and to allow higher speeds in appropriate circumstances. “Safe” is used in the relative sense. What is a safe speed must be determined on a case by case basis after analyzing the facts according to the factors listed in the Rule. There is no general rule for such a concept because of the many variables involved in any situation. DOA 2294 (Nicholas Tittonis)

**ACCEPTED** see Discussion, 1. Negligent Violation of Rule 5 – Lookout regarding enhanced lookout and 2. Negligent Violation of Rule 6 – Safe Speed.

7. Operators are not required to assume that persons operating other vessels will be under the influence of a deadly combination of illegal and prescription drugs, alcohol and fatigue rendering them severely impaired or unconscious, failing to keep a proper lookout or maneuver into the path of oncoming vessels. DOA 2337 (Nyborg). Every operator is entitled to presume that others will act lawfully. The Victory 168 U.S. 410 at 426 (1897).

**REJECTED** as not conclusive to the facts of this matter. The facts here are not based on overtaking vessels and nothing in this Decision is rendered in the

absolute. Appeal Decision 2337 (NYBORG) (1984).

8. The Pennsylvania Rule does not create a presumption of negligence following a collision. The Pennsylvania Rule cannot be used to establish negligence of the Respondent in a collision case. DOA 2358 (Buisset).

**REJECTED** as no finding or discussion concerning the application of the “Pennsylvania Rule” is applicable to this proceeding.

9. The negligence of an operator cannot be found proved on the existence of a collision alone. Any such specification is inadequate to, “enable the person charged to identify the offense so that he will be in a position to prepare his defense,” as required by regulation. A negligence specification must allege particular facts amounting to negligence. DOA 2358 (Buisset).

**ACCEPTED IN PART, REJECTED IN PART** as citation refers to prior state of the Rules of Procedure that is not applicable in this 33 CFR Part 20 proceeding with regard to the requirements for a Complaint. Further, there is no question that the parties were apprised of the allegations presented and that the parties actually litigated those allegations.

10. The Supreme Court holding in Steadman v. SEC, 450 US 91, which examined the issue of which standard of proof should be applied in administrative hearings governed by the administrative procedure act is directly applicable in these proceedings. The Supreme Court in Steadman supra, found that it was the intent of Congress to establish a preponderance standard in administrative

hearings to ensure due process. The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence. Except for an affirmative defense, or as provided by paragraph (b) of this section, the Coast Guard always bears the burden of proof.

**ACCEPTED.** See 33 CFR 20.701, 20.702.

11. A specification in a suspension and revocation proceeding must set forth the facts which form the basis of a charge sufficiently to enable a Respondent to identify the act or offense so that a defense can be prepared. The definition is found in the regulation which requires that each specification shall state:

- (a) basis for jurisdiction;
- (b) date and place of act or offense; and,
- (c) the facts constituting the alleged factor or offense.

**REJECTED** noting the specific language of 20.307 controls.

12. The complaint filed by the United States Coast Guard dated January 30, 2004, alleges that the Respondent while serving as master aboard the vessel Elaine G, as required by law or regulation, was negligent on July 15, 2001, at Ohio River Mile 568. The first factual allegation is contained in paragraph 2 which states:

Respondent was negligent by committing an act or failing to perform an act that contributed to a collision between the vessel Elaine G (D501444) and recreational vessel (KY7808PP).

This specification is insufficient and is dismissed because it does not contain any factual allegation and does not sufficiently describe the act or the failure to act.

The Respondent was denied due process of law with regard to this specification.

**ACCEPTED** as discussed and held, see IV. Discussion

13. The Complaint further alleges that on July 15, 2001, at Ohio River Mile 568, the Respondent negligently operated the vessel Elaine G (D501444) by failing to post a lookout. (Allegation 3.)

**ACCEPTED**

14. The Complaint further alleges at paragraph 4 that the respondent on July 15, 2001, at Ohio River Mile 568 negligently operated the vessel Elaine G by failing to operate at a safe speed. (Allegation 4)

**ACCEPTED**

15. The master/operator of an uninspected towing vessel is not responsible for the actions of another operators/pilot which occurs when he is not on watch. DOA 2262 (Sherman)

**REJECTED** not relevant as to the facts and allegations of this proceeding.

16. Negligence is defined as the failure to exercise such precautions or degree of care as a reasonably prudent master would exercise under the same circumstances. In other words, a master is not required to make the right decision at all times in order to avoid being guilty of negligence; but he must exercise reasonable care according to the standards of the ordinary practice of good

seamanship rather than to indulge in the acts of imprudent seamanship. By making a wrong choice among alternatives, a master commits an error of judgment which does not amount to negligence if his choice was one which a competent and prudent master might reasonably have made under the prevailing circumstances. Commandant's DOA 1073, 1091 and 1093.

**ACCEPTED** to the extent provided.

17. The mere showing of violation of a regulation does not constitute negligence per say. Kernan v. American Dredging Co., (1958), 355 US 426. DOA 1093 (Sharpe).

**REJECTED** as not relevant to this proceeding.

18. If Respondent was charged with misconduct rather than negligence, then a violation of a regulation would be sufficient to support the charge since the additional factor of reasonable care would have had no bearing on the proof of the charge. Kernan v. American Dredging Co., (1958), 355 US 426. DOA 1093 (Sharpe).

**REJECTED** as not relevant to this proceeding.

19. When Respondent is charged with negligence, the Coast Guard bears the burden of establishing the standard of care and it failed to establish that standard in these proceedings.

**REJECTED** See IV Discussion, B. Negligence, i. Standard of Care

20. In the Senate report 96-979, the Senate expressed its intent concerning lookouts on towing vessels to permit operators to act as lookouts under certain conditions. DOA 2420 (Lentz). (Schroeder Affidavit, Respondent's Exhibit 34)

**ACCEPTED**

21. Before radar was common, an old rule of thumb was that vessels should be able to stop within half the range of visibility. This was to allow vessels on opposite courses to stop before colliding. This rule of thumb was not widely accepted by the Courts, which wisely decided that the many factors involved warranted a case by case consideration. Nautical Rules of the Road, Second Edition, Page 39. Trico Marine Assets, Inc., v. Diamond B Marine Services, Inc., 01-31323 (5<sup>th</sup> Cir. 05/2003).

**ACCEPTED** as discussed - see B. Negligence, 2. Negligent Violation of Rule 6 – Safe Speed.

22. The speed at which a vessel can safely travel in fog depends on the circumstances of each case and the half the distance rule has no application if there is no relationship between the application of the rule and the collision. The San Jacinto, 409 US 140-146 (1972). The “line of site rule” was inapplicable, in this instance, because the Wellcraft was negligent in a manner that could not have been anticipated.

**ACCEPTED IN PART, REJECTED IN PART** as provided in B. Negligence, 2. Negligent Violation of Rule 6 – Safe Speed.

The reason for requirement of a lookout and to operate at a safe speed was to avoid reasonably anticipatable hazards, and the lookout requirement and operate at a safe speed does not apply where it is unrealistic to anticipate the possibility of a particular hazard created by the other vessel's negligence. The *San Jacinto*, supra and Magnolia Towing Company, 764 F.2d 1134 (5<sup>th</sup> Cir. 1985).

**REJECTED** as to the allegations of this proceeding. See B. Negligence.

**ATTACHMENT D - RESPONDENT'S SUPPLEMENTAL PROPOSED FINDING OF  
FACTS AND CONCLUSIONS OF LAW**

**NOTE:** The following Supplemental Proposed Findings of Fact and Conclusions of Law submitted by Respondent are exactly the same as Respondent's original proposed Findings of Fact and Conclusions of Law except that there are fewer Supplemental Findings and they have been renumbered. Since I have previously ruled on the original Proposed Findings in Attachment C, I will not repeat my rulings in this Attachment.

1. The crew of the Elaine G was comprised of professional mariners who were properly licensed and trained, and were experienced. In particular, the Captain and Pilot were experienced river towboat operators, who were licensed, and who had attended special radar training, and had earned radar endorsements on their licenses. (Respondent's Exhibit 36, Page 16, Number 2)
  
2. Both Captain Graham and Pilot Pauley are competent radar observers, who were trained at Coast Guard certified radar schools. These skilled and certified radar observers testified that they were observing both radar units. Captain Graham testified that he did not see a small craft on radar. Pilot Pauley, who was relieved, just prior to Captain Graham hearing the calls for help, also did not observe the Wellcraft on radar, although he had observed one small craft and buoys on radar earlier on his watch. Captain Graham carefully assessed the limitations of the radar in evaluating the visibility, speed and lookout situation.

(Respondent's Exhibit 36, Coast Guard Exhibit C at pages 59, 63, 85, 98, 100, 141, 142 and 157)

3. The Elaine G was properly manned by a full complement of crew, who were operating under appropriate operational procedures provided by the vessel owner. In particular, the watch change protocol was adequate, and was properly followed resulting in a complete exchange of information to enable a seamless transition from the Pilot on watch to the Captain relieving. (Respondent's Exhibit 36, Page 16-17, Number 4)

4. The Elaine G was crewed by a full complement of sober, trained and licensed professional river boat men, who were not impaired by substance, lack of sleep, and were standing watch in appropriate locations at the time of the accident. (Respondent's Exhibit 36, Page 3, Number 3)

5. The Elaine G is equipped with modern commercial grade professional navigation and electronics equipment, including marine radios and two separate marine radar units. (Respondent's Exhibit 36, Page 3, Number 2) At all times, both of the Elaine G's radars were working and being used properly. (ALJ Exhibit 1, Paragraph 2, Coast Guard Exhibit M)

6. The Elaine G's radars were at all times operating properly. There was a ghost area of radar directly ahead of the tow but this was known and appreciated by Captain Graham and Pilot Pauley. It was determined by IDNR investigators

that the radars were properly tuned by observing and being able to track two (2) personal watercraft and a fiberglass recreational vessel on both radars. There was no blind spots (radar or visual down the sides of the Elaine G. The blind spot forward was only as wide as the tow. (Coast Guard Exhibit M, Page 15(aa) and Coast Guard Exhibit D Stoll at page 13)

7. At all times pertinent, the M/V Elaine G was properly displaying all her navigation lights including one (2) mile light on the top of the pilot house, a (3) mile green running light on the starboard side and a (3) mile red running light on the port side, and two (2) mile amber towing lights on the stern. The tow was lit with a (2) mile green running light on the forward starboard corner, a (2) mile red running light on the forward port corner and a (2) mile special flashing amber on the forward center line. A seven watt white steering light on a 7-8 foot pole located all the way forward to the center of the tow. The tow also had 2 foot by 2 foot low intensity lights at each barge coupling on the port and starboard sides (4 on each side). The Elaine G had her guard lights on. (ALJ Exhibit 1, Paragraph 8, Coast Guard Exhibit M)

8. On the morning of July 15, 2001, the Elaine G's lights and fog signals should have been heard and seen by any vessel in the Elaine G's vicinity for miles. (ALJ Exhibit 1, Paragraph 8)

9. On the morning of July 15, 2001 near mile 560-561, Pilot Pauley reduced

the speed of the Elaine G from approximately 10 miles per hour to bare steerage way of approximately 5 miles per hour over the bottom. The Elaine G made no other speed changes. (Hammond testimony and Respondent's Exhibit 33)

10. During the watch exchange, Captain Graham and Pilot Pauley acted as a joint enhanced lookout. They could see far enough ahead to safely operate the Elaine G and stop her in a safe distance. The watch information exchange took an unknown amount of time, but more likely than not lasted anywhere from 5 to 10 minutes. (Hammond testimony, Respondent's Exhibit 33 and Tilford testimony and Pauley Coast Guard Exhibit C at page 128, lines 20-24, 151, line 11)

11. Captain Graham was fully rested and prepared to assume the watch and was not impaired in any way. (Coast Guard Exhibit M)

12. From the time Captain Graham assumed the watch, he was not distracted in any way and kept his eyes on the River and radar. He remained in the pilothouse and was maintaining a diligent lookout by sight, sound and radar. There was no indication of anything unusual. Minutes after assuming the watch, Captain Graham heard a call from outside the starboard side of the pilot house. (Coast Guard Exhibit C at pages 50, 51, 59, 63, 98, 100, 114 and 121)

13. The Elaine G was maintaining a proper lookout pursuant to Rule 5 of the Inland Navigation Rules. The Captain and/or Pilot were standing watch in the

pilothouse and were observing visually, by radar, standing by on the appropriate radio channels, as well as by hearing which was how the Respondent first became aware of the occurrence. While there was no separate lookout posted at the head of the tow, this is an appropriate discretionary prerogative of the Captain/Pilot on watch. He exercises his discretion based upon all conditions known and foreseeable to him, and makes a determination as to whether an additional lookout posted on the head of the tow, or any other location, is needed and/or would enhance safety of the operation of the vessel and tow under the conditions present. (Respondent's Exhibit 36, Page 17-18 and Respondent's Exhibit 26, 28, 33 and 34 and Coast Guard Exhibit C and Hearing Transcript of Graham at pages 85-86, 100 and Pauley at pages 141-142)

14. At all times pertinent, the Wellcraft was underway but not making way and was severely overloaded. (ALJ Exhibit 1, Paragraph 13)

15. The Wellcraft had no operating navigation lights. (ALJ Exhibit 1, Paragraph 13)

16. The occupants of the Wellcraft were not actively engaged in fishing and none of the occupants were wearing personal floatation devices. (ALJ Exhibit 1, Paragraph 13)

17. The Wellcraft was not equipped with any portable sound device and the

Wellcraft's onboard sound device was not functional. (ALJ Exhibit 1, Paragraph 13)

18. Some of the equipment on board the Wellcraft that added to her overloading was two operational cell phones, a cooler with pop and beer; bucket of tools; an anchor with 50 feet of line; 7 fishing rods; a 12 volt hand held light attached to the starting battery; two (2) spare gas tanks; a spare 12 volt battery; and, various other items on board. There may have been other equipment onboard that was lost and not recovered. (ALJ Exhibit 1, Paragraph 13)

19. The Wellcraft was unlit and silent before the collision. (ALJ Exhibit 1, Paragraph 13)

20. The Wellcraft's engine was operational and it was equipped with a functional search light, that was turned off. (ALJ Exhibit 1, Paragraph 13)

21. The Wellcraft was not anchored. (ALJ Exhibit 1, Paragraph 13)

22. All the occupants of the Wellcraft including the operator were engaged in illegal drug use and were severely impaired by a combination of fatigue, illegal and prescription drugs and alcohol. (Page 24, Paragraph 6-A)

23. The positions and maneuvers of the Wellcraft prior to the collision are

unknown, but it was stipulated by the parties that on the morning of July 15, 2001, the Wellcraft was drifting in a 1-2 mph down river current underway in the middle of the Ohio River in complete darkness without any lights, flares, or sound appliances with six (6) severely fatigued, drug and alcohol impaired occupants each of whom was using and was under the influence of a deadly combination of cocaine, various pain killing medications, opiates and alcohol. The effect of the prescription and illegal drugs, fatigue, and alcohol was extreme fatigue or loss of consciousness. All six (6) men and the dog were out on the Ohio River all night and in the case of the operator, Mr. Burgen and Mr. Valentine, were “boating” on the River for approximately 16 hours. (ALJ Exhibit 1, Paragraphs 13-14)

24. After hearing the call from outside the pilot house, Captain Graham brought the engines to all stop and went out to the starboard side of the pilothouse to determine the location of the call. He returned to the pilothouse and sounded the general alarm and put the engines in neutral slow to the way of the Elaine G. The vessel came to a stop, the Elaine G drifted in the current for twenty to thirty (20-30) minutes while the entire crew used search lights to attempt to locate the call and check the tow. Captain Graham and the crew did all they could to locate the source of the calls. No one ever identified the source of the call or saw anyone in the water. Captain Graham and the crew of the Elaine G acted appropriately following the call for help. (ALJ Exhibit 1, Paragraph 11)

25. Captain Graham called the Coast Guard at 0550 hours and moored the Elaine G onto the “Kentucky side”, on the Ohio River at Mile 568. The position of the Elaine G at Mile 568 on the Kentucky side was confirmed by IDNR using GPS. (ALJ Exhibit 1, Paragraph 11 and Coast Guard Exhibit D and Stoll testimony at pages 21-22)

26. It is more likely than not that the opportune moments the crew of the Elaine G had to detect the Wellcraft occurred before Captain Graham assumed the watch. The Wellcraft, if discernable visually or by radar, should have been identified by Pilot Pauley on his watch. (Coast Guard Exhibit M, Page 21, Paragraph 1-H)

27. The factual witnesses involved testified to only rough approximations of critical times related to this incident. Since uninspected towing vessels are not required to keep official logs, the exact time of the watch relief, the Elaine G’s location, and the time of the first call are estimates. It is more likely than not that the approximate times given by the witnesses could be several minutes off in either direction. (Coast Guard Exhibit M)

28. The evidence concerning the fog was that it was patchy and variable. However, Captain Graham was able to see a clear path down the middle of the River. There was substantial evidence that the Elaine G was fully equipped and properly manned to operate under such conditions. The Captain/Pilot also had the prerogative to interrupt and/or discontinue operations in their discretion, if they felt doing so was appropriate. Their

decision to operate in the manner they were doing at the time of the occurrence was reasonable under the conditions present at that time. It was prudent to operate the fog signal even where the Elaine G had adequate visibility, as a warning to other vessels, including small recreational boats. (Respondent's Exhibit 36, Page 18, Number 8.1 and Hammond testimony and Respondent's Exhibits 26, 33, 34 and 36 and Coast Guard Exhibit C at page 98, line 19)

29. Even if Captain Graham had ordered a lookout to go forward at the time he assumed the watch, it is more likely than not that the lookout could not have gotten to the head of the tow in sufficient time to be of any assistance in this instance. (Adkins deposition page 94 testimony and Hammond testimony)

30. Captain Graham was tested by a portable breath testing device that showed that he was negative for alcohol and later submitted to a drug test and the results were negative. (ALJ Exhibit 1, Paragraph 12)

31. It is not known whether some of the occupants of the Wellcraft had left the Wellcraft prior to the collision or whether the Wellcraft had been taking on water prior to the collision. (Respondent's Exhibit 36, Coast Guard Exhibit D and Stoll at page 73)

32. The operator of the Wellcraft violated Rule 35(b) in that the Wellcraft was not sounding any sound signal. (ALJ Exhibit 1)

33. The operator of the Wellcraft violated Rule 23(c)(I) by failing to exhibit the proper navigation lights while being underway at night. (ALJ Exhibit 1)

34. The operator of the Wellcraft violated Rule 9(b), by failing to stay clear of the path of the M/V Elaine G. (ALJ Exhibit 1)

35. The operator of the Wellcraft violated Rule 5 by not maintaining a proper lookout. (ALJ Exhibit 1)

36. The operator of the Wellcraft violated the provisions of Rule 19(c) by failing to take into consideration prevailing circumstances and conditions of night operation. (ALJ Exhibit 1)

37. The operator of the Wellcraft was illegally operating under the influence of drugs and/or alcohol. (Para. 13, ALJ Exhibit 1)

38. There was no foreseeable reason to expect or believe that an overloaded and unlit pleasure craft would be adrift in the navigable channel on the morning of July 15, 2001. (Respondent's Exhibit 34, Number 10a)

39. There was no foreseeable reason to believe or anticipate that a pleasure craft, if encountered, would be unwilling or unable to yield and/or keep

out of the way of an approaching tow as required by law. (Respondent's Exhibit 34, Number 10b)

40. There was no foreseeable reason to believe that a crew member posted at the head of the tow and assigned lookout duties would be able to observe or detect an unlighted object, and interpret and communicate that information to the pilothouse with sufficient detail and time to enable a watch officer at the helm to take effective evasive action to avoid collision. (Respondent's Exhibit 34, Number 10c and Respondent's Exhibit 35)

41. Under the existing circumstances and conditions, it would have been inappropriate for the vessel to subject a crew member to the risks and hazards which he would have been exposed to had he been required to stand watch at the head of the tow on the morning of July 15, 2001. (Respondent's Exhibit 34, Number 10d)

42. The publication entitled Riverways, issued by the Commander, Second Coast Guard District, is addressed to pleasure boat owners. Across the bottom of the two joined and foiled sheets on the pamphlet is a warning: "A tow boat operator's vision is blocked ahead for several hundred feet... stay clear." A sketch across under the word shows in profile of tow boat pushing a line of 4 barges, with a line of site drawn from an eye-level at the tow boat's wheelhouse, tangent to the upper most point of the cargo cover on the lead barge, and then continued to the water surface ahead.

This evidence establishes that the Coast Guard knew of and accepted the practice of tow boat operators acting as their own lookouts with substantial blind spots. (Respondent's Exhibit 23)

43. The sole cause of the collision was the actions of the Wellcraft.

### CONCLUSION OF LAW

1. Negligence is defined as the failure to exercise such precautions or degree of care as a reasonably prudent master would exercise under the same circumstances. In other words, a master is not required to make the right decision at all times in order to avoid being guilty of negligence; but he must exercise reasonable care according to the standards of the ordinary practice of good seamanship rather than to indulge in the acts of imprudent seamanship. By making a wrong choice among alternatives, a master commits an error of judgment which does not amount to negligence if his choice was one which a competent and prudent master might reasonably have made under the prevailing circumstances.

Commandant's DOA 1073, 1091 and 1093.

2. The mere showing of violation of a regulation does not constitute negligence per say. Kernan v. American Dredging Co., (1958), 355 US 426. DOA 1093 (Sharpe).

3. If Respondent was charged with misconduct rather than negligence,

then a violation of a regulation would be sufficient to support the charge since the additional factor of reasonable care would have had no bearing on the proof of the charge. Kernan v. American Dredging Co., (1958), 355 US 426. DOA 1093 (Sharpe).

4. When Respondent is charged with negligence, the Coast Guard bears the burden of establishing the standard of care and it failed to establish that standard in these proceedings.

5. The reason for requirement of a lookout and to operate at a safe speed was to avoid reasonably anticipatable hazards, and the lookout requirement and operate at a safe speed does not apply where it is unrealistic to anticipate the possibility of a particular hazard created by the other vessel's negligence. The San Jacinto, supra and Magnolia Towing Company, 764 F.2d 1134 (5<sup>th</sup> Cir. 1985).

## ATTACHMENT E – APPEALS

### TITLE 33 - NAVIGATION AND NAVIGABLE WATERS

#### CODE OF FEDERAL REGULATIONS

#### PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

##### **§ 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

##### **§ 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

##### **§ 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard

Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

- (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    - (i) Basis for the appeal;
    - (ii) Reasons supporting the appeal; and
    - (iii) Relief requested in the appeal.
  - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
  - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

**§ 20.1004 Decisions on appeal.**

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

## Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by DHL Overnight Express:

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Done and dated this 16<sup>th</sup> day of November, 2005  
New York, NY

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