

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHN C. MCCARTHY III

Respondent.

Docket Number: CG S&R 06-0192
CG Case No. 2616092

ORDER

Issued: November 29, 2006

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

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CWO Terry Roberts
PO Michael Rohland
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For Respondent

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II.

PRELIMINARY STATEMENT

On April 27, 2006, the United States Coast Guard ("Coast Guard") filed a complaint against Respondent, Captain John C. McCarthy III ("Captain McCarthy" or "Respondent") alleging that he violated 46 U.S.C. 7703, 46 CFR 5.29, and 46 CFR 5.33 by failing to operate the tank vessel CHARLESTON at a safe speed on the Savannah River. The essence of the Coast Guard's claim is that Respondent should not have navigated the CHARLESTON past the Southern Liquid Natural Gas, Inc. ("LNG") facility at full ahead while there was an LNG tankship within its slip. The Coast Guard sought twelve (12) months outright suspension followed by six (6) months suspension remitted on twelve (12) months probation.

On May 16, 2006, Respondent filed an Answer to the Coast Guard's complaint which denied that he operated negligently by failing to operate at a safe speed. Respondent also denied that his actions were the sole cause of the alleged damage and denied the paragraph regarding requested penalty. Respondent admitted all other paragraphs. Respondent affirmatively alleged the defense of "other" and specified that the Respondent's actions amount to a mere error in judgment. Respondent requested a hearing and proposed a location and dates. Respondent requested settlement discussions.

On June 13, 2006, the Coast Guard filed an Amended Complaint alleging that Respondent violated 46 U.S.C. 7703 by committing Misconduct and Negligence under 46 CFR 5.27 and 46 CFR 5.29 respectively. The underlying factual allegations were essentially the same in that the Coast Guard alleged that Respondent failed to operate the tank vessel CHARLESTON at a safe speed on the Savannah River past the LNG tankship within its slip. The Coast Guard did not amend its proposed sanction at this time.

Following a grant for an extension of time, Respondent filed his Answer to the Coast Guard's Amended Complaint on July 7, 2006. Respondent denied various numbered paragraphs contained therein and indicated the defense of "other" in that his actions constituted an error in judgment. Finally, he stated that the Coast Guard's allegations concerning damage are not relevant and should be stricken from the amended complaint.

This matter was set for hearing on September 20, 2006 at 9:30 am in Savannah Georgia. This date, location, and time were amenable to all parties involved as was evident from an August 8, 2006 prehearing conference call and from various other requests and filings. On that date, the hearing convened as scheduled and spanned two days. CWO Bernard Tufts, CWO Terry Roberts, and PO Michael Rohland represented the Coast Guard, and Charles H. Raley, Jr. represented Respondent.

At the hearing, the Coast Guard called seven (7) witnesses and introduced into evidence twelve (12) exhibits. Respondent called three (3) witnesses and introduced into evidence seventeen (17) exhibits. The undersigned took official notice of two (2) documents. The parties also filed Joint Stipulations of Facts prior to the hearing and Proposed Findings of Facts and Conclusions of Law after the hearing.¹

It is worthy to note that both parties filed numerous Motions, Motion Withdrawals, Oppositions, Briefs, and Responses during the course of this proceeding. Each filing has been given careful consideration and appropriate weight in deciding the outcome of this case. Only the relevant filings will be discussed in this Decision and Order.

¹ Coast Guard exhibits are identified as "Ex. IO" using numerical numbers. Respondent's exhibits are identified as Ex. R" using alphabetic letters. Documents the undersigned has taken official notice of are identified as "ON" using numerical numbers. Filings prior to and post hearing are identified as "ALJ" using numerical numbers. All citations to the official transcript are designated by "TR." followed by the applicable page numbers.

III.

FINDINGS OF FACT

A. Stipulated Facts

On September 15, 2006, the parties filed the following Joint Stipulations of Agreed Facts:

1. That the tank ship CHARLESTON is 635.5 ft in length and 27,798 GT.
2. That the CHARLESTON is an officially documented vessel of the United States, (O.N. 658493).
3. That on March 14, 2006, the respondent, JOHN C. MCCARTHY III, was serving as Pilot on board the CHARLESTON, as required by 46 Code of Federal Regulations (CFR) § 15.812 (a).
4. That the respondent, JOHN C. MCCARTHY III did sign the T/V CHARLESTON's Pilot Card dated 3-14-2006 along with the Master.
5. That the T/V CHARLESTON's Pilot Card states engine RPM for maneuvering engine orders ranging from full astern to full ahead. The minimum RPM is 30 (5.5 knots).
6. That the respondent, JOHN C. MCCARTHY III, did slow the CHARLESTON to slow ahead while passing the Coast Guard and the Pilot Stations along the Savannah River on March 14, 2006.
7. That on March 14, 2006, at approximately 0418, the CHARLESTON was transiting the Savannah River.
8. That on March 14, 2006, at approximately 0418, the CHARLESTON was enroute to Conoco Phillips.
9. That on March 14, 2006, at approximately 0418, there was a .5 or a half - knot flood current.
10. That on March 14, 2006 at approximately 0418 the LNG tank ship GOLAR FREEZE was moored at the LNG Terminal located on Elba Island.
11. That the respondent, JOHN C. MCCARTHY III, while transiting the Savannah River and having the conn of the CHARLESTON did not slow the CHARLESTON down while passing by the moored LNG tank ship GOLAR FREEZE at approximately 0418 on the morning of March 14, 2006.
12. That the T/V CHARLESTON piloted by respondent, JOHN C. MCCARTHY III, did pass by the moored LNG tank ship GOLAR FREEZE at approximately 0418 under an engine order of full ahead.
13. That on March 14, 2006, at approximately 0418, the moored LNG tank ship GOLAR FREEZE did surge along the dock face after the T/V CHARLESTON passed by at full ahead.
14. That on March 14, 2006 at approx 0418 the weather conditions on the Savannah River included clear skies, visibility of at least 10 nautical miles and winds of less than 15 mph.
15. That after embarking the T/V CHARLESTON, respondent, JOHN C. MCCARTHY III gave two security broadcasts each on VHF Channels 13 and 16; the first broadcast

was given while the CHARLESTON was entering the Tybee Range and the second was given while the CHARLESTON was entering the Long Island Crossing Range.²

ALJ 1.

B. Other Facts of Record

After careful consideration of the entire record and the testimony at the hearing, the undersigned finds the following facts.

1. On March 14, 2006 at approximately 0418, the tank vessel CHARLESTON under Captain McCarthy's engine order of full ahead navigated inbound on the Savannah River past the LNG terminal with an LNG tankship within its slip. ALJ 1 para. 11, 12. At this exact time or immediately thereafter, the LNG tankship surged along the dock face and damage ensued. ALJ 1 para. 13; TR. 213.
2. At the time of the incident, Respondent, Captain John C. McCarthy III was the holder of a Coast Guard issued License number 1042660 expiring May 2008. Respondent's license has the following endorsements: Master of Towing Vessels upon the Great Lakes, inland waters in the western rivers; Mate of towing vessels upon near coastal waters; First Class Pilot of vessel of any gross tons upon the waters of the Savannah River, Georgia, from the principal harbor entrance buoy to Port Wentworth turning basin; Radar Observer Unlimited on vessels under 200 gross tons, domestic tonnage, 500 gross tons, ITC tonnage, on domestic voyages only. TR. at 7; ALJ 1 para. 3; ALJ 2 para. 1; ALJ 3 para. 4.
3. At approximately 0300 on the day in question, Captain McCarthy boarded the tankship CHARLESTON in the vicinity of the sea buoy where the Savannah River meets the

² The parties originally stipulated that Respondent gave the second broadcast as he was entering the Lower Flats Range. Respondent indicated at the hearing that this was a mistake and moved to replace Lower Flats Range with Long Island Crossing Range. The amendment was made without objection. TR. 29-30.

Atlantic Ocean. TR. 65. He served as Pilot on board the CHARLESTON as 46 CFR 15.812(a) requires and served aboard for his local knowledge of the Savannah River for the transit inbound on the Savannah River to Conoco Philips. ALJ 1 para. 3, 7-8; TR. 65, 96.

4. The CHARLESTON is a tankship 635.5 feet in length, 27,798 gross tons, and an officially documented vessel of the United States, (O.N. 658493). ALJ 1 para. 1-2.
5. On the day in question, Captain Gregory Maxwell was serving as Master onboard the CHARLESTON. TR. 63-64. Captain Maxwell holds a U.S. Coast Guard Master's license for Unlimited Tonnage on the Oceans. TR. 59. He has been a Coast Guard licensed captain for three and a half years. TR. 64.
6. Captain Maxwell was in overall charge of the CHARLESTON, but Captain McCarthy was navigating the vessel on the Savannah River and giving engine orders and rudder commands because of his local knowledge. TR. 64-65.
7. At the time of the incident, the LNG tankship GOLAR FREEZE was moored at the LNG Terminal located on Elba Island along the Savannah River and was in the process of an active liquid natural gas transfer. ALJ 1 para. 10.
8. Shortly after Captain McCarthy embarked the CHARLESTON, but before approaching the LNG terminal, Captain Maxwell and Captain McCarthy had an initial Pilot-Master conference. TR. 67. At that time, they discussed whether the CHARLESTON would need to slow before passing the LNG terminal because of the LNG tankship moored within its slip. Id. Captain McCarthy indicated that there were minimal requirements and that they would proceed at full ahead despite the LNG tankship moored within its slip. TR. 333.

9. After starting inbound on the Savannah River, but prior to passing the moored LNG tankship, Captain McCarthy slowed the CHARLESTON to slow ahead while passing the Coast Guard and Pilot Stations. ALJ 1 para. 6; TR. 338. Captain McCarthy slowed the CHARLESTON at this point to avoid potential damage the CHARLESTON's surge could cause to unattended vessels moored there.
10. The engine setting slow ahead on the CHARLESTON produces approximately 6 knots. TR. 493.
11. After passing the Coast Guard and Pilot Stations, but before reaching the point on the Savannah River where the LNG tankship GOLAR FREEZE was moored, Respondent gave the engine order full ahead and the CHARLESTON began increasing speed. TR. 339.
12. After reaching speed at full ahead, but before reaching the LNG terminal, the CHARLESTON made radio contact with the KOBE EXPRESS. Captain McCarthy made passing arrangement with its Pilot and the two vessels successfully passed at Bloody Point on the Savannah River. TR. 334.
13. After passing the KOBE EXPRESS, but before reaching the LNG facility, Captain McCarthy made the second of two security broadcasts each on VHF Channels 13 and 16 announcing his presence and intended course up the Savannah River. He gave the first broadcast while the CHARLESTON was entering the Savannah River at the Tybee Range. ALJ 1 para. 15; TR. 66.

14. After the second broadcast, but before reaching the LNG tankship GOLAR FREEZE, Captain Spencer Edleman spoke with Captain McCarthy to agree upon a passing arrangement between the CHARLESTON and the Tug TARPON.³ TR. 163.
15. Captain Edleman has been a Savannah River Pilot for 22 years and was piloting the Tug TARPON at the time in question. TR. 162-3. The Tug TARPON was outbound on the Savannah River and had an asphalt barge in tow. TR. 164. The two captains formed a passing arrangement by which the CHARLESTON and the TARPON would meet and pass below the Fig Island Turning Basin. TR. 164. The Fig Island Turning Basin is a zone of the Savannah River the CHARLESTON would reach after passing the LNG facility. Ex. IO-D.
16. Captain Edleman testified that the TARPON “is not that big.” TR. 169. He further testified that because of this the TARPON and barge in tow could have easily met and passed the CHARLESTON at another agreed upon point on the Savannah River even if the CHARLESTON slowed while passing the LNG tankship. TR. 169.
17. Shortly thereafter at approximately 0418, the CHARLESTON passed the moored LNG tankship GOLAR FREEZE under Captain McCarthy’s engine order of full ahead. ALJ 1 para.13. Captain McCarthy did not make contact with the LNG terminal or the GOLAR FREEZE at its slip before passing at full ahead.
18. The CHARLESTON’s full ahead engine setting generally produces approximately 14 knots. TR. 490. The CHARLESTON’s half ahead engine setting generally produces approximately 10 knots. TR. 355.

³ The transcript refers to this tug as the “TARPIN.” The correct spelling is TARPON.

19. At this exact time or immediately after the CHARLESTON passed the LNG facility, the LNG tankship surged along the dock face and damage to the LNG tankship's lines and gangway ensued. ALJ 1 para. 13; TR. 213. The CHARLESTON's surge was a cause of this damage.
20. At the time in question, the weather conditions on the Savannah River included clear skies, visibility of at least 10 nautical miles, and winds of less than 15 mph. ALJ 1 para. 14.
21. At the time of the incident, there were no vessels crossing, meeting, or overtaking the CHARLESTON. TR. 94.
22. Captain Robert Thompson is and has been a river Pilot for Savannah for five years. TR. 100. Captain Thompson's general practice is to pass any moored vessels as slow as possible as to not cause a surge. TR. 101. His practice when passing the LNG terminal with an LNG tankship within its slip is to give the engine order of dead slow or stop as to pass as slow as possible and not cause a surge. TR. 101-4. Captain Thompson could not testify as to the specifics of why the LNG terminal is dangerous when there is an LNG tankship within its slip. TR. 104. Rather he has a general knowledge of the relative danger and thus proceeds with caution when passing. TR. 104.
23. A vessel can create a surge under the surface without any visible wake. TR. 102.
24. Captain Robert Thompson observed the CHARLESTON on his AIS system passing by the LNG terminal at the time in question at 14.2 knots. AIS is a tracking system and provides information on vessels in the area based on a global positioning system. It plots the vessel name, the location, course, speed, draft length, and other vessel information. TR. 107-8.

25. Captain Robert Thompson remembered the CHARLESTON's exact speed at the time in question because he was surprised and apprehensive that a tankship was about to pass an LNG tankship moored at the LNG facility at 14.2 knots. TR. 108.
26. Captain Robert Thompson believes that bare steerageway is the same as minimum safe speed. TR. 112.
27. Douglass G. Logan is a first class Pilot for the bar and harbor of Charleston, South Carolina. TR. 135. He has been a licensed Pilot since 2000. Id. His belief is that the most important thing to consider when passing a moored vessel is speed. He slows to bare steerageway when passing any moored vessel.
28. The docking pilot on duty at the LNG facility observed the CHARLESTON traveling at 14.8 knots on his GPS system when it passed the LNG facility at the time in question. TR. 226.
29. On December 20, 2005, the U.S. Coast Guard Captain of the Port Savannah issued a Marine Safety Information Bulletin ("MSIB") setting policy for certain vessels when passing the LNG terminal under certain conditions. Ex. R-K. The MSIB states that when an LNG tankship is present within the slip, vessels 1600 gross tons or greater shall transit at "minimum safe speed." Ex. R-K. After the day in question, the U.S. Coast Guard Captain of the Port Savannah amended MSIB 13-05 replacing the term minimum safe speed with the term "bare steerageway." Ex. R-L.
30. Captain McCarthy had knowledge that minimum safe speed was the prevailing standard of care for the CHARLESTON to pass the LNG terminal at the time in question. TR. 355.

31. The term minimum safe speed is not defined or assessed a specific numerical value and varies from vessel to vessel. TR. 148, 503. Mariners navigating the Savannah River understand the term to mean bare steerageway. TR. 112, 503.
32. Captain McCarthy believes that his speed was hypothetically negligent had bare steerageway been the prevailing standard of care for the CHARLESTON to pass the LNG facility with an LNG tankship moored within its slip. TR. 366.
33. Richard Knox is a cross functional technician at the LNG terminal. TR. 208. He is in charge of operation and maintenance of the LNG terminal. TR. 208.
34. Passing the LNG terminal with an LNG tankship within its slip is more dangerous than passing other moored vessels. TR. 153.
35. Liquid natural gas is regular natural gas condensed 600 times converting it from a gas form to a liquid form by cryogenically freezing it to minus 260 degrees. TR. 217-19. This is done to increase shipping efficiencies. TR. 218. If liquid natural gas is exposed to the environment, its vapors are highly inflammable. TR. 220. Liquid natural gas coming in contact with human skin would cause instant frost bite and could result in loss of appendages. TR. 220.
36. The Savannah River is approximately 700 to 1000 feet wide at the LNG terminal. TR. 507. The CHARLESTON was approximately 300 to 500 feet from the LNG terminal when it passed at full ahead. TR. 507.
37. A surge from a passing vessel can cause a vessel moored in the LNG slip to thrust forward and back and disrupt a liquid natural gas transfer by breaking transfer hoses and other equipment. TR. 227-28. The faster a vessel travels, the more surge it creates. TR. 125.

38. At 14.2 knots, CHARLESTON's surge can be felt from two and one half miles away.
TR. 319.
39. Captain McCarthy thought there was a possibility that the GOLAR FREEZE would hold in the terminal had standby tugs been in place. TR. 449.
40. Captain McCarthy believed there would be standby tugs in place bases on an alleged prior conversation with the docking pilot by which the docking pilot apparently told him that there would be standby tugs in place twenty four hours per day. TR. 334.
41. There is general knowledge in the Savannah maritime community that it is prudent to navigate slowly and with great caution past the LNG terminal when there is an LNG tankship within its slip. TR. 162-3.
42. Captain Edleman makes a practice of passing any moored vessel at dead slow. TR. 162.
He makes a practice of passing the LNG terminal at no faster than 6 knots when there is an LNG tankship within its slip. TR. 162.
43. Captain Logan has previously piloted the CHARLESTON and makes a practice of reducing his speed to no more than 6 knots when passing any moored vessel. TR. 138.
Captain Logan testified that 12-14 knots was too fast for the CHARLESTON to pass the LNG terminal with an LNG tankship within its slip. TR. 151.
44. Captain McCarthy believes that the LNG terminal is a hazard to navigation when there is an LNG tankship within its slip and no tugs on standby. TR. 365.
45. The CHARLESTON was putting out minimal wake at the time in question. TR. 337.
46. Captain Steve Harvey had previously worked on the CHARLESTON. He was not intimately familiar with the Savannah River as he is primarily a Florida Pilot. TR. 479.

Captain Harvey has never passed the LNG terminal or worked on standby in Savannah, TR. 501.

47. Captain McCarthy previously passed the LNG facility with an LNG tankship within its slip with the CHARLESTON at full ahead with no incident. TR. 323. Captain McCarthy believes that the reason there was no incident on this voyage was that there were standby tugs pushing the LNG tankship. TR. 323.

IV.

DISCUSSION

A. General

This Suspension and Revocation proceeding is remedial and not penal in nature and is “intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5. The Coast Guard has jurisdiction over Respondent and this matter pursuant to 46 U.S.C. § 7703, which states that a merchant mariner’s document may be suspended or revoked if the mariner has committed an act of misconduct or negligence while acting under the authority of such document. The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 CFR 20.701-02. See also Appeal Decision Nos. 2468 (LEWIN); 2477 (TOMBARI); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 101-3 (1981).

To prevail under this standard, the Coast Guard has the burden to establish that it is more likely than not that the Respondent committed the violations alleged in the complaint. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983); 33 CFR 20.701-702(a). To satisfy the burden of proof, the Coast Guard may rely on direct and/or circumstantial evidence. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The

proceeding is conducted under the provisions in 33 CFR Parts 20, 46 CFR Part 5, and the Administrative Procedure Act, 5 U.S.C. § 551 et. seq.

B. Allegations

The Coast Guard charged Respondent with Negligence and Misconduct under 46 CFR 5.27 and 5.29 respectively. The Coast Guard alleges that on March 14, 2006, Respondent navigated the vessel CHARLESTON at an excessive speed on the Savannah River past the LNG terminal while an LNG tankship was present within its slip and in the process of a liquid natural gas transfer. (Cite to Amended Complaint Here).

These charges cannot be found proved unless the Coast Guard establishes that Respondent was acting under the authority of his Coast Guard license during the alleged Negligence and Misconduct. 46 U.S.C. 7703(1). “A person employed in the service of a vessel is considered to be acting under the authority of a license . . . when the holding of such license . . . is [r]equired by law or regulation.” 46 CFR 5.57. The parties have stipulated that Respondent was serving as Pilot on board the CHARLESTON as required under 46 CFR 15.812 on March 14, 2006 during the alleged Negligence and Misconduct. Respondent was therefore acting under the authority of his Coast Guard license at all relevant times.

C. Negligence

The Coast Guard alleges that Respondent was negligent in navigating the vessel CHARLESTON at an excessive speed past the LNG terminal while an LNG tankship was present within its slip and in the process of a liquid natural gas transfer. Respondent admits he was aware of the LNG tankship’s presence in the slip and of the impending transfer, but maintains that his engine order of full ahead did not produce an excessive speed. TR. 67, 333.

The first question is Respondent's actual speed at the time in question. Respondent did not stipulate to and was not certain of his actual speed while passing the LNG terminal. ALJ 1. Respondent did, however, testify that the CHARLESTON was at full ahead and that the CHARLESTON runs at 10 knots at half ahead. TR. 355. Full ahead on the CHARLESTON must therefore be well in excess of 10 knots.

Indeed, Coast Guard witness Robert Thompson, a riverboat captain, testified that he followed the CHARLESTON on his global positioning system at the actual time in question and recalled that Respondent's speed was 14.2 knots. TR. 108. Captain Thompson's testimony was that he remembered the CHARLESTON's exact speed because he was shocked that a large tanker was about to pass the LNG terminal at 14.2 knots with an LNG tankship within its slip. Captain Thompson's testimony is consistent with Respondent's witness Captain Steve Harvey's testimony that the CHARLESTON runs at "about 14" knots at full ahead on the Savannah River. TR. 491. Since Respondent stipulated and freely admits that the CHARLESTON was at full ahead, and in light of the aforementioned testimony at hearing, one can reasonably find by the facts presented in this case by a preponderance of the evidence that the CHARLESTON's actual speed at the time in question was 14.2 knots. The outcome of this case then depends on whether it was negligent for Respondent to navigate past the LNG terminal with an LNG tankship within its slip at 14.2 knots under the prevailing circumstances.

I. General

In Coast Guard cases, negligence is "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 circumstances, 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.” Appeal Decision 2642 (RIZZO) (2003), Appeal Decision 2321 (HARRIS) (1983), Appeal Decision 2282 (LITTLEFIELD) (1982).

The Coast Guard asserted two alternative theories of standard of care. In the Coast Guard's Amended Complaint, it alleged that Respondent exceeded “minimum safe speed” as set forth in a MSIB. At the beginning of the hearing, the Coast Guard amended its Amended Complaint to remove the language regarding “minimum safe speed” as the MSIB requires and added language that Respondent was negligent because he did not proceed at a “safe speed” as Rule 6 requires. This amendment at hearing came without objection. At the hearing both sides offered extensive evidence and testimony regarding both theories of standard of care.

II. Pleading

It is important to note that 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)). With respect to pleadings, the “purpose . . . is to provide notice and not make a ritualistic recitation of the details.” Appeal Decision 2585 (COULON) (1997). It is, however, important that the allegations “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, “[f]indings 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).

In this case, it is clear that Respondent had notice to identify the act or offense alleged and to prepare an adequate defense under both theories of standard of care. The amendment removing the language regarding “minimum safe speed” came at the actual hearing. Respondent therefore had actual notice and could prepare an adequate defense for “minimum safe speed” as the applicable standard of care. Respondent offered multiple exhibits and indeed put on a vigorous defense regarding this issue. With respect to preparing a defense for Rule 6 “safe speed” as the applicable standard of care, Respondent put on a vigorous defense to this theory standard of care as well and in fact did not object to the amendment. He must have therefore anticipated this amendment or at least that the issue would arise. In any case, the question of whether Respondent had adequate notice for preparing a defense to violating Rule 6 is moot as discussed in the following section. Thus, a technical and narrow reading of the Complaint will not be dispositive in this matter and the undersigned will analyze this case under both theories respectively.

III. Rule 6

The Coast Guard amended its Complaint at the hearing to allege that Respondent “negligently operated the tank vessel CHARLESTON by failing to operate at a safe speed appropriate to the prevailing circumstances in violation of Rule 6 of the Inland Navigational Rules.” Rule 6 requires that “[e]very 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 circumstances and conditions.” 33 U.S.C. § 2006 (Rule 6). Rule 6 goes on to give a number of factors that ought to be taken into account in determining safe speed. Id. The plain language of Rule 6 limits its applicability to situations involving the risk of collision. The risk of collision refers to the risk of collision between vessels.

There was credible testimony and the Coast Guard does not dispute that there were no vessels crossing, meeting, or overtaking the CHARLESTON at the time in question. TR. 94. Rather the facts of this case involved the vessel CHARLESTON allegedly navigating at an excessive speed causing surge damage to a moored shore vessel and impending liquid natural gas transfer. There was therefore no risk of collision and a Rule 6 analysis is not applicable in determining the appropriate standard of care. The Coast Guard's allegation of Negligence based on a violation of Rule 6 is hereby **DISMISSED**.

IV. Minimum Safe Speed

To establish the proper standard of care, the Coast Guard pointed to a MSIB the Captain of the Port Savannah issued on December 20, 2005. The MSIB states that when an LNG tankship is present within the LNG slip, vessels of 1600 gross tons or greater shall transit at "minimum safe speed." Ex. R-K. This document's legal effect for establishing the proper standard of care was not disputed at hearing and indeed appears reliable. In fact, Respondent concedes that minimum safe speed was the prevailing standard of care in this case. Respondent likewise concedes that he had knowledge of this document, that the vessel CHARLESTON was more than 1600 gross tons, and that there was an LNG tankship within the slip. TR. 355. The meaning of minimum safe speed is in dispute.

1. General Meaning

The term "minimum safe speed" is not defined or assessed a specific numerical value and varies from vessel to vessel. TR. 148, 503. However, there are several cases and Commandant Appeal Decisions on point in which the term is used and help illustrate its fundamental meaning. Most commonly, the term is used to describe bare steerageway. See, e.g., Wenzel v. U.S., 291 F.Supp. 978, 980 (D. N.J.1968) (The same instructions advised that feathering is the first action

to be taken if initiated prior to the approach of the RPM (revolutions per minute) to overspeed range. If such range has been reached before the propeller can be feathered, the throttles should be closed, the nose pulled up to a minimum safe speed, and the attempt to feather the propeller resumed.); People v. Bogner, 20 Misc.2d 465, 189 N.Y.S.2d 777 (1959) (That the speed at which he was traveling was not excessive and that the minimum safe speed at which such a boat had to be operated in order to maintain control of the same was six miles per hour.). Bare steerageway is the slowest speed a vessel can possibly navigate without being out of control. Trico Marine Assets Inc. v. Diamond B Marine Services Inc., 332 F.3d 779, 784 (5th Cir. May 28, 2003); TR. 136. Under this definition the only question of safety regards maintaining rudder control.

The term is used in another case to describe the speed an engine order of dead slow would produce, and in another case, the term is used in connection with a speed of 4.5 knots. Bank Line v. Texas Co., 251 F.2d 329, 330 (2nd Cir. 1958) (libellant does not contest the finding below that the speed of dead slow ahead was the minimum safe speed for the Texas); Appeal Decision 2390 (PURSER) (1986) (In his brief, Appellant asserts that the vessel and tow were making a speed of only 4 to 5 knots. He also states that the minimum safe speed necessary for the M/V SATOCO to maintain steerageway was 4.5 knots and that this was the only safe speed under the circumstances.). The usage of the term in these cases is consistent with the testimony at hearing that minimum safe speed is in fact understood in the maritime community to mean bare steerageway and that any distinction between the two terms amounts to semantics. TR. 112, 113, 503. The undersigned will first analyze the case as if the two terms are synonymous.

2. CHARLESTON's Specific Minimum Safe Speed

There was testimony at the hearing regarding the CHARLESTON's minimum safe speed under the circumstances. Captain Harvey testified that slow ahead on the CHARLESTON

produces 6 or 7 knots and that dead slow produces 4.5 to 5 knots. TR. 493. Captain McCarthy himself testified that he slowed the CHARLESTON to slow ahead when previously passing the Coast Guard station, which amounted to 6 knots. Captain McCarthy did not mention any loss of rudder control at this speed. In fact, Respondent does not dispute that the CHARLESTON can maintain rudder control at slow ahead or even dead slow. In light of the aforementioned testimony and reasonable inferences, one can find that based on the preponderance of the evidence, the CHARLESTON's minimum safe speed under the circumstances was around 6 knots, if the term is equivalent to bare steerageway.

3. Breach of Minimum Safe Speed

As previously discussed, Captain McCarthy navigated past the LNG terminal with an LNG tankship within its slip at 14.2 knots under an engine order of full ahead. Under the theory that minimum safe speed amounts to bare steerageway, Respondent was navigating at least double the proper speed. Captain McCarthy himself testified at the hearing that if the MSIB indicated that bare steerageway was the proper speed instead of minimum safe speed, then "we wouldn't be here" because he would be clearly be in breach of that standard. TR. 366. Under this theory then, and without any regard to the relative danger of the CHARLESTON passing the LNG terminal under these conditions at 14.2 knots, Respondent unquestionably breached the applicable standard of care of minimum safe speed of approximately 6 knots.

4. Respondent's Definition of Minimum Safe Speed

On the other hand, Captain McCarthy argued at the hearing that minimum safe speed encompasses additional factors such as safe passing arrangements with other vessels and is not limited to maintaining rudder control. His primary support for this argument was that the terms must not be synonymous because the Coast Guard subsequently issued a revised MSIB

substituting one term for the other. Indeed, the Coast Guard issued the aforementioned revision to the MSIB. Without some additional support, however, it would be erroneous to conclude minimum safe speed encompasses factors such as safe passing arrangements based on an assumption the terms are not synonymous. In any case, the facts will be analyzed as if minimum safe speed encompasses a range of other factors.

Captain McCarthy argued that he was traveling at the minimum safe speed because if he slowed the vessel, it would force him to later pass an outbound vessel at a dangerous location. The outbound vessel was the Tug TARPON and its captain was Captain Spencer Edleman. Captain Edleman testified that the two vessels could have easily met and made a safe pass whether the CHARLESTON slowed its speed or not. TR. 169. He testified that his tug and barge in tow were not that large and that the CHARLESTON slowing its speed would not have caused a passing problem. TR. 169. He further testified that an easy and safe pass could have been accomplished even if slowing the CHARLESTON inevitably caused the two vessels to meet in an undesirable passing point on the Savannah River. Respondent did not contest this point during cross examination.

There was nothing to show that the tug's speed was a fixed variable in Captain McCarty's calculation as to what engine order to give. Even if Captain McCarthy's testimony was accurate that slowing the CHARLESTON would cause the vessels to meet at an unsafe passage point, there is no reason why slowing both vessels would not have resolved this problem. There is therefore no apparent justification to offset the inherent risk in navigating past the LNG terminal during an active transfer at this speed.

Even if it were true that slowing the CHARLESTON would inevitably cause the two vessels to meet at an unsafe passing point, this scenario would be immensely preferable to the

CHARLESTON passing the LNG terminal in the process of a liquid natural gas transfer at 14.2 knots. There was extensive testimony at the hearing as to the relative danger associated with passing the LNG terminal at high speeds with an LNG tankship within its slip.

Coast Guard witness Richard Knox was the cross functional technician on staff at the LNG terminal at the time in question. He testified that liquid natural gas is regular natural gas condensed 600 times, converting it from gas form to liquid form by cryogenically freezing it to minus 260 degrees. TR. 217-219. This greatly increases shipping efficiencies but at the same time creates a substance that requires extreme care in handling. Mr. Knox testified that liquid natural gas coming into contact with human skin would cause instantaneous frost bite that could result in loss of appendages. TR. 220. He further testified that liquid natural gas vapors could catch fire at the flash point and result in a massive fire. TR. 220. Because of the properties of liquid natural gas, the importance of not disturbing a transfer any way is obvious.

Respondent's witness Captain Harvey testified that the Savannah River is only approximately 1000 feet wide at the LNG terminal and that the CHARLESTON was only around 300 to 500 feet from the terminal when it passed. TR. 509. Coast Guard witness Richard Knox testified that passing vessels at this distance causes a disturbance in the water called a surge, which can cause a transfer to go completely awry. TR. 227-228. He testified that such a disturbance can cause the transferring vessel to thrust forward and back in the slip and cause transfer hoses to break loose and other damage potentially resulting in cataclysmic consequences. TR. 227-28. The testimony was clear that the faster a vessel travels, the greater the surge effect. This is the very reason the Coast Guard issued the MSIB restricting passage of an LNG tankship within the LNG terminal slip to minimum safe speed. Ex. R-K.

Captain McCarthy testified that vessels up to two and one half miles away could feel the CHARLESTON's surge at the speed that the CHARLESTON passed the LNG tankship. TR. 319. Captain McCarthy and the CHARLESTON were approximately 300 to 500 feet from the LNG tankship and impending liquid natural gas transfer when passing at full ahead producing 14.2 knots. TR. 507. Mr. Knox testified that a surge at this distance could thrust the LNG tankship forward and back in the slip and cause transfer lines and other equipment to break. TR. 227-28. As previously discussed, this sort of disruption of a liquid natural gas transfer could set in motion a chain of events potentially creating a massive disaster. Every single witness at the hearing testified that they were aware of this danger. Even Captain McCarthy testified that the LNG slip was dangerous and in fact was "a hazard to navigation and should have never been built." TR. 365. This is an immense risk that does not compare with the minimal risk of passing a tow at an undesirable passing point on the Savannah River. As such, 14.2 knots is no where near minimum safe speed by any reasonable definition of the term.

With respect to the instant case, it is undisputed that the CHARLESTON traveling at full ahead under Respondent's control in fact created a strong surge. It is also undisputed that the CHARLESTON's surge caused the LNG tankship to thrust forward and back in the slip resulting in line breakage and damage to the gangway.

Respondent argues and has a valid point that damage does not guarantee a negligence finding. Appeal Decision 2585 (COULON) (1997), Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2395 (LAMBERT) (1985). In this case however, it is a very strong indicator that the CHARLESTON passing the LNG terminal at this speed was extremely dangerous under the circumstances. As such, it defies logic that a prudent mariner would choose to pass the LNG terminal with an LNG tankship within its slip at 14.2 knots merely to avoid a

supposed unsafe passing arrangement with an oncoming tug. The speed of 14.2 knots is therefore nowhere near minimum safe speed under any reasonable definition if the term even when weighed against the risk of passing a tug at an undesirable location. Perhaps it was Respondent's erroneous belief that he would be subject to a mere \$100 fine that contributed to this disregard for navigating prudently past the LNG facility. TR. 425.

Captain McCarthy therefore breached the standard of care of minimum safe speed under any reasonable definition and was negligent in passing the LNG terminal with an LNG tankship within its slip at 14.2 knots.

V. General Defenses to Negligence

1. Previous Passing Without Incident

Respondent maintains that his speed should be regarded as safe because he has previously passed the LNG terminal with an LNG tankship within its slip at a similar speed without incident. The law is well settled in this area and as Respondent has previously pointed out, the lack of damage or incident is never dispositive in Coast Guard negligence cases. Appeal Decision 2585 (COULON) (1997), Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2395 (LAMBERT) (1985). It could very well be that Captain McCarthy was negligent previously and was simply lucky that he escaped damage or incident. The standard of care was around 6 knots and Captain McCarthy clearly breached this standard of care in navigating past the terminal at 14.2 knots.

Secondly, navigating past the LNG terminal with an LNG tankship within its slip during an active transfer procedure at 14.2 knots could never be considered safe under any conditions. Even assuming arguendo that 14.2 knots could somehow be safe under these conditions, it is inconceivable that the vessel's highest engine setting producing its top speed of 14.2 knots was

minimum in any respect. Thus, even if his speed was in the range of “safe,” which it clearly was not, Captain McCarthy’s speed in no way falls into any reasonable definition of minimum safe speed. The fact remains that he could have slowed the vessel considerably without compromising safety and his speed therefore was not “minimum.”

2. Reliance Defenses

Respondent asserts two reliance defenses. Respondent argues that he should be entitled to rely on a bridge watch tender on duty at the LNG facility to tell him to slow down. Respondent sent out two radio broadcasts, indicated that his surge could be felt from two miles away, and that the bridge watch tender should have seen him coming. Respondent argues that the bridge watch tender therefore should have contacted Respondent if the speed was going to be a problem. In the alternative, he argues that he should be entitled to rely on standby tugs to push the LNG tankship negating the effect of the CHARLESTON’s surge. According to Respondent, had the standby tugs been doing their job, there would have been no incident. Nevertheless, the fact remains that Respondent could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed, even if it were true that the bridge watch tender should have told Respondent to slow down, that there should have been tugs, that this would have prevented the incident, or that Respondent was somehow entitled to rely on these factors.

In any case, it is well settled Coast Guard law that contributory negligence or the negligence of a third party is never a defense to a Coast Guard negligence claim. Appeal Decision 2639 (HAUCK) (2003), Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2319 (PAVELEC) (1983). The only issue present herein is whether or not Respondent’s actions or non-actions breached the applicable standard of care. Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2380 (HALL) (1985), Appeal

Decision 2175 (RIVERA) (1980). As previously discussed, the proper speed and standard of care in this case was around 6 knots, less than half Captain McCarthy's speed.

In support of his argument that he should have been entitled to rely on the bridge watch tender, Respondent relies on Magnolia Towing Co. v. Atchison, Topeka & Santa Fe Railway in which a vessel allided with a draw bridge. 764 F.2d 1134 (5th Cir. 1985). The facts were that in dense fog a draw bridge operator twice told an oncoming vessel that he would raise the bridge but then failed to do so causing the allision. Id. at 1135. The Pilot was not found negligent where, in light of the bridge operator's assurances, any possible hazard was totally unanticipated and not within the intended protection of the excessive speed rule. Id. at 1138.

The facts of this case are quite distinct. In that case, there was an affirmative communication and actual agreement between the bridge operator and the oncoming vessel's captain that the bridge tender would open the draw. In this case, Respondent sent out a general broadcast that he was approaching the LNG terminal at full ahead and did not receive a response from the bridge watch tender. It does not follow that he should be entitled to assume this lack of response was an affirmative communication or actual agreement that Respondent's speed would not be a problem. Even if there were such an agreement in this case, it would not likely change the outcome for at least two reasons. First, having an agreement with the bridge watch tender would not vary the applicable standard of care for which a reasonable prudent mariner would navigate a vessel. The testimony and evidence was clear that the proper standard of care and corresponding speed under these circumstances is around 6 knots. Captain McCarthy clearly breached this speed by navigating at 14.2 knots. Secondly, an agreement with the bridge watch tender does not change the fact that Captain McCarthy could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed.

Respondent makes a similar argument regarding his reliance that tugs would be pushing the LNG tankship. He argues that there is a regulatory requirement that tugs should be on standby and pushing. According to Respondent, there would have been no incident had the tugs been there and doing their job. Indeed the MSIB itself appears to require or reiterate another requirement that standby tugs be in place at the LNG terminal during a liquid natural gas transfer. Ex. R-K. As previously stated, however, contributory negligence is not a defense in Coast Guard negligence cases. Appeal Decision 2639 (HAUCK) (2003). As long as Respondent breached the standard of care, which in this case is a speed of around 6 knots, the question of damages or whether others could have prevented or even contributed to the damage is irrelevant. Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2319 (PAVELEC) (1983). The fact remains that Captain McCarthy was navigating at more than twice the proper speed regardless of whether others may have contributed to causing this accident.

As with the previous reliance argument, this argument again only focuses on safe speed, and says nothing about minimum safe speed. Even if the tugs somehow would have made Respondent's speed "safe" and that he was entitled to rely on their presence, the fact remains that Respondent could have slowed the vessel CHARLESTON without reducing safety. Respondent was therefore not traveling at minimum safe speed. Indeed the testimony was clear that the tugs should have been there as added protection in the case of an emergency. Even so, it is well settled that negligence can still follow in Coast Guard cases regardless of whether damage ensues as long as the standard of care of what a reasonable mariner would or would not do is breached. Appeal Decision 2639 (HAUCK) (2003). The testimony is clear that mariners view the tugs as protection in case of an emergency and would not intentionally pass at this speed in reliance that

the tugs would negate the emergency. Furthermore, Captain McCarthy should have anticipated the possibility that the tugs would not be on standby even if they were required to do so given the extreme danger of their absence.

The situation in this case is analogous to a lifeguard required to be on duty at a swimming pool. No reasonable person would push a small child into a swimming pool in reliance on the lifeguard making a save. That child could drown whether the lifeguard is on duty or not and it would be unreasonable to assume the lifeguard would save the day. It is similarly unreasonable to navigate past the LNG slip in reliance on the tugs saving the LNG transfer from catastrophe. In any case, Respondent does not provide anything to support his argument that he should be entitled to rely on others whether they are required to do their job or not. Even if he had support, it would not likely change the outcome of this case because the fact remains that Respondent could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed.

3. Error in Judgment Defense

Respondent quotes the following passage in support of his error in judgment defense. “There are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgment in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not a measure of compliance.” Kime v. Hawker, N.T.S.B. EM-173 (1993), (citing Appeal Decision 1755 (HAWKER)). As previously discussed, passing the LNG terminal at this speed during an active liquid natural gas transfer could have cataclysmic consequences. Thus, there would have to be some intervening emergency near the same level of danger before

the CHARLESTON passing at this speed could be considered anything close to a reasonable alternative.

The only counter balancing factor Respondent provided to justify this risk was his assertion that slowing down could cause an unsafe passing point between the CHARLESTON and an oncoming tug. As previously discussed, the risk associated with an unsafe passing arrangement is miniscule compared to the risk of disrupting an active transfer of liquid natural gas. Captain McCarthy himself testified that the LNG slip was a hazard to navigation and was extremely dangerous. In any case, the oncoming tug's captain testified that passing would not be a problem even if the CHARLESTON slowed its speed. From the testimony at hearing, it is clear that a reasonable prudent mariner would do just about anything short of creating an inevitable head on collision in order to avoid passing the LNG terminal with an LNG tankship within its slip at this speed. The error in judgment defense is therefore rejected.

VI. General Practice for Speed near the LNG Terminal

While not specifically alleged in the Complaint as a basis for establishing the applicable standard of care, the Coast Guard provided several local Pilots who testified to the proper speed under the circumstances of this case. As previously discussed, this proceeding is not bound by the rigid procedural requirements of criminal and civil trials and the pleadings will therefore not be dispositive. The local knowledge of Pilots the Coast Guard provided as witness will establish the applicable standard of care in the event that the MSIB designating minimum safe speed as the proper speed is not the applicable standard of care.

These witnesses' testimony was in accord that it is general knowledge in the Savannah maritime community that a vessel should proceed very slowly and with caution past the LNG terminal when an LNG tankship is within its slip. Coast Guard witness Captain Edleman's

testimony was that he makes a practice of passing the LNG terminal with an LNG tankship within its slip at no faster than 6 knots. TR. 162. In fact, his practice is to pass any moored vessel at dead slow as to not create a surge. TR. 162. Coast Guard witness Captain Logan testified that even 12 knots was too fast to pass the LNG terminal with an LNG tankship within its slip, but that slow speeds are appropriate. TR. 151.

Coast Guard witness Captain Thompson's testimony was in accord with Captain Edleman's in that his general practice for passing any moored vessel is to proceed as slow as possible as to not create a surge. TR. 101. He likewise testified that he cuts the engine to dead slow or stop when passing the LNG terminal under these conditions with a ship similar to the CHARLESTON. TR. 101-04. As previously discussed, the very reason Captain Thompson remembered the CHARLESTON's exact speed after following it at on his global positioning system at the time in question was that he could not believe that someone was about to pass the LNG terminal with a LNG tankship within its slip at that speed. TR. 226. According to local mariners then, the standard of care was somewhere near 6 knots, which is nothing close to 14.2 knots.

Respondent testified that the CHARLESTON was throwing out minimal or no wake and stressed that he would not have rocked a kayak and that his speed was therefore safe. Again, the question is not whether damage will ensue; the question is whether Captain McCarthy breached the standard of care. The standard of care was minimum safe speed, which in this case amounted to around 6 knots. Captain McCarthy navigated at more than double this speed.

In any case, the testimony was undisputed that wake was only half the equation and surge is the other. Surge is a displacement of water that essentially travels under the surface. This is what caused the accident in question. As such, Respondent could be correct in that he may not

have rocked a kayak because a kayak floats on top of the water surface whereas surge travels below it. Since the CHARLESTON was putting out minimal wake, its surge theoretically could have passed below a kayak with little or no effect. The GOLAR FREEZE on the other hand is a tankship. Unlike a kayak, any tankship's hull sits down far below the water surface. The CHARLESTON, for instance, had a draft of around 26 feet on the day in question, which Captain McCarthy considered light. TR. 329. Thus, the CHARLESTON surely would have and in fact did affect the GOLAR FREEZE with its surge. Respondent should have anticipated this and slowed the CHARLESTON.

Respondent offered a single witness who testified that 14.2 knots is a safe speed under these circumstances. However, findings "need not be consistent with all evidentiary materials in the record as long as there is sufficient material in the record to support their justifications." Appeal Decision 22642 (RIZZO) (2003), Appeal Decision 2492 (RATH) (1989), Appeal Decision 2282 (LITTLE FIELD) (1982), Appeal Decision 2395 (LAMBERT) (1985). In this case, there is overwhelming evidence that 14.2 knots is nothing close to safe under these circumstances and is more than double the proper speed. Even if the speed was safe, which it clearly was not, Respondent could have slowed the CHARLESTON and was therefore in excess of minimum safe speed.

In any case, Respondent's witness was Captain Steve Harvey. Captain Harvey had worked on the CHARLESTON previously but was unfamiliar with this portion of the Savannah River as he primarily navigates in Florida. Captain Harvey could not testify as to the specifics of the Savannah River or the prevailing standard of care for navigating the CHARLESTON past the LNG terminal with an LNG tankship within its slip. As such, and as common sense dictates, it is

unimaginable that 14.2 knots would be safe a safe speed to pass the LNG terminal under the circumstances.

Captain McCarthy's speed was therefore not safe in any respect under the prevailing circumstances, and was nothing close to minimum safe speed as the MSIB requires and was likewise in breach of any theory of standard of care. The Coast Guard's claim that Respondent was negligent in navigating past the LNG terminal with an LNG tankship within its slip at an excessive speed is therefore found **PROVED**.

D. Misconduct

As discussed previously, Captain McCarthy was the holder and acting under the authority of his Coast Guard license at all relevant times.

The Coast Guard has charged Respondent with two counts of Misconduct in connection with the events of March 14, 2006. Misconduct is defined as a "behavior which violates some formal, duly established rule. Such rules are found in . . . statutes, regulations, the common law, the general maritime law, . . . and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 CFR 5.27. The Coast Guard alleged in count one that Respondent violated a local ordinance containing a speed limit for passing the LNG terminal. The Coast Guard alleged in count two that Respondent violated 33 CFR 162.65(b)(3).

I. Coast Pilot

The Coast Guard provided an excerpt from the Coast Pilot manual in support of count one of Misconduct. This excerpt is directly on point and clearly states that the speed limit in this case would be 6 knots. The facts are clear Respondent was navigating at 14.2 knots and at first blush, this would seem to be dispositive regarding misconduct. However, Respondent maintains that this manual is out of date and lacks legal authority. Respondent offered a local attorney who

testified that the manual might in fact be out of date and could contain mistakes. There is therefore significant doubt as to whether the speed limit contained in the Coast Pilot manual qualifies as a duly established rule for the purposes of misconduct. However, the undersigned will not rule on the legal effect of this manual or whether it is in fact obsolete. The Coast Guard has not established by a preponderance of the evidence that Respondent committed Misconduct with respect to count one because the legal effect of this passage of the Coast Pilot is in doubt.

II. 33 CFR 162.65(b)(3)

The Coast Guard alleges that Respondent committed Misconduct by violating 33 CFR 162.65(b)(3). This regulation mandates that “[v]essels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with any work in progress incident to maintaining, improving, surveying or marking the channel.” Id. Respondent navigated past the LNG terminal with an LNG tankship within its slip at 14.2 knots. There was extensive testimony at hearing that this speed caused damage to the LNG tankship’s mooring lines and gangway. The testimony was that the CHARLESTON put out a surge which caused the LNG tankship to thrust forward and back severing lines and causing damage to the gangway. Clearly this speed was excessive and endangered other vessels and structures, namely the LNG terminal and the LNG tankship within its slip. As such, Respondent violated 33 CFR 162.65(b)(3) by navigating at an excessive speed as to endanger other vessels and structures.

Respondent argues that this regulation is not applicable because its scope is limited to protecting vessels and structures engaged in maintaining, improving, surveying or marking the channel. This argument is rejected on its face because Respondent is requesting the regulation be interpreted counter to its plain meaning. The regulation clearly states that “[v]essels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with

any work in progress incident to maintaining, improving, surveying or marking the channel.” 33 CFR 162.65(b)(3) (emphasis added). By the plain language of the regulations, the Respondent’s speed must satisfy two factors to avoid violation. It must not endanger other vessel or structures, and it must also not interfere with work in progress incident to maintaining, improving, surveying or marking the channel.

The testimony is undisputed that Respondent’s speed in navigating the CHARLESTON endangered shore structures and shore vessels. Respondent actually caused the LNG tankship to thrust forward and back, causing significant damage to transfer equipment and the vessel’s gangway. Respondent also pointed to a passage of the Maritime Guide to Safe Navigation which states that “safe speed” encompasses a range of factors. As previously discussed, the risk associated with passing an active liquid natural gas transfer at 14.2 knots far outweighs any other factor asserted in this case and could therefore never be considered safe under these circumstances.

Respondent traveled at an excessive speed to endanger other vessels and shore structures and the Coast Guard’s claim that Respondent therefore committed Misconduct is hereby found **PROVED.**

V.

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

1. Captain John C. McCarthy III is the holder a Coast Guard issued Pilot’s license.
2. At all times pertinent to this case, Captain McCarthy was acting under the authority of his Coast Guard issued License as Pilot on the CHARLESTON.

3. At all times pertinent to this case, Captain McCarthy was navigating the CHARLESTON and giving engine orders and rudder commands because of his local knowledge of the Savannah River.
4. On March 14, 2006 at approximately 0418, the CHARLESTON was under Captain McCarthy's engine order of full ahead and traveling at 14.2 knots while proceeding inbound on the Savannah River.
5. At this time, the CHARLESTON passed the LNG terminal at 14.2 knots while an LNG tankship was within its slip.
6. At this time or immediately thereafter, the LNG tankship GOLAR FREEZE surged along the dock and damage ensued.
7. The CHARLESTON's surge was a cause of this damage.
8. The charge of Negligence against Captain McCarthy based on him violating Rule 6 "safe speed" as the applicable standard of care is found **NOT PROVED**.
9. The charge of Negligence against Captain McCarthy based on him violating "minimum safe speed" found in a Coast Guard Marine Safety Information Bulletin as the applicable standard of care is found **PROVED**.
10. The charge of Misconduct against Captain McCarthy based on him violating provisions found in the Coast Pilot manual is found **NOT PROVED**.
11. The charge of Misconduct against Captain McCarthy based on him violating Section 162.65(b)(3) of the Code of Federal Regulations is found **PROVED**.


VI.

ORDER

IT IS HEREBY ORDERED that the second part of this bifurcated hearing will occur on December 20, 2006 in Savannah Georgia. On that date, both parties will have an opportunity to present evidence in aggravation and mitigation bearing on the appropriate sanction. The precise location and time to be announced.

IT IS HEREBY ORDERED that both parties are to file with the undersigned and serve on one another their intended witness and exhibit lists by close of business on December 13, 2006.

PLEASE TAKE NOTE 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 a Attachment E.


PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on November 29, 2006 at
Norfolk, VA

ATTACHMENT A – WITNESS AND EXHIBIT LIST

A. Witness Lists

I. Agency's Witnesses

1. Gregory Todd Maxwell, Captain, CHARLESTON
2. Robert Thompson, River Pilot, Savannah, GA
3. Douglas G. Logan Jr., First Class Pilot, Bar and Harbor, Charleston SC
4. Spencer L. Edleman, Jr., River Pilot, Savannah, GA
5. William T. Brown, Jr., River Pilot, Savannah GA
6. Richard Knox, Cross Functional Technician, Southern LNG, El Paso Corporation
7. Timmy J. Grifface, Lead Cross Functional Technician, Southern LNG

II. Respondent's Witnesses

1. John C. McCarthy III, Respondent
2. Thomas Gray, Attorney, Savannah GA
3. Steven B. Harvey, First Class Pilot

B. Exhibit Lists

I. Judge's Exhibits. ALJ 1 through ALJ 3

1. Joint Stipulations of Facts
2. Respondent's Proposed Findings of Fact and Conclusions of Law
3. Coast Guard's Proposed Findings of Fact and Conclusions of Law
4. The undersigned took official notice of page 358 of the All Coast Pilot Manual.
5. The undersigned took official notice of excerpts of Law of Marine Collision.

II. Agency Exhibits. IO-1 through IO-12

1. Bell Book

2. Speed Tape and Copy
3. Pilot Card (4-14-06)
4. 2 Aerial Photographs
5. IO-5(a)-(k) Photographs of damage of LNG tankship and terminal
6. MAERSK DUNAFARE data
7. Chapter 14, Chatham County Code
8. CG Form 2692
9. CG Form 2692
10. Chart No. 11512
11. Pilot Sketch, Savannah River
12. List of vessels moored at LNG terminal

III. Respondent's Exhibits. R-A through R-Q

- A. DILIGENCE'S Log (4 pages)
- B. Expanded Photograph of LNG tanker
- C. Drawing
- D. Map 1152
- E. Photograph of CHARLESTON
- F. Survey Report
- G. Chatham County Code
- H. Drawing of GOLAR FREEZE
- I. R-I(1)-(22)Photographs
- J. Witness Attorney's File
- K. Marine Safety Information Bulletin 13-05

- L. Revised Marine Safety Information Bulletin 13-05
- M. Copy of Captain McCarthy's Coast Guard license
- N. Witness Attorney's Drawing
- O. Deposition transcript of Captain Tommy Parker
- P. Letter from Captain Gregg
- Q. Newsletter Article

ATTACHMENT B – COMPLAINANT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOTE: Responses provided to proposed findings of fact and conclusions of law 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. Pilot John C. McCarthy III established that the T/V CHARLESTON could be handled and steered at engine order position slow ahead when the CHARLESTON passed by the Coast Guard and Pilot stations at a speed of approx 6 knots. Stipulations number 6 and pilot card. ACCEPTED AND INCORPORATED.
2. Pilot John C. McCarthy III did know the rule, regulation and custom, concerning the speed limit when passing by the LNG Terminal was Minimum Safe Speed. Pilot McCarthy testimony 9/21, Page 355 of the Condensed Transcript. ACCEPTED AND INCORPORATED.
3. Pilot John C. McCarthy III could have slowed the T/V CHARLESTON down when passing by the LNG terminal and still would have made it to a place of safe passing with the down bound Tug TARPON as arranged and agreed to by both pilots. Pilot Edleman testimony 9/20, page 168 & 169 of the condensed transcript. Pilot McCarthy testimony 9/21, page 451 & 452 of the condensed transcript. ACCEPTED AND INCORPORATED.

4. Stipulations between parties where as the respondent John C. McCarthy III did stipulate:
- a. That on March 14, 2006, the respondent John C. McCarthy III, was serving as Pilot on board the CHARLESTON, as required by 46 Code of Federal Regulations (CFR) 15.812. Number 3 of stipulations. ACCEPTED AND INCORPORATED.
 - b. That on March 14, 2006 at approximately 0418 the LNG tank ship GOLAR FREEZE was moored at the LNG Terminal located on Elba Island. Number 10 of stipulations. ACCEPTED AND INCORPORATED.
 - c. That the respondent, JOHN C. McCARTHY III, while transiting the Savannah River and having the conn of the CHARLESTON did not slow the CHARLESTON down while passing by the moored LNG tank ship GOLAR FREEZE at approximately 0418 on the morning of March 14, 2006. Number 11 of stipulations. ACCEPTED AND INCORPORATED.
 - d. That the T/V CHARLESTON piloted by respondent, JOHN C. McCARTHY III, did pass by the moored LNG tank ship GOLAR FREEZE at approximately 0418 under an engine order of full ahead. Number 12 of stipulations. ACCEPTED AND INCORPORATED.
 - e. That on March 14, 2006, at approximately 0418, the moored LNG tank ship GOLAR FREEZE did surge along the dock face after the T/V CHARLESTON passed by at full ahead. Number 13 of stipulations. ACCEPTED AND INCORPORATED.

ATTACHMENT C – RESPONDENT’S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

NOTE: Responses provided to proposed findings of fact and conclusions of law 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.

A. Proposed Findings of Fact

1. Capt. McCarthy is the holder of U.S. Coast Guard License No. 1042660 and was operating under the authority of this license on March 14, 2006. (Stipulations).
ACCEPTED AND INCORPORATED.
2. He started working on the Savannah River as a deckhand at Atlantic Towing in 1974 and worked his way up to tug captain, a position he held with that company for ten years. He has been piloting ocean-going vessels up and down the Savannah River since 1988. (Transcript, p. 303). ACCEPTED AND INCORPORATED.
3. At the time of the subject incident, on March 14, 2006, Capt. McCarthy was serving as Pilot on board the CHARLESTON, as required by 46 Code of Federal Regulations (CFR) § 15.812(a). (Stipulations). ACCEPTED AND INCORPORATED.
4. The CHARLESTON is 635.5 ft in length and 27,798 GT and is a documented vessel of the United States, bearing official number 658493. (Stipulations). ACCEPTED AND INCORPORATED.
5. At the time of the subject transit, the draft of the CHARLESTON at its deepest point, the stern, was 26.6.feet. (Transcript, pp. 328-329). ACCEPTED AND INCORPORATED.

6. The Army Corps of Engineers project depth for those portions of the Savannah River transited by the CHARLESTON on March 14, 2006 ranges from 40-42 feet. (Exhibit R-D). ACCEPTED AND INCORPORATED.
7. Prior to December, 2005, discharging LNG tankers at the subject LNG terminal docked near the main channel on the river. (Transcript pp. 486, 487). ACCEPTED AND INCORPORATED.
8. In accordance with the regulations in effect prior to the opening of the new slip, escort tugs were used to assist transiting vessels while a discharging LNG tanker was at the terminal's docks on the main channel. 33 CFR 165.756. ACCEPTED AND INCORPORATED.
9. A new slip was added by the terminal operator prior to December, 2005, including two new berths; the new slip is located off of the main channel of the river. ACCEPTED AND INCORPORATED.
10. With the availability of the new slip, the terminal operator, Southern LNG, requested a waiver from the Captain of the Port to eliminate the requirement of escort tugs. The COTP granted the terminal operator's request, per the Marine Safety Information Bulletin (MSIB) 13-05 dated 12/20/05). ACCEPTED AND INCORPORATED.
11. The MSIB also imposed positive duties upon the LNG tanker: "While moored inside the facility slip, LNG tank ships shall maintain a bridge watch consisting of a docking pilot or other licensed deck officer to monitor vessels passing and to coordinate the actions of the towing vessel(s) in the event of emergency." ACCEPTED AND INCORPORATED.
12. Prior to this incident, three different LNG tankers made seven vessels call at the new slip. REJECTED.

13. Between the time of the opening of the new slip on December 20, 2005 and the date of the incident on March 14, 2006, Respondent's only pilotage transit past the LNG terminal (with an LNG tanker in the new slip), occurred on February 20, 2006 while piloting the tanker DILIGENCE downriver. (Transcript, pp. 327-329). ACCEPTED AND INCORPORATED.
14. During that transit, the DILIGENCE was light draft and, significantly, passed the terminal under an engine order of full ahead. (Exhibit R-A; Transcript p. 327). ACCEPTED AND INCORPORATED
15. Respondent observed tugs on the outboard side of the LNG tanker GOLAR FREEZE, moored port side to (or "head in"); while he was not certain whether the tugs were pushing the tanker in to the dock or not, they were located fore and aft on the starboard side of the GOLAR FREEZE. (Transcript, pp. 327-329). ACCEPTED AND INCORPORATED, to the extent that the Respondent so testified.
16. The transit of the DILIGENCE, under an engine order of full ahead (producing a speed of 11 knots) past the terminal and GOLAR FREEZE on February 20, 2006 did not result in any damage, complaint, or reportable incident. (Transcript, pp. 327-329). ACCEPTED AND INCORPORATED.
17. At 0200 hours on March 14, 2006, Capt. McCarthy, in preparation for his imminent pilotage of the CHARLESTON, called the dispatcher's offices at two local tug companies, Crescent Towing and Moran Towing, to determine details about river traffic. (Transcript, p. 316). ACCEPTED AND INCORPORATED.

18. Shortly before 0300 hours on March 14, 2006, near the mouth of Lazaretto Creek on Tybee Island, Capt. McCarthy boarded the pilot launch boat used by Coastal Pilots. (Transcript, p. 315). ACCEPTED AND INCORPORATED.
19. Weather conditions on the Savannah River included clear skies, visibility of at least 10 nautical miles and winds of less than 15 mph. These conditions persisted throughout the CHARLESTON's transit. (Stipulations). ACCEPTED AND INCORPORATED.
20. The tidal state flooding with currents at one-half (0.5) knot. (Stipulations). ACCEPTED AND INCORPORATED.
21. At approximately 0300 hours, Capt. McCarthy boarded the CHARLESTON near the sea buoy, shown as RW "T" on NOAA chart number 11512. (Transcript, p. 65; p. 307). ACCEPTED AND INCORPORATED.
22. Immediately after boarding the CHARLESTON, Capt. McCarthy gave the first of two sets of security broadcasts on VHF channels 13 and 16. (Transcript, p. 65) ACCEPTED AND INCORPORATED.
23. He also signed the vessel's CHARLESTON's Pilot Card, which also bore the signature of the Master of the vessel, Capt. Maxwell. (Stipulations). ACCEPTED AND INCORPORATED.
24. The CHARLESTON's Pilot Card states engine RPM for maneuvering engine orders ranging from full astern to full ahead. The minimum RPM is 30 (5.5 knots). (Stipulations). ACCEPTED AND INCORPORATED.
25. At the time of Respondent's boarding of the CHARLESTON, she was already underway, under an engine order of full ahead previously given by the CHARLESTON's master, Capt. Maxwell; the CHARLESTON was preparing to enter the easternmost portion of the

Savannah River Channel at the Tybee Range. (Transcript, p. 333). ACCEPTED AND INCORPORATED.

26. At the time of the incident, the CHARLESTON was bound for the Conoco Phillips dock, located on the south side of the Savannah River, downriver from the city front and near Fort Jackson. (Transcript, p. 309). ACCEPTED AND INCORPORATED.

27. The passage plan for the CHARLESTON's transit up the Savannah River included, at the uppermost portion of its transit, a turn at the Fig Island Turning Basin so that the vessel could dock starboard side to the Conoco Phillips dock, or "head out". (Transcript, p. 309). ACCEPTED AND INCORPORATED.

28. Shortly after boarding the CHARLESTON, Capt. McCarthy had radio communications with Savannah River Pilot Spencer Edelman, Sr., who was piloting a container vessel, the KOBE EXPRESS, outbound, to discuss passing arrangements between the two vessels. The vessels passed each other port-to-port near buoy 8A on the Bloody Point Range. (Transcript, p. 334). ACCEPTED AND INCORPORATED, but modified. The pilot of the KOBE EXPRESS was not discussed at the hearing and is not apparent from the record.

29. Following the uneventful passing of the KOBE EXPRESS, The CHARLESTON did not pass another vessel underway or working until it had passed the LNG terminal, where it later encountered the Dredge ARLINGTON working on The Bight channel. (Transcript, pp. 334, 391). ACCEPTED AND INCORPORATED.

30. As the CHARLESTON entered the jetties in the Tybee Knoll Cut range, Capt. McCarthy briefly left the wheelhouse and walked out onto the wings to observe the vessel's wake. As the vessel was light draft, he observed a slight visible wake. At this time, the

CHARLESTON was proceeding under an engine order of full ahead, which had not been modified by Capt. McCarthy since boarding the vessel. (Transcript, p. 337).

ACCEPTED AND INCORPORATED.

31. Capt. McCarthy walked onto the wings again during the vessel's transit of the Long Island Crossing Range and, again, observed a minimal visible wake. ACCEPTED AND INCORPORATED.

32. In order for the CHARLESTON to reach the Conoco Phillips dock, it was necessary for the vessel to pass, the Coast Guard Station Tybee and its docks and moored vessels; and the Savannah River Pilots offices, its docks and moored vessels. Both of these facilities are located on the south side of the main channel of the Savannah River, on Long Island. (Exhibit R-D). ACCEPTED AND INCORPORATED.

33. Capt. McCarthy ordered the CHARLESTON's engines from full ahead to slow ahead past these two facilities. (Transcript, p. 308). ACCEPTED AND INCORPORATED.

34. These orders, and all engine orders from the pilot, were repeated by the vessel's Master, Capt. Gregory Maxwell, repeated again by the Mate on watch, and then executed by the Mate on watch via the engine order telegraph. (Transcript, pp. 92-93). REJECTED.

35. There is no evidence that any damage was reported due to CHARLESTON's passing of these facilities and no complaints were received by the CHARLESTON. ACCEPTED AND INCORPORATED.

36. After passing the Coast Guard station and the pilot docks, Capt. McCarthy gave an engine order to increase from slow ahead to full ahead. ACCEPTED AND INCORPORATED.

37. After passing the Coast Guard station and when approaching the ICW, Capt. McCarthy gave a second set of security broadcasts while the CHARLESTON transited the Long Island range. (Transcript, pp. 29-30; p. 66). ACCEPTED AND INCORPORATED.
38. Capt. McCarthy then received a radio call from the pilot aboard the Tug TARPON, Capt. Spencer Edelman, Jr. (Transcript, p. 339-340). ACCEPTED AND INCORPORATED.
39. The TARPON had just sailed from its berth at CITGO and was pushing a loaded asphalt barge. The total length of tug and tow was about 500 feet. (Transcript, p. 165-166; Exhibit R-D). ACCEPTED AND INCORPORATED.
40. Capt. Edelman, Jr. and Capt. McCarthy agreed that the inbound CHARLESTON and the outbound TARPON (and its tow) would pass port-to-port upriver of the LNG terminal, after the CHARLESTON had cleared The Bight channel, but before the CHARLESTON reached the Fig Island Turning Basin. (Transcript, p. 164; 343; 357). ACCEPTED AND INCORPORATED.
41. The CHARLESTON maintained an engine order of full ahead until after it had passed the Southern Liquid Natural Gas (LNG) terminal located on Elba Island. ACCEPTED AND INCORPORATED.
42. At the time of the CHARLESTON's transit up the Savannah River, the LNG tank ship GOLAR FREEZE was moored at the LNG terminal. (Stipulations). ACCEPTED AND INCORPORATED.
43. Prior to 0418 hours, the CHARLESTON passed the LNG terminal at a distance of approximately 700 - 800 feet from the moored GOLAR FREEZE. (Transcript, p. 509). REJECTED.

44. Specifically, the GOLAR FREEZE was moored port side to the dock, within a new slip which had recently been opened at the terminal. It was secured to the dock with multiple mooring lines, consisting of wires with rope pendants. Tension alarms were affixed to the dock end of the mooring lines. (Exhibit R-F; R-O). ACCEPTED AND INCORPORATED.
45. Two tractor tugs, the BULLDOG (owned by Crescent Towing) and the DIANE MORAN (owned by Moran Towing), were made up to the starboard stern quarter of the tanker GOLAR FREEZE. (Exhibit R-F). ACCEPTED AND INCORPORATED.
46. At approximately 0418, after the CHARLESTON passed by at full ahead, the moored LNG tank ship GOLAR FREEZE surged along the dock face of the terminal. (Stipulations). ACCEPTED AND INCORPORATED.
47. After passing the terminal, Capt. McCarthy stated to Capt. Maxwell, the CHARLESTON's master, that he was surprised that the tugs were not pushing the GOLAR FREEZE and that "they were asleep." (Transcript., p. 77). ACCEPTED AND INCORPORATED.
48. Capt. Tommy Parker, the bridge watchtender for the GOLAR FREEZE, did not know that the CHARLESTON was on the river. (Exhibit R-O, p. 46). ACCEPTED AND INCORPORATED.
49. The CHARLESTON then passed the Dredge ARLINGTON, working on The Bight Channel, without incident. (Transcript., p. 68, 184). ACCEPTED AND INCORPORATED.
50. The CHARLESTON next passed the outbound TARPON, with tow, after the CHARLESTON passed the ARLINGTON, but before the CHARLESTON reached the

Fig Island Turning Basin. (Transcript, pp. 165-166). ACCEPTED AND INCORPORATED.

51. This was in accordance with the passing arrangements made previously between Cpts. McCarthy and Edelman, Jr. and, according to Edelman, Jr., “was the best choice.” This is illustrated in Capt. Edelman, Jr.’s testimony:

Q (By Mr. Tufts): The passing arrangement agreed upon, was that the only arrangement available at the time?

A. (By Capt. Edelman, Jr.): Well, it was the best arrangement at the time. Even if he'd have slowed down, it would have given me more time to get further down the river before we turned the tanker. (Transcript., p. 168). ACCEPTED AND INCORPORATED.

52. The CHARLESTON then took on a docking pilot, Capt. Kirk, and tugs, which assisted in turning the vessel around in the Fig Island turning basin and headed downriver. The CHARLESTON docked at Conoco Phillips at 0606 hours. (Transcript, pp. 68-69; Exhibit R-D). ACCEPTED AND INCORPORATED.

B. Proposed Conclusions of Law

1. The Amended Complaint, as amended further during the opening of the proceedings, contain allegations of negligence under 46 CFR 5.29 and misconduct under 46 CFR 5.27. (Transcript, p. 33-34). ACCEPTED AND INCORPORATED.
2. Specifically, Count 1 (Negligence) alleges that Capt. McCarthy is guilty of negligence on the basis of his violation of Rule 6 of the Inland Rules, 33 U.S.C. 2006 (Rule 6). ACCEPTED AND INCORPORATED.
3. Rule 6 of the Inland Rules provides, in pertinent part, that:

“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 circumstances and conditions. In determining a safe speed, the following factors shall be taken into account:

- (a) By all vessels:
 - (i) the state of visibility;
 - (ii) the traffic density including concentrations 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;
- the draft in relation to the available depth of water...”

ACCEPTED AND INCORPORATED, but modified. The last clause starting with “the draft” is enumerated separately under the numeral (vi).

- 4. Count 2 (Misconduct) alleges that Capt. McCarthy is guilty of misconduct on the basis of his violation of local ordinances containing speed limits as referenced in the Coast Pilot, which contains the following passage at p. 358: “A speed limit of 4 mph, against the current, and 6 mph, with the current, is in force within the harbor limits.”
ACCEPTED AND INCORPORATED.

- 5. Count 3 (Misconduct) alleges that Capt. McCarthy is guilty of misconduct on the basis of his violation of 33 CFR 162.65(b)(3), which states as follows: “Vessels shall proceed at a speed which will not endanger other vessels or structures and will not

interfere with any work in progress incident to maintaining, improving, surveying or marking the channel.”

The Answer contains various denials of the factual and legal allegations and asserts the affirmative defense of error in judgment.

I will review the charges, denials, and defenses seriatim. ACCEPTED AND INCORPORATED.

6. I find that Rule 6 does not apply where no risk of collision between vessels exists and that the risk of collision, if extant, must be between two vessels, not a vessel and another object. See: Farwell’s, p. 205, citing *Lyon v. The RANGER*, 858 F.2d 22 (1st Cir. 1988).

A risk of collision does not exist where only one vessel is underway within the confines of the subject waterway. This legal principle is supported by the practical testimony of Capt. Maxwell:

Q: If there’s no other vessel, there’s no risk, is that right?

A: That is right, correct, yes. (Transcript, p. 94).

Capt. Parker, aboard the *GOLAR FREEZE*, also agreed that no risk of collision existed. (Exhibit R-O, p. 100).

Additionally, the record is clear that the *CHARLESTON* did not encounter any other vessels underway, after the outbound *KOBE EXPRESS* (on Bloody Point range, outside of the jetties) until it had passed the LNG terminal. (Transcript, p. 390, 391).

Consequently, since no risk of collision existed, I find that there can be no violation of Rule 6. Count 1 of the Amended Complaint, as further amended at the outset of the proceedings, is therefore dismissed with prejudice. ACCEPTED AND INCORPORATED.

7. The Coast Pilot is an informational reference book covering diverse topics such as topographical and marine features, nautical charts applicable to particular areas, the contact information for various marine vendors, and docking/terminal facilities located along various waterways.

As its Preface points out: “Mariners, and others, are urged to report errors, omissions, or differing conditions to those found in the Coast Pilot, or shown on the charts, in order that they may be fully investigated and corrections made.”

As such, I find that the Coast Pilot is not, in and of itself, a source of positive law and therefore does not carry the weight of law.

More troubling here is the reference in the Coast Pilot to a local speed limit, found on p. 358, and relied upon by the Coast Guard as the basis for Count 2 of the Amended Complaint: “A speed limit of 4 mph, against the current, and 6 mph, with the current, is in force within the harbor limits.”

This passage also states that “[t]he Savannah Port Authority has jurisdiction over Savannah Harbor and the port district...Copies of the port and harbor regulations are available from the Savannah Port Authority, 42 E. Bay Street.

Attorney Thomas Gray, who has been practicing law in Georgia for 43 years and is General Counsel to the Savannah Economic Development Authority (“SEDA”), testified that the Savannah Port Authority (“SPA”) no longer exists by that name. (Transcript, p. 371). He also testified that the successor entity to the SPA, SEDA, does not actively regulate port traffic (Transcript, p. 382); and that the SPA has not been located at the address given in the Coast Pilot since 1982 or 1983. (Transcript, p. 386). Finally, and most importantly, he testified:

Q (By Mr. Raley). Okay. Do you know of any document that contains a speed limit that is currently in force and in effect on the Savannah River as generated by the Savannah Port Authority as the Coast Pilot says?

A (Mr. Gray). No.

Q. No document exists to your knowledge.

A. Not that I know of. (Transcript, p. 387).

While it is clear that Chatham County, Georgia promulgates ordinances which purport to regulate navigation on the Savannah River, it is not clear that the SPA, which does not exist by that name, continues to regulate such navigation. ACCEPTED AND INCORPORATED to the extent that the Coast Guard has not shown by a preponderance of the evidence that this is a duly established rule for the purposes of a Misconduct charge under 33 CFR 5.27.

8. Since the burden is on the Coast Guard to prove that such a speed limit exists in the first instance, and since that burden is not met by reference to an informational text which admits in its Preface to be imperfect and open to revision by third parties, I find as a matter of law that the Coast Guard has failed to prove that a speed limit exists. Therefore, there can be no violation of a rule of questionable existence; Count 2 of the Amended Complaint, as further amended, is dismissed with prejudice.

ACCEPTED AND INCORPORATED.

9. Count 3 of the Amended Complaint, as further amended, relies on Respondent's alleged breach of federal regulatory duty, 33 CFR 162.65(b)(3), which states that "Vessels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with any work in progress incident to maintaining, improving, surveying or marking the channel."

Another portion of this section, 33 CFR 162.65(b)(6), states: “Meeting and passing. Vessels, on meeting or overtaking, shall give the proper signals and pass in accordance with the Navigation Rules, International-Inland, Commandant Instruction M16672.2 (series). Rafts shall give to vessels the side demanded by proper signal. All vessels approaching dredges or other plant engaged on improvements to a waterway, shall give the signal for passing and slow down sufficiently to stop if so ordered or if no answering signal is received. On receiving the answering signal, they shall then proceed to pass at a speed sufficiently slow to insure safe navigation.”

These sections, read as a whole, indicates an emphasis on the safety of “vessels or structures” engaged in “maintaining, improving, surveying or marking the channel”. None of these definitions fits the GOLAR FREEZE or the LNG terminal.

Further, inasmuch as the Note at the end of this section states, “The Corps of Engineers also has regulations dealing with this section in 33 CFR Part 207,” I find that the foregoing applies to dredges, survey vessels, and buoy tenders and the like and does not apply to the LNG tanker or terminal at issue here.

Count 3 of the Amended Complaint, as amended, is also therefore dismissed with prejudice. REJECTED

10. Respondent has asserted the error in judgment defense in his Answers.

This defense, simply put, holds that “[t]here are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgment in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not the measure of

compliance.” Kime, *Commandant v. Hawker*, 1993 NTSB Lexis 164, p. 76, citing Decision on Appeal No. 1755.

This defense, in this case, must be examined in light of the applicable speed standard, which, although excised from Amended Complaint (at the outset of the proceedings when the Coast Guard inserted the Rule 6 violation in Count 3), appears to be “minimum safe speed” as directed by MSIB 13-05 dated 12/20/05. (After the incident, the COTP changed the standard, in MSIB 13-05 (Revised) dated 3/23/06, to “bare steerageway”.)

A familiar source, Farwell’s Rules of the Nautical Road, of which this Court has taken official judicial notice, dedicates an entire chapter to the subject of Safe Speed:

“Safe speed is a relative term...`the prudent mariner must use his best judgment in determining what constitutes safe speed for his vessel in order that proper action can be taken to avoid collision...The phrase ‘safe speed’ does not preclude the setting of high speed in appropriate circumstances. However, `such a speed can only be justified so long as it is safe to proceed and provided that timely action is taken to reduce it or take it off all the way in the light of the information supplied...there is no bright line rule for determining safe speed.” Farwell’s, pp. 176-177.

ACCEPTED AND INCORPORATED. Accept only to extent the Error in Judgment defense exists at law and the quote from Farwell’s Rule of the national Road is accurate. The Error In Judgment defense is not applicable here.

11. The circumstances facing Capt. McCarthy, as those were known to him, at the time of his decision to continue past the LNG terminal at a full ahead engine order, consisted of: (1) the CHARLESTON (underway as she was at the time of his embarkation, with a maximum draft of 26.6 feet and minimal visible wake); (2) the LNG terminal with

moored tanker and a bridge watch tender (consisting of a licensed docking pilot, later determined to be Capt. Parker); (3) the Dredge ARLINGTON, working on the green (or port) side of the river at the upper end of The Bight channel; and (4) the outbound Tug TARPON, with loaded asphalt barge (whose pilot, Edelman, Jr., notified him that it had sailed from its moorings when the CHARLESTON was on Bloody Point Range. REJECTED. The enumerated circumstances do not include other factors such as the width and depth of the channel, the speed draft and operating characteristics and impact on the LNG of the Charleston, the danger surrounding the unloading of LNG by the GLOMAR FREEZE, the Coast Guard MSIB requiring vessels to operate at minimum safe speed when passing the LNG terminal, etc..

12. Additionally, superimposed upon these physical factors, was a layer of regulations and laws which controlled his conduct. Capt. McCarthy was generally aware (1) that a local ordinance prohibited vessels passing near a dredge; (2) was specifically aware that federal regulations required a bridge watch tender aboard the discharging tankship to monitor passing vessel traffic, as contained in 33 CFR 165.756(d)(3)(i); and (3) was specifically aware that federal regulations prohibited vessels passing within 1000 yards of the LNG facility when a tankship is in the slip, as indicated by MSIB 13-05 dated 12/20/05. ACCEPTED AND INCORPORATED.

13. Concerning the speed of the CHARLESTON as she approached and passed the LNG terminal, Capt. McCarthy had three options available to him: (1) to maintain current speed setting of full ahead; (2) to reduce the speed setting to half ahead; or (3) to reduce the speed setting to slow ahead. (Transcript, p. 355). REJECTED

14. Of these three choices, Capt. McCarthy chose the first option, to maintain current speed at a full ahead engine setting. The critical issue in this case is whether his choice, in light of the conditions existing at the time the decision was required to be made, was reasonable. (An engine order of stop was not an alternative due to the necessity to maintain steerageway with a fair current.) (Transcript, p. 66).

Concerning risks on the river during an inbound transit, Capt. Maxwell testified that one of the greatest concerns was outbound (oncoming) traffic:

A: (By Capt. Maxwell): ...Pilot/Master Pilot conference, all kind of specific stuff is discussed. Outbound traffic is always a big one because we have to make passing arrangements at a safe location. (Transcript. pp. 66-67). REJECTED.

15. Respondent, who boarded the CHARLESTON while underway, learned of the sailing downriver of the Tug TARPON when he was approaching Fields Cut, where the ICW intersects the North Channel of the Savannah River. (Transcript, p. 339).

ACCEPTED AND INCORPORATED

16. Respondent was under orders from the vessel's master, Capt. Maxwell, to turn the CHARLESTON in the Fig Island turning basin, so that the CHARLESTON could be docked starboard side to at the Conoco Phillips terminal. (Transcript, p. 309).

ACCEPTED AND INCORPORATED.

17. Respondent rejected outright the idea of turning in front of the oncoming TARPON. (Transcript, p. 356-357). ACCEPTED AND INCORPORATED. Accepted to the extent that the Respondent so testified

18. He was further limited in the section of the river on which he would meet TARPON by (1) regulations prohibiting passing within 1000 yards of the LNG slip; (2) The

Bight channel itself, generally regarded as a dangerous place to pass; and (3) local ordinances prohibiting passing near a dredge.

As Capt. Edelman, Jr., at the helm of the Tug TARPON, testified:

Q. (By Mr. Raley): Okay. So, you were going to have to pass Captain McCarthy either above this bracket or the dredge that was above the bracket, closer to Fort Jackson, right?

A. (By Capt. Edelman, Jr.) Yes.

Q. You were going to pass him

JUDGE FITZPATRICK: Counsel, you're going to you can't mark on that chart, that's for a witness to do.

MR. RALEY: Okay.

BY MR. RALEY:

Q. Is that correct

JUDGE FITZPATRICK: If you want to have him do it, that's fine.

BY MR. RALEY:

Q. Is that a correct statement?

A. Yes.

Q. So, you're going to have to pass him above 50, is that a fair statement?

A. Yes.

Q. Okay. If you could circle 50 there and

A. Six.

Q. Yeah, six would be fine. Or downriver, you were going to have to pass him around 33, 35, somewhere, is that a fair statement?

A. There's no way I could have made it there.

Q. You couldn't have made it that far.

A. No, my tug wasn't fast enough.

Q. Okay. So, was it better to pass where you actually did pass?

A. Further up was better except just to make sure I could either pass him before he turned or I had to wait at the dock for him to turn and get back down to his dock before I proceeded on.

Q. Okay. And you'd already

A. We

Q. -- talked.

A. We already discussed it.

Q. Okay. So, that was the agreement that you had. All right. So, what actually was the better arrangement as it turns out.

A. Yes. He didn't hold me up. I really didn't hold him up, as far as I know.

Q. Okay. And there was this sort of blacked out area where you couldn't pass anyhow

A. That's right.

Q. -- is that right?

A. There's no way I could have made it there anyhow.

Q. Okay. So, what happened was the better choice.

A. Yes, sir. (Transcript, pp. 184-186).

REJECTED. Captain McCarthy could have slowed down and passed the Tarpon at other locations on the river.

19. Against the backdrop of the dilemma itself, created by the myriad physical and regulatory factors facing Capt. McCarthy, the strongest indicator of the reasonableness of Capt. McCarthy's decision is the testimony of the CHARLESTON's master, Capt. Maxwell, who stated that he had the right to intervene and to override Capt. McCarthy's decision to pass the LNG terminal on full ahead, but refused to do so because he believed Capt. McCarthy's decision to be reasonable at the time:

Q (By Mr. Raley). Is it your understanding apart from any document that you have as the Master, the right to intervene in the actions and the orders of the Pilot.

A (By Capt. Maxwell). Certainly.

Q. You didn't do that before

A. No, sir.

Q. -- before the Charleston passed the LNG Terminal, correct?

A. That's correct.

Q. May I assume from that that you believed that Captain McCarthy was handling the vessel properly?

A. Yes, you may. Yes.

Q. And reasonably under the circumstances?

A. Yes.

Q. You did not believe that he was proceeding at an excessive speed at that time, is that correct?

A. At that time, that is correct.

Q. And if you had believed that, you would have intervened, is that right?

A. Yes.

Q. Later, in hindsight, I believe that you have determined that perhaps his actions were not proper, is that right?

A. In hindsight, we certainly should have slowed down. (Transcript., p. 90).

Capt. Maxwell's understanding of his role is consistent with the case law on this issue: "The Master is ultimately responsible for the safety of his vessel at all times regardless of whether a pilot is on board. When he observes, or should observe, that his vessel will be placed in danger by actions of the pilot, the master must take action, even it means interfering with, or relieving the pilot." *Kime v. Hawker*, 1993 NTSB Lexis 164, Order EM-173; docket ME-141 (July 23, 1993), citing cases. REJECTED

20. Of all of the various factors facing Capt. McCarthy, the only one within his control was his speed. He elected, consciously, to maintain the CHARLESTON under an engine speed order of full ahead. In doing so, he avoided passing the TARPON on The Bight channel; avoided passing the TARPON near the Dredge ARLINGTON; and avoided passing the TARPON near the LNG terminal. REJECTED

21. "Minimum safe speed" means the minimum speed to maintain rudder control and to provide safety to all vessels and structures within the ambit of Capt. McCarthy's decision making, not just the LNG terminal. His responsibilities on the river do not begin and end with the LNG terminal. Capt. McCarthy was placed in a position, by the presence of the Tug TARPON and the Dredge ARLINGTON, of being forced to rely upon a bridge watch tender with positive regulatory duties to monitor the CHARLESTON's passing (if he elected to maintain full ahead) versus being forced to

pass the TARPON near the LNG terminal, on The Bight, or near the ARLINGTON (if he elected to slow the CHARLESTON). REJECTED.

22. Capt. McCarthy did not create this overall situation; instead, he inherited it and used his best judgment in addressing all of the competing factors. In sum, the totality of the circumstances he faced was not of his own making. REJECTED.

23. There is no question that Respondent is required to take appropriate precautions against reasonably foreseeable risks. See: Farwell's, p. 197.

However, Respondent's situation, as he approached the LNG terminal, was akin to the towboat operator's situation in *Magnolia Towing Co., Inc.*, 764 F.2d 1134 (5th Cir. 1985), involving a towboat-bridge allision. In that case, the bridge operator agreed with the towboat captain to open the bridge, then failed to do so, causing the allision; the Fifth Circuit Court of Appeals held that "the hazard here presented – that the bridge tender, operating in a dense fog, would twice say she would raise the bridge span, and then fail to do so – was a totally unanticipatable possible hazard not within the intended protection of the excessive speed rule." ACCEPTED AND INCORPORATED.

24. The record is clear that Capt. McCarthy gave four separate securite' broadcasts on two distinct VHF radio channels (channels 13 and 16) well before his immediate approach to the terminal. ACCEPTED AND INCORPORATED.

25. Capt. Parker had a positive and specific regulatory duty to "monitor" all passing vessel traffic, which would include, at the very least, the fact that the tugs were rafted up, without power, on the starboard stern quarter of the GOLAR FREEZE. The record is likewise clear that he failed to do so. REJECTED

26. Similarly, the record is clear that the GOLAR FREEZE itself prevented, despite clear visibility, the Respondent from sighting the tugs as he approached the LNG terminal. REJECTED.

27. Another issue in this case is the meaning, in practice, of the term “standby”, relative to the tugs required to be present at the new slip, as used in the RNA regulations and MSIB 13-05. REJECTED.

28. The RNA regulations state that “[s]tandby means immediately available, ready, and equipped to conduct operations.” 33 CFR 165.756(b). ACCEPTED AND INCORPORATED.

29. While it is unclear whether “standby” requires the tugs to have their engines running and pushing on the LNG tanker during a passing vessel’s transit, it is clear that the tugs should not, by being made fast to the LNG tanker, create additional tension on the tanker’s mooring lines when the inevitable surge from a passing vessel creates hydrodynamic force against the moored tanker. This is supported by credible expert testimony provided by Capt. Steve Harvey, a docking pilot holding a federal license for the Savannah River whose duties include bridge watch tender:

Q (By Mr. Raley). If there were a docked vessel, docked tank vessel, docked port side to and two tugs were moored to one another, with one or more lines between them, and one line running from the inside tug to the starboard side of the moored tanker and there was no engine power applied, in other words, the engines were not running on these two tugs, and there's a channel off the stern of the vessel at a distance of approximately 500 feet, would you consider those two tugs to be on standby?

A (Capt. Steve McCarthy). Not in tandem like that. I would think they'd just be hanging on for convenience.

Q. Whose convenience?

A. For theirs, I guess, I mean, I wouldn't have both my tugs hanging together in that position if I needed them to work. I'd want them in their position to standby, not in that position.

Q. So, they're not in standby when they're like that. (Transcript, pp. 483).

REJECTED.

30. Respondent had only one opportunity, on February 20, 2006 aboard the DILIGENCE, to observe the tugs' own interpretation of the meaning of "standby" under MSIB 13-05. The record is undisputed that the tugs, during that prior transit, were not rafted up, abreast of each other, alongside the GOLAR FREEZE. Instead, they were "bow on" the outboard (starboard) side of the GOLAR FREEZE. (Transcript, p. 325-326; Exhibit R-C). REJECTED.

31. Under these facts, the unusual location of the tugs represents an unanticipatable hazard that Respondent is not required to assume. *Magnolia Towing Co., Inc.*, 764 F.2d 1134 (5th Cir. 1985). REJECTED

32. This conclusion is based, simply, on the imprudence – due to the additional drag effect on the moored tanker created upon the inevitable surge of a passing vessel -- of the tugs being placed in this location. Particularly in light of Capt. Parker's radio silence and inattention – despite positive regulatory duty to the contrary -- Respondent should not be forced to assume that the tugs would be in any location other than the location at which he actually observed them during his only prior transit past the new slip containing an LNG tanker on February 20, 2006. Not

coincidentally, February 20, 2006 represented Respondent's first and only transit past the LNG terminal after the COTP's waiver of the escort tug requirement, in which the tugs were made fast to transiting vessels when a tanker was present in the old slip near the channel. REJECTED.

33. At the outset, there is no evidence that the CHARLESTON's passing of the GOLAR FREEZE was the sole cause of the damage sustained by the GOLAR FREEZE. (Tr., p. 91). REJECTED.

34. Likewise, there is no evidence that the GOLAR FREEZE would have sustained damage at all if the tugs BULLDOG and DIANE MORAN had not been rafted, abreast at the starboard stern quarter of the GOLAR FREEZE. There is also evidence that the presence of the "dead tugs", rafted as they were alongside the GOLAR FREEZE, contributed to the damage.

As discussed in the testimony of Capt. Harvey:

Q. Okay. When the if they were alongside made fast to one another as I've drawn here, as we've discussed, with a bow line running from the bow of the end board tug to the moored tanker, and there were a vessel passing in the channel approximately 500 feet away from the stern of the docked tanker, would those two tugs, without their power engaged, would those be helpful or harmful to the conditions of the docked tanker?

A. They would increase the drag effect of the surge or the suction, they would increase the effect.

Q. What drag effect?

A. Well, if they weren't tied to the ship, they would it would suck them out into the river when you went by. They would if they didn't have the lines to the ship they would leave,

I mean, they would be pulled away, but by having the line up, they'd pull on the ship. They're extra drag. They're extra drag to displacement and all, it creates extra drag. (Transcript, pp. 483-484).

REJECTED

35. The law in this area is well-settled: "A ship passing piers or docks where other vessels are tied up is obligated to proceed carefully and prudently so as to avoid creating unusual swells or suction which would damage craft properly moored or installations along the shoreline * * * (Citations). The moving vessel must take into consideration the reasonable effects to be anticipated from its speed and motion through the water and must take such precautions by way of reduction of speed or alteration of course as may be reasonably necessary to prevent such damage * * *" (Citations). *Shell Pipe Line Corp. v. M/T CYS ALLIANCE*, 1982 AMC 389 (E.D. La. 1981), citing *O'Donnell Transportation Co. v. M/V Maryland Trader*, 1964 AMC 453, 462, 228 F.Supp. 903, 909 (SDNY 1963), cited in *Creole Shipping, Ltd. v. Diamandis Pateras, Ltd., et al.*, 1977 AMC 189, 194, 410 F.Supp. 313, 318 (SD Ala. 1976), *aff'd*, 1977 AMC 1648, 554 F.2d 1348. See *West India Fruit & Steamship Co. v. Raymond*, 1951 AMC 1648, 190 F.2d 673 (5 Cir. 1951).

"On the other hand, piers and docks along the shoreline are required to be kept in proper condition and vessels tied up there must be seaworthy and properly moored so as to resist ordinary and normal swells in narrow waters where heavy traffic may be anticipated. Some wash from passing vessels is bound to occur and must be anticipated and guarded against. Only unusual swells or suction which cannot be reasonably anticipated furnish the basis for a claim * * * (Citations). *Id.*, citing *O'Donnell Transportation Co.*, *supra*, 1964 AMC at 462, 228 F.Supp. at

909, cited in *Creole Shipping, Ltd.*, supra, 1977 AMC at 195, 410 F.Supp. at 318. See *West India Fruit & Steamship Co.*, supra. (bold supplied). **ACCEPTED AND INCORPORATED.**

36. As such, Capt. Parker's turning a blind eye to the CHARLESTON, which he did not even know was on the Savannah River that morning, cannot be the basis of a claim by the terminal or the GOLAR FREEZE that some surge was "not anticipated." **REJECTED**

36. The surge from the CHARLESTON passing at full speed ahead 500 feet from the GOLAR FREEZE could not have been reasonable anticipated. **REJECTED.**

37. As a matter of law, I find that Capt. McCarthy exercised his best judgment, under the conditions and circumstances prevailing, in determining to maintain a full ahead speed setting and therefore has proven the error in judgment defense. **REJECTED.**

ATTACHMENT D - STATUTES AND REGULATIONS INVOLVED

A. Statutes.

5 U.S.C. § 551. Definitions.

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

* * *

33 U.S.C. § 2006 (Rule 6).

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 circumstances 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 shores 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.

* * *

46 U.S.C. § 7703. Bases for suspension or revocation

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder--

(1) when acting under the authority of that license, certificate, or document--

(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters;
or

(B) has committed an act of misconduct or negligence;

(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document;

(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49;

(4) has committed an act of incompetence relating to the operation of a vessel; or

(5) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

* * *

B. Regulations

33 CFR 20.701 Standard of proof.

The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence.

* * *

33 CFR 162.65 All waterways tributary to the Atlantic Ocean south of Chesapeake Bay and all waterways tributary to the Gulf of Mexico east and south of St. Marks, Fla.

(a) Description; This section applies to the following:

(1) Waterways. All navigable waters of the United States, natural or artificial, including bays, lakes, sounds, rivers, creeks, intracoastal waterways, as well as canals and channels of all types, which are tributary to or connected by other waterways with the Atlantic Ocean south of Chesapeake Bay or with the Gulf of Mexico east and south of St. Marks, Florida.

(2) United States property. All river and harbor lands owned by the United States in or along the waterways described in paragraph (a)(1) of this paragraph, including lock sites and all structures thereon, other sites for Government structures and for the accommodation and use of employees of the United States, and rights of way and spoil disposal areas to the extent of Federal interest therein.

(3) Vessels and rafts. The term "vessel" as used in this section includes all floating things moved over these waterways other than rafts.

(b) Waterways--

(1) Fairway. A clear channel shall at all times be left open to permit free and unobstructed navigation by all types of vessels and rafts that normally use the various waterways or sections thereof. The District Commander may specify the width of the fairway required in the various waterways under his charge.

(2) Stoppage in waterway, anchorage or mooring.

(i) No vessels or rafts shall anchor or moor in any of the land cuts or other narrow parts of the waterway, except in case of an emergency. Whenever it becomes necessary for a vessel or raft to stop in any such portions of the waterway it shall be securely fastened to one bank and as close

to the bank as possible. This shall be done only at such a place and under such conditions as will not obstruct or prevent the passage of other vessels or craft. Stoppages shall be only for such periods as may be necessary.

(ii) No vessel or raft will be allowed to use any portion of the fairway as a mooring place except temporarily as authorized above without the written permission from the District Commander.

(iii) When tied up, all vessels must be moored by bow and stern lines. Rafts and tows shall be secured at sufficiently close intervals to insure their not being drawn away from the bank by winds, currents or the suction of passing vessels. Tow lines shall be shortened so that the different parts of the tow shall be as close together as possible. In Narrow sections, no vessel or raft shall be tied abreast of another.

(iv) Lights shall be displayed in accordance with provisions of the Navigation Rules, International-Inland, Commandant Instruction M16672.2 (series).

(v) No vessel, even if fastened to the bank as prescribed in paragraph (b)(2)(i) of this section, shall be left without a sufficient crew to care for it properly.

(vi) Vessels will not be permitted to load or unload in any of the land cuts except as a regular established landing or wharf without written permission secured in advance from the District Commander.

(vii) No vessel, regardless of size, shall anchor in a dredged channel or narrow portion of a waterway for the purpose of fishing, if navigation is obstructed, thereby.

(viii) Except in cases of emergency the dropping of anchors, weights, or other ground tackle, within areas occupied by submarine cable or pipe crossings, is prohibited. Such crossings will ordinarily be marked by signboards on each bank of the shore or indicated on coast charts.

(3) Speed.

(i) Vessels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with any work in progress incident to maintaining, improving, surveying or marking the channel.

(ii) Official signs indicating limiting speeds through critical portions of the waterways shall be strictly obeyed.

(iii) Vessels approaching and passing through a bridge shall so govern their speed as to insure passage through the bridge without damage to the bridge or its fenders.

(4) Assembly and handling of tows.

(i) All vessels drawing tows and equipped with rudders shall use two tow lines or a bridle and shorten them to the greatest possible extent so as to have full control at all times. The various parts of a tow shall be securely assembled with the individual units connected by lines as short as practicable. If necessary, as in the case of lengthy or cumbersome tows or tows in restricted channels, the District Commander may require that tows be broken up and may require the installation of a rudder, drag or other approved steering device on the tow in order to avoid obstructing navigation or damaging the property of others, including aids to navigation maintained by the United States or under its authorization, by collision or otherwise.

(ii) No tow shall be drawn by a vessel that has insufficient power or crew to permit ready maneuverability and safe handling.

(iii) Tows desiring to pass a bridge shall approach the opening along the axis of the channel so as to pass through without danger of striking the bridge or its fenders. No vessel or tow shall navigate through a drawbridge until the movable span is fully opened.

(iv) In the event that it is evident to the master of a towing vessel that a tow cannot be safely handled through a bridge, it will be brought to anchor and the towed vessels will be taken

through the bridge in small units, or singly if necessary, or the tow will wait until navigation conditions have improved to such an extent that the tow can pass through the bridge without damage.

(5) Projections from vessels. No vessel carrying a deck load which overhangs or projects over the side of said vessel, or whose rigging projects over the side of the vessel so as to endanger passing vessels, wharves or other property, will enter or pass through any of the narrow parts of the waterway.

(6) Meeting and passing. Vessels, on meeting or overtaking, shall give the proper signals and pass in accordance with the Navigation Rules, International-Inland, Commandant Instruction M16672.2 (series). Rafts shall give to vessels the side demanded by proper signal. All vessels approaching dredges or other plant engaged on improvements to a waterway, shall give the signal for passing and slow down sufficiently to stop if so ordered or if no answering signal is received. On receiving the answering signal, they shall then proceed to pass at a speed sufficiently slow to insure safe navigation.

* * *

33 CFR 165.756 Regulated Navigation Area; Savannah River, Georgia.

(a) Regulated Navigation Area (RNA). The Savannah River between Fort Jackson (32° 04.93' N, 081° 02.19' W) and the Savannah River Channel Entrance Sea Buoy is a regulated navigation area. All coordinates are North American Datum 1983.

(b) Definitions. The following definitions are used in this section:

Bollard pull is an industry standard used for rating tug capabilities and is the pulling force imparted by the tug to the towline. It means the power that an escort tug can apply to its working line(s) when operating in a direct mode.

Direct Mode is a towing technique which is defined as a method of operation by which a towing vessel generates towline forces by thrust alone at an angle equal to or nearly equal to the towline, or thrust forces applied directly to the escorted vessel's hull.

Indirect Mode is a towing technique that, for the purpose of this section, is defined as a method of operation by which an escorting towing vessel generates towline forces by a combination of thrust and hydrodynamic forces resulting from a presentation of the underwater body of the towing vessel at an oblique angle to the towline. This method increases the resultant bollard pull, thereby arresting and controlling the motion of an escorted vessel.

LNG tankship means a vessel as described in 46 CFR 154.

Made-up means physically attached by cable, towline, or other secure means in such a way as to be immediately ready to exert force on a vessel being escorted.

Make-up means the act of, or preparations for becoming made-up.

Operator means the person who owns, operates, or is responsible for the operation of a facility or vessel.

Savannah River Channel Entrance Sea Buoy means the aid to navigation labeled R W "T" Mo (A) WHIS on the National Oceanic and Atmospheric Administration's (NOAA) Nautical Chart 11512.

Standby means immediately available, ready, and equipped to conduct operations.

Underway means that a vessel is not at anchor, not made fast to the shore, or not aground.

(c) Applicability. This section applies to all vessels operating within the RNA, including naval and other public vessels, except vessels that are engaged in the following operations:

- (1) Law enforcement or search and rescue operations;
- (2) Servicing aids to navigation;
- (3) Surveying, maintenance, or improvement of waters in the RNA; or
- (4) Actively engaged in escort, maneuvering or support duties for the LNG tankship.

(d) Regulations.

(1) Requirements for vessel operations while a LNG tankship is underway within the RNA:

(i) Except for a vessel that is moored at a marina, wharf, or pier, and remains moored, no vessel 1600 gross tons or greater may approach within two nautical miles of a LNG tankship that is underway within the RNA without the permission of the Captain of the Port (COTP).

(ii) All vessels under 1600 gross tons shall keep clear of transiting LNG tankships.

(iii) The owner, master, or operator of a vessel carrying liquefied natural gas (LNG) shall:

(A) Comply with the notice requirements of 33 CFR 160. Updates are encouraged at least 12 hours before arrival at the RNA boundaries. The COTP may delay the vessel's entry into the RNA to accommodate other commercial traffic. LNG tankships are further encouraged to include in their notice a report of the vessel's propulsion and machinery status and any outstanding recommendations or deficiencies identified by the vessel's classification society and, for foreign flag vessels, any outstanding deficiencies identified by the vessel's flag state.

(B) Obtain permission from the COTP before commencing the transit into the RNA.

(C) While transiting, make security broadcasts every 15 minutes as recommended by the U.S. Coast Pilot 4 Atlantic Coast. The person directing the vessel must also notify the COTP

telephonically or by radio on channel 13 or 16 when the vessel is at the following locations: Sea Buoy, Savannah Jetties, and Fields Cut.

(D) Not enter or get underway within the RNA if visibility during the transit is not sufficient to safely navigate the channel, and/or wind speed is, or is expected to be, greater than 25 knots.

(E) While transiting the RNA, the LNG tankship shall have sufficient towing vessel escorts.

(2) Requirements for LNG facilities:

(i) The operator of a facility where a LNG tankship is moored shall station and provide a minimum of two escort towing vessels each with a minimum of 100,000 pounds of bollard pull, 4,000 horsepower and capable of safely operating in the indirect mode, to escort transiting vessels 1600 gross tons or greater past the moored LNG tankship.

(ii) In addition to the two towing vessels required by paragraph (d)(2)(i) of this section, the operator of the facility where the LNG tankship is moored shall provide at least one standby towing vessel of sufficient capacity to take appropriate actions in an emergency as directed by the LNG vessel bridge watch.

(3) Requirements for vessel operations while a LNG tankship is moored:

(i) While moored within the RNA, LNG tankships shall maintain a bridge watch of appropriate personnel to monitor vessels passing under escort and to coordinate the actions of the standby-towing vessel required in paragraph (d)(2)(ii) of this section in the event of emergency.

(ii) Transiting vessels 1600 gross tons or greater, when passing a moored LNG tankship, shall have a minimum of two towing vessels, each with a minimum capacity of 100,000 pounds of bollard pull, 4,000 horsepower, and the ability to operate safely in the indirect mode, made-up in such a way as to be immediately available to arrest and control the motion of an escorted vessel in the event of steering, propulsion or other casualty. While it is anticipated that vessels will

utilize the facility provided towing vessel services required in paragraph (d)(2)(i) of this section, this regulation does not preclude escorted vessel operators from providing their own towing vessel escorts, provided they meet the requirements of this part.

(A) Outbound vessels shall be made-up and escorted from Bight Channel Light 46 until the vessel is safely past the LNG dock.

(B) Inbound vessels shall be made-up and escorted from Elba Island Light 37 until the vessel is safely past the LNG dock.

(iii) All vessels of less than 1600 gross tons shall not approach within 70 yards of an LNG tankship.

(e) LNG Schedule. The Captain of the Port will issue a Broadcast Notice to Mariners to inform the marine community of scheduled LNG tankship activities during which the restrictions imposed by this section are in effect.

(f) Waivers.

(1) The COTP may waive any requirement in this section, if the COTP finds that it is in the best interest of safety or in the interest of national security.

(2) An application for a waiver of these requirements must state the compelling need for the waiver and describe the proposed operation and methods by which adequate levels of safety are to be obtained.

(g) Enforcement. Violations of this section should be reported to the Captain of the Port, Savannah, at (912) 652-4353. In accordance with the general regulations in § 165.13 of this part, no person may cause or authorize the operation of a vessel in the regulated navigation area contrary to the provisions of this section.

* * *

46 CFR 5.5 Purpose of administrative actions.

The administrative actions against a license, certification or document are remedial and not penal in nature. These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.

* * *

46 CFR 5.27 Misconduct.

"Misconduct" is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

* * *

46 CFR 5.29 Negligence.

"Negligence" is 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 circumstances, would not fail to perform.

* * *

46 CFR 5.33 Violation of law or regulation.

Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation, a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

* * *

46 CFR 5.57 Acting under authority of license, certificate or document.

(a) A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is:

- (1) Required by law or regulation; or
- (2) Required by an employer as a condition for employment.

(b) A person is considered to be acting under the authority of the license, certificate or document while engaged in official matters regarding the license, certificate or document. This includes, but is not limited to, such acts as applying for renewal of a license, taking examinations for upgrading or endorsements, requesting duplicate or replacement licenses, certificates or documents, or when appearing at a hearing under this part.

(c) A person does not cease to act under the authority of a license, certificate or document while on authorized or unauthorized shore leave from the vessel.

* * *

46 CFR 15.812 Pilots.

(a) Except as specified in paragraph (f) of this section, the following vessels, not sailing on register, when underway on the navigable waters of the United States, must be under the direction and control of an individual qualified to serve as pilot under paragraph (b) or (c) of this section as appropriate:

(1) Coastwise seagoing vessels propelled by machinery and subject to inspection under 46 U.S.C. Chapter 33, and coastwise seagoing tank barges subject to inspection under 46 U.S.C. Chapter 37;

(2) Vessels that are not authorized by their Certificate of Inspection to proceed beyond the Boundary Line established in part 7 of this Chapter which are in excess of 1,600 gross tons, propelled by machinery, and subject to inspection under 46 U.S.C. chapter 33; and

(3) Vessels operating on the Great Lakes that are propelled by machinery and subject to inspection under 46 U.S.C. chapter 33, or are tank barges subject to inspection under 46 U.S.C. chapter 37.

(b) The following individuals may serve as a pilot for a vessel subject to paragraph (a) of this section, when underway on the navigable waters of the United States that are designated areas.

(1) An individual holding a valid first class pilot's license issued by the Coast Guard, operating within the restrictions of his or her license, may serve as pilot on any vessel to which this section applies.

(2) An individual holding a valid license issued by the Coast Guard as master or mate, employed aboard a vessel within the restrictions of his or her license, may serve as pilot on a vessel of not more than 1,600 gross tons propelled by machinery, described in paragraphs (a)(1) and (a)(3) of this section, provided he or she:

(i) Is at least 21 years old;

(ii) Complies with the currency of knowledge provisions of § 10.713 of this chapter; and

(iii) Has completed a minimum of four round trips over the route to be traversed while in the wheelhouse as watchstander or observer. At least one of the round trips must be made during the hours of darkness if the route is to be traversed during darkness.

(3) An individual holding a valid license issued by the Coast Guard as master, mate, or operator employed aboard a vessel within the restrictions of his or her license, may serve as pilot on a tank barge or tank barges totalling not more than 10,000 gross tons, described in paragraphs

(a)(1) and (a)(3) of this section, provided he or she:

(i) Is at least 21 years old;

(ii) Complies with the currency of knowledge provisions of § 10.713 of this chapter;

- (iii) Has a current physical examination in accordance with the provisions of § 10.709 of this chapter;
 - (iv) Has at least six months service in the deck department on towing vessels engaged in towing operations; and
 - (v) Has completed a minimum of twelve round trips over the route to be traversed, as an observer or under instruction in the wheelhouse. At least three of the round trips must be made during the hours of darkness if the route is to be traversed during darkness.
- (c) An individual holding a valid license issued by the Coast Guard as master, mate, or operator, employed aboard a vessel within the restrictions of his or her license, may serve as a pilot for a vessel subject to paragraph (a)(1) and (a)(2) of this section, when underway on the navigable waters of the United States that are not designated areas of pilotage waters, provided he or she:
- (1) Is at least 21 years old;
 - (2) Complies with the currency of knowledge provisions of § 10.713 of this chapter; and
 - (3) Has a current physical examination in accordance with the provisions of § 10.709 of this chapter.
- (d) In any instance when the qualifications of a person satisfying the requirements for pilotage through the provisions of this Subpart are questioned by the Coast Guard, the individual shall, within a reasonable time, provide the Coast Guard with documentation proving compliance with the applicable portion(s) of paragraphs (b) and (c) of this section.
- (e) Federal pilotage requirements contained in paragraphs (a) through (d) of this section are summarized in two quick reference tables.
- (1) Table 15.812(e)(1) provides a guide to the pilotage requirements for inspected, self-propelled vessels.

Table 15.812(e)(1).--Quick Reference Table for Federal Pilotage Requirements
for U.S. Inspected Self-Propelled Vessels, Not Sailing on Register

| | |
|------------------|--------------------------|
| Designated areas | Nondesignated areas of |
| of pilotage | pilotage waters (between |
| waters (routes | the three mile line and |
| for which | the start of traditional |
| First Class | pilotage routes) |
| Pilot's | |
| licenses are | |
| issued) | |

Inspected self-propelled
vessels greater than 1,600
GT, authorized by their
Certificate of Inspection
(COI) to proceed beyond the
Boundary Line, or operating
on the Great Lakes First Class

Pilot Master or Mate may serve as
pilot if the individual:

1. Is at least 21 years old.

2. Has an annual physical exam.
3. Maintains current knowledge of the waters to be navigated. [FN1]

Inspected self-propelled

vessels not more than 1,600

GT, authorized by their

Certificate of Inspection to

proceed beyond the Boundary

Line, or operating on the

Great Lakes First Class

Pilot, or

Master or Mate

may serve as

pilot if the

individual: ... Master or Mate may serve as

pilot if the individual:

1. Is at least

21 years old... 1. Is at least 21 years old.

2. Maintains

current

knowledge of

the waters to

be navigated.

[FN1] 2. Maintains current

knowledge of the waters to

be navigated. [FN1]

Inspected self-propelled

vessels greater than 1,600

GT, not authorized by their

COI to proceed beyond the

Boundary Line (Inland route

vessels); other than vessels

operating on the Great Lakes . First Class

Pilot Master or Mate may serve as

pilot if the individual:

1. Is at least 21 years old.

2. Has an annual physical

exam.

3. Maintains current

knowledge of the waters to

be navigated. [FN1]

Inspected self-propelled

vessels not more than 1,600

GT, not authorized by their

COI to proceed beyond the
 Boundary Line (Inland route
 vessels); other than vessels
 operating on the Great Lakes . No pilotage
 requirement ... No pilotage requirement.

FN1 One round trip within the past 60 months.

FN2 If the route is to be traversed during darkness, 1 of the 4 round trips
 must be made during darkness.

(2) Table 15.812(e)(2) provides a guide to the pilotage requirements for tank barges.

Table 15.812(e)(2).--Quick Reference Table for Federal Pilotage Requirements
 for U.S. Inspected Tank Barges, not Sailing on Register

| | |
|--|--|
| Designated areas of pilotage waters (routes for which First Class Pilot's licenses are issued) | Nondesignated areas of pilotage waters (between the three mile line and the start of traditional pilotage routes) |
|--|--|

Tank Barges greater

than 10,000 GT,

authorized by their

Certificate of

Inspection to

proceed beyond the

Boundary Line, or

operating on the

Great Lakes First Class Pilot Master, Mate, or Operator may

serve as pilot if the

individual:

1. Is at least 21 years old.
2. Has an annual physical exam.

[FN1]

3. Maintains current knowledge

of the waters to be

navigated. [FN2]

4. Has at least 6 months'

service in the deck

department on towing vessels

engaged in towing.

Tank Barges 10,000 GT

or less, authorized

by their

Certificate of

Inspection to

proceed beyond the

Boundary Line, or

operating on the

Great Lakes First Class Pilot, or

Master, Mate, or

Operator may serve as

pilot if the

individual: Master, Mate, or Operator may

serve as pilot if the

individual:

1. Is at least 21 years

old 1. Is at least 21 years old.

2. Has an annual

physical exam. [FN1] . 2. Has an annual physical exam.

[FN1]

3. Maintains current

knowledge of the

waters to be

navigated. [FN2] 3. Maintains current knowledge

of the waters to be
navigated. [FN2]

4. Has at least 6
months' service in
the deck department
on towing vessels
engaged in towing
operations..... 4. Has at least 6 months'
service in the deck
department on towing vessels
engaged in towing operations.
5. Has 12 round trips
over the route. [FN3]

Tank Barges

authorized by their
Certificate of
Inspection for
Inland routes only
(Lakes, Bays, and
Sounds/Rivers);
other than vessels
operating on the
Great Lakes No pilotage requirement No pilotage requirement.

FN1 Annual physical exam does not apply to an individual who will serve as a pilot of a Tank Barge of less than 1,600 gross tons.

FN2 One round trip within the past 60 months.

FN3 If the route is to be traversed during darkness, 3 of the 12 round trips must be made during darkness.

(f) In Prince William Sound, Alaska, coastwise seagoing vessels over 1,600 gross tons and propelled by machinery and subject to inspection under 46 U.S.C. Chapter 37 must:

(1) When operating from 60degrees49' North latitude to the Port of Valdez be under the direction and control of a federally licensed pilot who:

- (i) Is operating under the Federal license;
- (ii) Holds a license issued by the State of Alaska; and
- (iii) Is not a member of the crew of the vessel.

(2) Navigate with either two licensed deck officers on the bridge or a federally licensed pilot when operating South of 60degrees49' North latitude and in the approaches through Hinchinbrook Entrance and in the area bounded:

- (i) On the West by a line one mile west of the western boundary of the Traffic Separation Scheme;
- (ii) On the East by 146degrees00' West longitude;
- (iii) On the North by 60degrees49' North latitude; and
- (iv) On the South by that area of Hinchinbrook Entrance within the territorial sea bounded by 60degrees07' North latitude and 146degrees 31.5' West longitude.

ATTACHMENT E - SUBPART J

33 CFR 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.

33 CFR 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.

33 CFR 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.

33 CFR 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.
- (b) 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

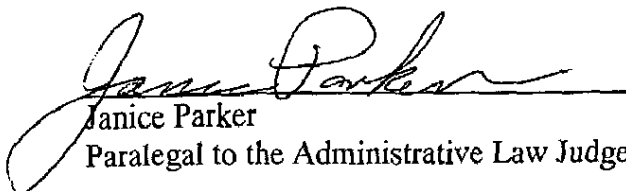
I hereby certify that I have this day served the foregoing Order by Fed Ex upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated:

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Janice Parker
Paralegal to the Administrative Law Judge

Done and Dated on November 29, 2006 at
Norfolk, VA