

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

UNITED STATES COAST GUARD
Complainant

vs.

RICHARD ALBERT CHESBROUGH
Respondent

Docket Number 2012-0288
Enforcement Activity No. 4357261

DECISION AND ORDER
Issued: September 18, 2013

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

CWO John E. Nay
Sector Columbia River
For the Coast Guard

Richard Albert Chesbrough and
Scott Clifford, Esq.
For the Respondent

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001.

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DECISION AND ORDER

I. PRELIMINARY STATEMENT

A. Summary

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Richard Albert Chesbrough’s (Respondent) Merchant Mariner’s Credential (MMC or Credential). This action is brought pursuant to the authority contained in 46 U.S.C. § 7701 et seq. and its underlying regulations codified at 46 C.F.R. Part 5.

Hearings in this matter commenced on December 4, 2012 and February 26, 2013 at the United States Bankruptcy Court in Portland, Oregon. Following the hearing, both

parties filed post-hearing briefs containing proposed findings of fact, conclusions of law, and argument in support thereof. As detailed below, after careful review of the entire record taken as a whole, including witness testimony, exhibits, applicable statutes, regulations, and case law, I find the charged violation of Misconduct PROVED and order Respondent's Credential SUSPENDED.

B. Procedural History

On June 27, 2012, the Coast Guard filed a Complaint seeking revocation of Respondent's MMC for Misconduct. Specifically, the Coast Guard alleges that Respondent violated the terms of his vessel's Certificate of Inspection (COI) by navigating the vessel, the WILLAMETTE QUEEN, into the Willamette River when the river level was higher than allowed by the COI. Respondent filed an Answer to the Complaint on July 17, 2012, admitting to the jurisdictional allegations and certain factual allegations but denying other factual allegations, specifically the level of the river and violating the terms of the vessel's COI. Respondent also filed a letter setting forth affirmative defenses he intended to assert at the hearing.

After a prehearing conference with both parties on September 20, 2012, I set the date of hearing for December 4, 2012. On Sunday, December 2, 2012, two days prior to the hearing, Respondent faxed to my office a request for continuance of at least 90 days because he wished to obtain counsel. The Coast Guard objected to this request on Monday, December 3, 2012. As I was already en route to the hearing location by the time my staff received Respondent's request, I reserved my ruling on this motion until the hearing convened.

At the hearing, Scott Clifford, Esq. entered his appearance as Respondent's co-representative¹ and submitted a Motion to Dismiss. The motion to dismiss was premised on the locks on the Willamette River being closed, meaning the WILLAMETTE QUEEN can no longer reach downriver areas. Mr. Clifford asserted that the area of the river where the vessel operates should therefore not be considered a "navigable water of the United States," depriving the Coast Guard of jurisdiction over the WILLAMETTE QUEEN. I held the motion in abeyance to permit the Coast Guard to file a response; however, on December 10, 2012, Mr. Clifford filed a notice that he was withdrawing the motion.

Mr. Clifford also renewed Respondent's request for a continuance at the hearing. The Coast Guard objected on the grounds that Respondent waited until the last minute to obtain counsel, and the Agency was prepared to put on its case. I allowed the Coast Guard to put on its witnesses, subject to cross-examination and potential recall at a later date. I then granted Respondent's request for a continuance as to his defense. Following the parties' agreement to certain stipulations, the Coast Guard withdrew several witnesses. During the December 4 hearing, the Coast Guard also asked me to retain Respondent's MMC until the conclusion of the second phase of the hearing. (12/4/12 Tr. at 53). I denied this request because there was no evidence Respondent posed any definite danger to maritime safety. (12/4/13 Tr. at 66).

The second phase of the hearing was set for February 26, 2013. On that date, Respondent appeared alone and explained that Mr. Clifford had been called out of town unexpectedly, but he was prepared to proceed without Mr. Clifford's assistance. As Respondent and Mr. Clifford had been acting as co-representatives, I allowed Respondent

¹ Mr. Clifford was clear that, although he is an attorney, he was not acting as counsel; he and Respondent intended to be co-representatives in this matter.

to proceed and present his defense. Respondent also filed a motion asking that LT Rule and CWO Nay be disqualified for prosecutorial [sic] misconduct due to interference with the renewal of his MMC. Respondent complained his renewal MMC had been sent to the Coast Guard rather than to him, and that the expiration date was moved up. The Coast Guard explained the reason this occurred was because Respondent currently has a temporary MMC while his appeal in a previous case is pending before the Commandant, and therefore his expiring six-month temporary document was being exchanged for a new six-month temporary document. The status of Respondent's renewal application has not been affected. (2/26/13 Tr. at 9-17).

Respondent also complained that LT Rule had attempted to serve the Complaint at a public meeting. The record established LT Rule did not do so. After hearing the explanations on the record, I determined that the actions of the Coast Guard did not constitute misconduct and denied Respondent's motion.

Respondent waived cross-examination of the Coast Guard's last witness, Mr. Kittelson. He testified and presented two witnesses on his own behalf. At the conclusion of the hearing, both parties stated that they wished to file Proposed Findings of Fact and Conclusions of Law. On March 19, 2013, I issued an Order providing the transcript to the parties and allowing 30 days for post-hearing filings. The Coast Guard submitted its brief on April 17, 2013. Respondent submitted a non-conforming document entitled Respondent's Post-Hearing Brief (Proposed Findings of Fact, Proposed Conclusions of Law, and Argument in Support Thereof) on April 22, 2013.² This matter is now ripe for decision.

² This document does not conform to the requirements of 33 C.F.R. § 20.303 because it was not filed by an authorized representative, nor was it signed. Additionally, the document contains unsworn statements by

II. FINDINGS OF FACT

The following Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, stipulations made by the parties, and the entire record taken as a whole.

1. The P/V WILLAMETTE QUEEN is a Small Passenger Vessel regulated under 46 CFR Subchapter T. (10/7/12 Stipulation of Facts).
2. The WILLAMETTE QUEEN is an officially documented vessel of the United States, O.N. 959851. Its gross tonnage is 62 tons and length is 64.8 feet. (10/7/12 Stipulation of Facts).
3. The Coast Guard issued a COI to the WILLAMETTE QUEEN on October 29, 2007. The vessel is required to abide by the COI whenever it is operating with paying passengers aboard. (10/7/12 Stipulation of Facts).
4. One of the conditions listed on the COI is: "When the river gauge at Salem reads 11 ft or more, the vessel's operation is limited to the Willamette Slough located behind Minto Browns Island." (10/7/12 Stipulation of Facts).
5. On May 9, 2012, Respondent was the holder of Merchant Mariner License (MML) No. 1215480.³ (10/7/12 Stipulation of Facts).

Respondent's wife as to how they ascertained river levels and what occurred on May 9, 2012. To the extent that this document contains testimony by Respondent's wife, who was not called as a witness or placed under oath at any time during this proceeding and has not been subject to cross-examination, it is rejected. Although Mrs. Chesbrough has not entered an appearance as Respondent's representative, I have nevertheless considered the arguments presented in the remainder of the document, as they purport to be made on Respondent's behalf.

³ This license expired since this incident. The Coast Guard now issues Merchant Mariner Credentials (MMCs) instead. The MMC combines the individual merchant mariner's document, license and certificate of registry as well as the STCW endorsement into a single credential that serves as the mariner's qualification document, certificate of identification and certificate of service. Respondent currently holds MMC No. 000211487 with an appropriate officer endorsement authorizing service as master of vessels 100GT or less on inland waters. The current issue is a temporary MMC. The Coast Guard will continue to issue such credentials until Respondent's pending appeal is finalized.

6. The Salem Gauge is located on the Willamette River about 300 feet upstream from the Center Street Bridge at river mile 84.2, near Salem, Oregon. (12/4/12 Tr. at 80-81).
7. The river gauge at Salem consists of a pressure transducer in a fixed position in the river that measures the amount of head above the fixed position. (2/26/13 Tr. at 142).
8. The pressure transducer is calibrated by comparison to outside staff gauges, and this occurs about every six to eight weeks. (2/26/13 Tr. at 142).
9. On May 9, 2012, the U.S. Geological Survey (USGS) took gauge readings of the Willamette River at Salem, Oregon every 15 minutes. (Ex.CG-1; 12/4/12 Tr. at 82).
10. The gauge readings are recorded in feet. (12/4/12 Tr. at 83).
11. These readings are updated hourly and are made publicly available on the USGS website. Each hourly update shows the most recent gauge readings in 15-minute increments. (12/4/12 Tr. at 88-89).
12. The USGS uses a hydrologic instrumentation facility to calibrate its gauges. They are calibrated to be accurate to within 1/100 of a foot. (12/4/12 Tr. at 90-91).
13. During the period from April 5th to June 28, the gauge was calibrated and giving appropriate readings. (Ex. CG-2, 3; 12/4/12 Tr. at 91).
14. USGS personnel checked the gauge on May 8, 2013; the pressure transducer gave exactly the same reading, 11.97 feet, as the staff gauge in the river. (2/26/13 Tr. at 174-76).

15. A staff gauge is one of a series of sticks placed along the river bank that show depth measurements. (2/26/13 Tr. at 175-76).
16. On May 9, 2012, Respondent was the Master onboard the WILLAMETTE QUEEN, operating the vessel as required by law. (10/7/12 Stipulation of Facts).
17. Karen Burkholder is the office manager for the P/V WILLAMETTE QUEEN. (Stipulations, 12/4/12 Tr. at 40-41).
18. Ms. Burkholder misinformed Respondent of the river levels on May 9, 2012, and inadvertently provided him with the May 7, 2012 projection levels instead of those from the correct date. (Ex. R-B; 2/26/13 Tr. at 40-41).
19. Respondent did not know what the actual river levels were on the Willamette River before getting underway on May 9, 2012. (2/26/13 Tr. at 77).
20. The only source for determining river level that Respondent had available to him when he got underway was the Advance Hydrologic Prediction Service forecast, entered as Exhibit R-A. (2/26/13 Tr. at 77).
21. Respondent used the National Weather Service's forecast prediction dated May 7, 2012 to plan his journey for May 9. (Ex. R-A; 2/26/13 Tr. at 38-40).
22. On May 9, 2012, there were 66 passengers for hire (60 teens and 6 adults from Chemawa Indian School) onboard the P/V WILLAMETTE QUEEN. (Stipulations, 12/4/12 Tr. at 40-41).
23. A witness, Weisha Mize, saw the WILLAMETTE QUEEN enter the Willamette River on May 9, 2012. (Stipulations, 12/4/12 Tr. at 40-41).
24. The WILLAMETTE QUEEN was underway at 19:00 hours on May 9, 2012. (12/4/12 Tr. at 82).

25. The WILLAMETTE QUEEN does not have any on-board computers or internet service. (2/26/13 Tr. at 40).
26. Respondent read the forecasts as predicting the water level would still be below 11 feet at 1700 hours on May 9, 2012. (2/26/13 Tr. at 42).
27. At 1700 hours, the actual gauge reading at Salem was 11.33 feet. (Ex. CG-1).
28. The excursion in question was scheduled to commence at 1900 hours, when the river height reading at the Salem gauge was 11.25 feet, and conclude at 2000 hours, when the river height reading was 11.24. (Ex. CG-1, CG-9; 12/4/12 Tr. at 83).
29. Every reading taken at the Salem River gauge on May 9, 2012 was above 11 feet, and the river did not fall below 11 feet until 0245 hours on May 10, 2013. (Ex. CG-1).
30. USGS measures and reports actual river height while the National Weather Service provides a prediction and forecast of what the river might be in the future. (2/26/13 Tr. at 94).

III. DISCUSSION

A. Principles of Law

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA). 46 U.S.C. § 7702(a).

Section 7(c) of the APA requires the proponent of a rule or order to bear the burden of proof unless otherwise provided by statute. The trier of fact must consider the “whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence” before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the “preponderance of the evidence” standard, under which a party must prove that a “fact's existence is more likely than not.” Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers’ Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993).

Evidentiary rules under the APA are less strict than in jury trials and only irrelevant, immaterial, or unduly repetitious evidence need be excluded. See 5 U.S.C. § 556(d); Gallagher v. Nat’l. Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. Nat’l. Transp. Safety Bd., 684 F.2d 683, 688 (10th Cir. 1982). Moreover, evidence “need not be authenticated with the precision demanded by the Federal Rules of Evidence” in order to be admissible in an administrative proceeding. Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007).

The Coast Guard bears the burden of proof when seeking suspension or revocation of a merchant mariner’s credentials. 33 C.F.R. § 20.702(a). As these proceedings are conducted under the APA, this means the Coast Guard must prove its case by a preponderance of the evidence. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries 512 U.S. 267 (1994). In this case, the Coast Guard alleges that Respondent committed misconduct by operating a vessel outside the conditions listed on its inspection certificate and seeks revocation of Respondent’s MMC. The Coast Guard had the burden of proving each of these allegations by reliable, credible, and probative

evidence showing that it was more likely than not that Respondent had committed the violation.

B. Jurisdiction

Jurisdiction in misconduct cases is established only if the misconduct occurred while the mariner was acting under the authority of his MML or MMC. 46 U.S.C. § 7703; see also Appeal Decision 2615 (DALE) (2000). The conditions under which a mariner acts under the authority of a Coast Guard-issued credential or endorsement are found at 46 C.F.R. § 5.57 and include when the holding of such credential or endorsement is: (1) required by law or regulation; or (2) required by an employer as a condition for employment. 46 C.F.R. § 5.57(a). Additionally, a mariner who is engaged in official matters regarding the credential or endorsement may act under the authority of such credential or endorsement in situations including, but not limited to, applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or appearing at a suspension or revocation hearing. 46 C.F.R. § 5.57(b).

While Respondent admitted to the jurisdictional elements of the Complaint, the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (stating that, irrespective of Respondent's admission of charged offense, appeal must be granted where jurisdiction is not established).

The record clearly establishes Respondent was the holder of a United States Coast Guard Merchant Mariner's License and served as Master at all times relevant to these allegations. The evidence establishes the WILLAMETTE QUEEN is an inspected vessel in the service of Small Passenger Vessel and that its Certificate of Inspection requires the vessel's crew to include a Master. Title 46 U.S.C. § 8902 requires that a

“small passenger vessel shall be operated by an individual licensed by the Secretary to operate that type of vessel in the particular geographic area, under prescribed regulations.”

Title 46 C.F.R. § 15.515 requires that vessels subject to inspection under 46 U.S.C. § 3301 must, while on a voyage, be under the direction and control of an individual who holds an appropriate license or appropriate officer endorsement on their MMC and that no vessel may be operated unless it has in its service and on board, the complement required by the COI. If a law or regulation requires a person serving in a position to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner credential, an individual cannot serve in that position unless he holds all the credentials required. 46 C.F.R. § 15.401.

In this case, the weight of the evidence clearly establishes Respondent was the holder of an appropriate MML and was acting as master of the WILLAMETTE QUEEN during its excursion on May 9, 2012, as required by law and regulation. Therefore, I find Respondent was acting under the authority of his MML all times relevant to these allegations and, accordingly, find jurisdiction established pursuant to 46 C.F.R. § 5.57(a)(1).

C. Misconduct

The Coast Guard has charged Respondent with misconduct, which is defined in the regulations as:

[A] 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 C.F.R. § 5.27. The basis of this charge is that Respondent operated the P/V WILLAMETTE QUEEN in violation of the conditions listed on its COI.

1. Operation Subject to a Certificate of Inspection

United States law requires certain vessels to undergo safety inspections conducted by the U.S. Coast Guard. 46 U.S.C. § 3301. Small passenger vessels, meaning those of less than 100 gross tons that carry 150 or fewer passengers or have overnight accommodations for 49 or fewer passengers, are included in the categories of inspected vessels if they carry more than six passengers, including at least one for hire. *Id.*; 46 C.F.R. § 175.110.

Under 46 C.F.R. § 175.400, the term *Passenger* means any “individual carried on a vessel, except: (1) The owner or an individual representative of the owner, or in the case of a vessel under charter, an individual charterer or individual representative of the charterer; (2) The master; or (3) A member of the crew engaged in the business of the vessel who has not contributed consideration for carriage and who is paid for on board services.” The term *Passenger for hire* means “a passenger for whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel.” *Id.*

The WILLAMETTE QUEEN is a vessel under 100 gross tons that carries more than six passengers and therefore is subject to inspection. (10/7/12 Stipulation of Facts). The WILLAMETTE QUEEN was issued a COI on October 29, 2007 which was valid through October 29, 2012. (10/7/12 Stipulation of Facts; 46 C.F.R. § 176.107(b)). A COI

describes the vessel, the route(s) that it may travel, the minimum manning requirements, the survival and rescue craft carried, the minimum fire extinguishing equipment and lifejackets required to be carried, the maximum number of passengers and total persons that may be carried, the number of passengers the vessel may carry in overnight accommodation spaces, the name of the owner and managing operator, any equivalencies accepted or authorized by the Commandant or any Officer in Charge, Marine Inspection (OCMI), and such other conditions of operations as determined by the OCMI. 46 C.F.R. § 176.103.

After the Coast Guard determines the area of operation, referred to as a route, for each inspected vessel, as well as any necessary operational limits and/or extensions, the route is described by reference to bodies of waters, geographical points, distance from geographical points, distances from land, depths of channel, seasonal limitations, and similar factors. 46 C.F.R. § 176.110(a). When designating a route or imposing operational limits on a vessel, the Coast Guard may consider the performance capabilities of the vessel based on design, stability, propulsion, speed, operating modes, maneuverability, and other characteristics. 46 C.F.R. § 176.110(d)(2).

Vessels must comply with any conditions listed on the COI, unless relieved by a suspension or an exemption granted under section 46 U.S.C. § 3306(e). 46 U.S.C. § 3313. Whenever passengers are on board, a small passenger vessel must operate in full compliance with the terms of a COI. 46 C.F.R. § 176.100(b). A mariner who operates a vessel in violation of the COI commits misconduct. See, e.g., Appeals Decisions 715 (ROLL) (1953); 2308 (GRAY) (1983); 2299 (BLACKWELL) (1983).

Here, the COI states and the parties have stipulated that the WILLAMETTE QUEEN's route of operation is restricted when the Salem River Gauge reads 11 feet or more. When the river height measured at the Salem River Gauge is over 11 feet, the vessel's operation is limited to the Willamette Slough located behind Minto Browns Island.

2. Coast Guard's Position

The Coast Guard has charged Respondent with committing an act of Misconduct for violating an operating condition listed on the P/V WILLAMETTE QUEEN's COI. The operating condition states, "When the river gauge at Salem reads 11ft or more, the vessel's operation is limited to the Willamette Slough located behind Minto Browns Island." This operational condition was added to the vessel's COI in November 2009 and was in effect on May 9, 2012. The Coast Guard asserts that on May 9, 2012, the Willamette River gauge at Salem was above 11 feet for the entire day and that in his testimony, Respondent admitted to not checking the Salem River Gauge on May 9, 2012 and to entering the Willamette River that day. (CG Closing Brief).

3. Respondent's Defenses

Respondent attempted to rebut the Coast Guard's case in three ways: first, by showing the gauge was inaccurate; second, by showing there was a reasonable alternate method on which he could rely to judge the level of the river; and third, by raising the argument that the conditions of the amended COI are arbitrary and unfairly restrict his ability to operate. For the following reasons, Respondent's three arguments fail.

Respondent attempted to call the Salem River Gauge's accuracy into question through the testimony of Philip Pasteris, a hydrologist and meteorologist who had

previously worked at the River Forecast Center for NOAA. (2/26/13 Tr. at 79). Mr. Pasteris stated that various river events can affect the river height and cause predictions to be off when they are derived from ratings tables and streamflow measurements. (2/26/13 Tr. at 83). He opined that “a strict interpretation of the 11-foot restriction on navigation cannot be enforced based on the best available information available to the public” due to inherent inaccuracies in both streamflow measurements and the Northwest River Forecast Center model calibration, and uncertainties in Corps of Engineers forecast reservoir releases. (2/26/13 Tr. at 86-87). He suggests that instead “an upper and lower gauge height range centered on 11 feet should be used using the USGS quality code as guidance in partnership with local navigation expertise.” (Id.)

Respondent also attempted to show the gauge at Salem was giving measurements that were, in and of themselves, inaccurate. The Coast Guard is charged with determining the area of operation for each inspected vessel and establishing any necessary operational limits. Here the Coast Guard used the river level as a measure, instead of streamflow or current. Part of Respondent’s expert’s testimony was based on the use of a stilling well gauge to measure river height, but the evidence established USGS measures the actual height of the river by using a pressure transducer, which gives real-time readings and displays them in 15-minute increments on the agency’s website. (2/26/12 Tr. at 142). Use of the stilling well had been discontinued around 2006. (2/26/13 Tr. at 150). The evidence also showed the pressure transducer gauge had recently been calibrated and was giving accurate readings at the relevant time.

In his closing brief, Respondent argues that, due to the fact the gauge data is considered accurate if it is within 5% of the true reading, he would not be out of

compliance with the COI unless the river height was above 11.82 feet. This appears to stem from a misreading of the hearing testimony. All discussion of a 5% margin of error at the hearing related to stream discharge flow measurements and ratings table development, not to actual gauge height measurements made using a pressure transducer. No testimonial or documentary evidence has established that the 5% margin of error does or should apply to the height rather than flow of the river. Moreover, the plain language of the COI states that the WILLAMETTE QUEEN's operation is restricted "when the river gauge at Salem reads 11 ft or more," and a mariner would have no way of knowing whether the precise accuracy of the measurement at any given time. Respondent's position is both unsupported by the evidence and not a reasonable reading of the COI, and I therefore reject it.

While I accept as true that forecasts of river height are likely to become inaccurate due to rain, runoff, releases from upriver dams, or other such events, Respondent did not show any of these events caused the pressure transducer gauge to give inaccurate readings, nor did he show the Coast Guard's reliance on river height as a measure of operating limitations was erroneous.

Respondent attempted to show the NOAA forecast was a reasonable alternate way of determining river level. I do not find this argument persuasive. He testified his secretary obtained the NOAA forecast online and the WILLAMETTE QUEEN has no internet service onboard. (2/26/13 Tr. at 40-41). However, he did not explain why his secretary could not have accessed the USGS data as easily as the NOAA data. Nor did he explain why he failed to notice the information he relied on to plan his voyage was outdated. Although the NOAA data is predictive and the USGS website only shows

readings that have already been obtained, Respondent should have ensured he was using the most recent and accurate data available before undertaking any excursion.

Finally, Respondent raised the argument that the conditions of the amended COI are arbitrary and unfairly restrict his ability to operate. (5/16/13 Tr. at 121). He believes the granting of exemptions for particular journeys is confusing, as the COI was put in place because the Coast Guard does not think the vessel can safely operate in waters above 11 feet but is nevertheless willing to issue a temporary permit for the vessel to sail in waters up to 18 feet. (5/16/13 Tr. at 123-24).

The question of whether the 11-foot restriction on the COI is arbitrary and/or unfair is not properly before me. Under Coast Guard regulations, “[a]ny person directly affected by a decision or action taken under this subchapter, by or on behalf of the Coast Guard, may appeal therefrom in accordance with [46 C.F.R.] §1.03...” 46 C.F.R. § 175.560. The procedures for requesting an amended COI are at 46 C.F.R. § 176.120, and a vessel is bound by the existing conditions until such time as the COI is amended again or a new COI is issued. BLACKWELL, *supra*; see also USCG v. Chesbrough, 2011-0224 (ALJ Decision 7/25/12).

D. Conclusion.

The WILLAMETTE QUEEN was required to comply with the conditions listed on its COI at any time it operated with at least six passengers, including at least one paying passenger, aboard. 46 C.F.R. § 176.100(b). On May 9, 2012, the vessel was carrying sixty-six paying passengers. (12/4/12 Tr. at 40). There is no evidence in the record that the WILLAMETTE QUEEN had been granted a suspension or exemption

from its COI on May 9, 2012.⁴ I find the WILLAMETTE QUEEN was bound by law to operate in accordance with the conditions listed on its COI during its May 9, 2012 excursion.

The evidence clearly establishes Respondent was the master of the WILLAMETTE QUEEN on May 9, 2012 and was responsible for determining the vessel's operating plan. After reviewing the NOAA forecasts for river stage, Respondent decided to navigate the WILLAMETTE QUEEN into the Willamette River without first determining that, in doing so, he would remain in compliance with the vessel's COI. The terms of the COI clearly state the river gauge at Salem is the mechanism used for determining the river's height for purposes of compliance with the COI, and Respondent's decision to rely on an alternate method of calculating river level was at his own risk.

The evidence also establishes that the water level in the Willamette River was at all relevant times above 11 feet, and the vessel was not permitted to operate in the main stem of the river unless the water level was below 11 feet. I find the preponderance of the evidence establishes that Respondent operated the WILLAMETTE QUEEN in violation of its COI on May 9, 2012. I therefore find the factual allegation of misconduct **PROVED.**

⁴ Respondent indicated that he had been granted an exemption from the 11-foot restriction on the COI at one point and was permitted to carry 80 passengers in levels up to 18 feet on a voyage to Portland. (Tr. at 122; R EX M). However, he did not argue that there was any exemption in place during the May 9, 2012 excursion.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent was the holder of a United States Coast Guard-issued Merchant Mariner's License, which has since expired and been replaced by a Merchant Mariner's Credential with endorsements.
3. On May 9, 2012, Respondent was acting under the authority of his MML as the captain of the small inspected passenger vessel WILLAMETTE QUEEN.
4. On May 9, 2012, the water level in the Willamette River was at 11.17 feet as measured at the Salem River Gauge.
5. The Certificate of Inspection for the WILLAMETTE QUEEN restricts the vessel to the Willamette Slough when the river is above 11 feet, as measured at the Salem River Gauge.
6. On May 9, 2012, Respondent maneuvered the WILLAMETTE QUEEN into the Willamette River when the river was above 11 feet as measured at the Salem River Gauge in violation of the COI.
7. The factual allegation of "misconduct" against Respondent for operating the WILLAMETTE QUEEN in violation of its conditions of inspection is found PROVED by a preponderance of the evidence.

V. SANCTION

Having found the allegations proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). "An Administrative Law Judge has wide discretion to formulate an

order adequate to deter the [a mariner's] repetition of the violations he was found to have committed.” Appeal Decision 2475 (BOURDO) (1988).

A. Factors Considered in Determining an Appropriate Order

Coast Guard regulations detail the factors to be considered in determining an appropriate order. 46 C.F.R. § 5.569. “The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.” 46 C.F.R. § 5.569(a). I am not bound by the Coast Guard’s recommendations.

In determining an appropriate sanction, an ALJ may consider the following factors: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

These rules include a Table entitled “Suggested Range of an Appropriate Order,” stating Table 5.569 “is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits.” 46 C.F.R. § 5.569(d).

In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ,” who is not bound by the scale of average orders. Appeal Decision 2628 (VILAS) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). “In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review.” Appeal Decision 2628 (VILAS) (citing Appeal Decision 1937 (BISHOP)).

However, in Coast Guard v. Moore, NTSB Order No. EM-201 (2005), the National Transportation Safety Board (NTSB) disapproved a license revocation order in a refusal to test case because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569. The NTSB stated that “unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors.” The Commandant has recognized that policy in Appeal Decision 2694 (LANGELY) (2011) and the NTSB has reiterated its position in Commandant v. Ailsworth, NTSB Order No. EM-211 (2012).

B. The Parties’ Arguments Regarding Sanction.

The Coast Guard has requested that Respondent’s MMC be revoked. The Coast Guard argues Respondent “was fully aware of the conditions set forth on the Certificate of Inspection and consciously violated it by operating the vessel in the Willamette River with the Salem river gauge reading over 11 feet” and “has shown a clear historical pattern of not abiding by conditions and restrictions contained in his vessel's Certificate of Inspection.” The Coast Guard also pointed out that over sixty paying passengers were aboard, most of whom were children.

The Coast Guard points to two previous matters as aggravating factors: first, Respondent settled with the Coast Guard in June 2003 in Docket Number CG S&R 03-0371 (Ex. CG-11), and second, a recent decision from July 2012, Docket # 2011-0224 (Ex. CG-12). The prior disciplinary record of a respondent comprises certain items less than 10 years old including “[f]inal agency action by the Coast Guard on any S&R proceeding in which a sanction or consent order was entered.” 33 C.F.R. § 20.1315(a)(2). The consent order issued in CG S&R 03-0371 was just less than 10 years old at the hearing in May. The decision in Docket # 2011-0224 was appealed on August 6, 2012. According to 33 C.F.R. § 20.1101(b), until the Commandant issues

an appeal decision in this matter, that decision is not final agency action. Accordingly, I cannot consider that decision as prior disciplinary record.

With respect to the consent order issued in CG S&R 03-0371, the record shows Respondent settled with the Coast Guard in June 2003, agreed to a suspension of 50 days, and agreed to complete a course during the suspension period. The regulations limit the amount of time in which prior cases may be introduced to ten years; at the time of the hearing in this matter, the prior settlement was nearly ten years old. The substance of the allegations in that case was not introduced into evidence,⁵ and pursuant to the agreement the Respondent did not admit or deny the allegations. I do not see a sufficient nexus with this case to give it significant weight. I will consider it only for the fact that Respondent credentials were previously suspended for 50 days.

The Coast Guard also points to statements made during the 2011 Suspension and Revocation hearing (Docket # 2011-0224). At the September 20, 2011 hearing in that matter, both Mr. and Mrs. Chesbrough stated they had changed their pre-voyage procedures to ensure they would be in compliance regarding the Salem river gauge in the future. (Ex. CG-13; 2/26/13 Tr. at 116-20 and 154). While the procedures Respondent followed on May 9, 2012 do differ from those at issue in the previous case, they were still insufficient to ensure compliance. Moreover, even though Respondent has denied the allegations, he asserts any violation in this case would be minimal. Respondent likens the violation here to driving 55.83 miles per hour in a zone marked 55. (2/26/13 Tr. at 204). He contends this analogy shows how nonsensical the Coast Guard's argument is. (Id.)

⁵ The Coast Guard did describe the underlying violations in its Post-Hearing Brief, however, the documentation submitted into evidence during the hearing does not contain any of that detail. As the information supplied in the Post-Hearing Brief is argument, not evidence, it would not be appropriate for me to accept it as fact or consider it when reaching my decision. If the Coast Guard wished me to consider the substance of the 2003 violation in addition to the existence of a Settlement Agreement and Consent Order, it should have submitted sufficient documentation into evidence.

The Coast Guard is seeking revocation in this matter. Coast Guard regulations include 46 C.F.R. 5.61 entitled acts or offenses for which revocation of credentials is sought. The act found proved here is not among the 11 enumerated offenses for which revocation is routinely sought. The rules also state that an “investigating officer may seek revocation of a respondent's credential or endorsements when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline.” 46 C.F.R. § 5.61(b).

Passenger safety is of paramount concern, and a mariner should act with the highest level of care when transporting passengers. Appeal Decisions 2698 (HOCKING) (2012) and 2618 (SINN) (2000); see also Huron Portland Cement Co. v. City of Detroit, Mich. 362 U.S. 440, 445. However, in this case, there was no evidence that Respondent’s decision to operate when the water level was slightly above the height permitted by the COI placed any passengers, crew, or other vessels on the river in any degree of danger. The streamflow between 11.0 and 11.05 feet is not significantly different. (Ex.CG-14). In the absence of such evidence, I cannot consider this to be a credible aggravating factor for purposes of the sanction.

In contrast, the Commandant found revocation appropriate in Appeal Decision 2654 HOWELL for failing to give a safety orientation before departure where the Respondent's cavalier attitude towards safety contributed to the deaths of passengers. While the record establishes that this Respondent has a significant and continuing disagreement with the Coast Guard over the need for the current operating restriction on his vessel, the record does not demonstrate that Respondent has such an cavalier attitude or total disregard for safety that warrants revocation.

The Commandant also found revocation to be appropriate in Appeal Decision 2524 (TAYLOR) (1991) where the “record clearly reflects an intentional, calculated course of conduct

to circumvent or disregard a previous suspension order of the Administrative Law Judge.” As noted above, while I have issued a previous order relating to Respondent, it was issued in July 2012 and the incident at issue here took place in May 2012. Moreover, the order is currently under appeal and not in effect. Since the incident predated my order and the order has not taken effect even now, Respondent could not have undertaken an intentional and calculated course of conduct to circumvent or disregard it. Accordingly, I do not find TAYLOR to be controlling here.

Here, the Coast Guard has not introduced sufficient evidence to support the aggravated sanction it seeks. I cannot find that this Respondent clearly presents a threat to the safety of life or property, or that his continued service under his credential or endorsements is necessarily detrimental to good discipline.

However, I am concerned with the disparity between Respondent’s statements about complying with the COI and his actions. Despite his earlier assurances, he has not demonstrated he takes the restriction on the COI seriously enough that he will use the best available measures to ensure compliance. This is considered an aggravating circumstance.

C. Conclusions as to Sanction

The proposed sanction in this case is premised on one allegation of misconduct for violating the vessel’s COI, as well as several factors articulated by the Coast Guard to be aggravating. In the Table entitled “Suggested Range of an Appropriate Order,” codified at 46 C.F.R. § 5.569, the suggested penalty range for misconduct for “Failure to comply with U.S. law or regulations” is 1-3 months suspension. The regulations explain how an ALJ may apply the “Suggested Range of an Appropriate Order” Table, noting that:

The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is

considered appropriate for failure to obey a master's written instructions. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified. 46 C.F.R. § 5.569(d)

As I have found the allegations proved but have not found the aggravating factors articulated by the Coast Guard sufficient to warrant an increased sanction beyond the Table, the most severe sanction the Table of Appropriate Orders supports is 3 months. Respondent operated outside the scope of the route allowed in the COI. Respondent was well aware of the limitations placed on the WILLAMETTE QUEEN but chose not to verify the official gauge reading prior to boarding his vessel. Instead, Respondent chose to rely on a NOAA forecast which was both outdated and inaccurate. Still, the river level was only slightly above the limit. Normally, such a circumstance would warrant a sanction at the low end of the range.

The decision to undertake a voyage or stay at the dock is the responsibility of the Master. Likewise is the decision whether the voyage should continue or whether the vessel should return to the dock. Respondent's actions operating in violation of the COI could potentially have compromised the safety of the vessel and the passengers. Fortunately, in this case there was no evidence the passengers were actually endangered and the excursion concluded safely. However, as a prudent mariner Respondent should have recognized the regulations and the conditions of his vessel's operation do not allow for flexibility and the laws must be obeyed. Respondent had previously stated he would comply with the river gauge readings rather than his visual observations. Instead, he relied on NOAA river forecasts that are not as reliable as the USGS gauge.

In light of the evidence presented, I find the aggravated sanction sought by the Coast Guard clearly inappropriate. Nevertheless, given the single aggravating circumstance discussed above and the fact that Respondent was once assessed a prior sanction of 50 days, a higher

sanction than the minimum one month penalty suggested in the Table is warranted here. I therefore assess a sanction of two months outright Suspension.⁶

ORDER

IT IS HEREBY ORDERED that the Allegations in the Complaint are found **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's Credential is

SUSPENDED for two months.

SO ORDERED.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: September 18, 2013

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001 – 20.1004.

⁶ Normally, I would also assess a probationary order to deter future violations, but since I have issued such an order in Docket # 2011-0224 which is currently under appeal, a further probationary order at this time would serve little purpose. Therefore a simple outright suspension for this violation is appropriate.

APPENDIX A: APPEALS

Procedural Rules for Appeals

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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

Additional Rules Concerning Appeals from 46 C.F.R. Part 5

46 C.F.R. § 5.701 Appeals in general.

A party may appeal the decision of an ALJ under the procedures in subpart J of 33 CFR part 20. A party may appeal only the following issues:

- (a) Whether each finding of fact rests on substantial evidence.
- (b) Whether each conclusion of law accords with applicable law, precedent, and public policy.
- (c) Whether the ALJ committed any abuses of discretion.
- (d) The ALJ's denial of a motion for his or her disqualification.

46 C.F.R. § 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary credential or endorsement.

- (a) A person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in §5.59, may file a written request for a temporary credential or endorsement. This request must be submitted to the Administrative Law Judge

who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.

(b) Action on the request is taken by the ALJ unless the hearing transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.

(c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary credential or endorsement may be denied for that reason alone.

(d) All temporary credentials or endorsements will provide that they expire not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary credential expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.

(e) If the request for a temporary credential or endorsement is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.

(f) Copies of the temporary credential issued become a party of the record on appeal.

§ 5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of credentials or endorsements are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.

(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances. Communications should be addressed to Commandant (CG-094), U.S. Coast Guard, 2100 2nd St. SW., Stop 7121, Washington, DC 20593-7121.

(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated of counsel.

§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary credential and/or endorsement pending appeal to National Transportation Safety Board.

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Commandant's

opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary credential and/or endorsement may be denied for that reason alone.

(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).

(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary credential and/or endorsement as specified in the stay order. This credential and/or endorsement is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

APPENDIX B: LIST OF WITNESSES AND EXHIBITS

Witnesses:

For the Coast Guard:

Richard Kittelson

For the Respondent:

Richard Chesbrough, Respondent

Phillip Pasteris

Paul Simonis

Exhibits:

For the Coast Guard:

CG-1	USGS Table of Gauge Heights for May 9-10, 2012
CG-2	USGS Discharge Measurement and Gauge Inspection Notes from April 5, 2012
CG-3	USGS Discharge Measurement and Gauge Inspection Notes from May 8, 2012
CG-4	USGS Discharge Measurement and Gauge Inspection Notes from June 28, 2012
CG-5	NWS Willamette River Gauge Readings at Salem for May 7, 2012
CG-6	NWS Willamette River Gauge Readings at Salem for May 9, 2012
CG-7	Willamette River Gauge Readings from Statesman Journal for May 9, 2012
CG-8	Email Correspondence from Karen Burkholder to Coast Guard dated May 18, 2012
CG-9	Dinner Cruise Booking Log for Willamette Queen, May 9, 2012
CG-11	Coast Guard Letter of Warning dated April 29, 2002 issued to Respondent
CG-12	Decision and Order dated July 25, 2012, Docket No. 2011-0224 (Cover Page Only)
CG-13	Excerpts from September 20, 2011 Hearing Transcript in Docket No. 2011-0224
CG-14	USGS Expanded Rating Table Updated April 4, 2012
CG-15	Gauge Height vs. Discharge Chart for Willamette River at Salem Starting January 3, 2013

For Respondent:

R-A	USGS Table for Salem Gauge, May 3-12, 2012
R-B	Email from Karen Burkholder to Coast Guard dated May 18, 2012
R-C	Email from Karen Burkholder to Chief Collins dated May 18, 2012
R-D	Email from Andy Bryant to Respondent dated Jan. 3, 2013
R-E	Comparative Analysis of Gauge and Stream Flow Readings
R-I	Excerpts from Sept. 20, 2011 Hearing – Testimony of Paul Thunberg
R-L	Copy of 46 C.F.R. 176.110
R-M	Jan. 25, 2010 Letter from Capt. F.G. Myer to Respondent Regarding Excursion Permit
R-O	Resume of Philip Pasteris

**APPENDIX C: RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

The Coast Guard's Proposed Findings of Fact

1. The WILLAMETTE QUEEN is a Small Passenger Vessel regulated under 46 CFR Subchapter T. (1) (2)

Accepted and incorporated.

2. On May 09, 2012, the P/V WILLAMETTE QUEEN's conditions of operation section on the COI stated the following: "When the river gauge at Salem reads 11 feet or more, the vessels operation is limited to the Willamette Slough located behind Minto Browns Island". (1)

Accepted and incorporated.

3. Captain Chesbrough was aware of the condition of the river stage height on the vessel's COI. (16)

Accepted and incorporated.

4. On May 09, 2012, prior to getting the P/V WILLAMETTE QUEEN underway for the evening dinner cruise, Mr. Chesbrough checked the NOAA printout dated May 07, 2012. The NOAA printout that he had in his possession was the one that his secretary had provided to him. (5) & (15)

Accepted and incorporated.

5. The NOAA reading that the Respondent utilizes for Salem River level readings was 11.58 feet on May 09, 2012. (CG Exhibit 06)

Accepted as to what the document says, but noted that this forecast was for 1000 hours, not the relevant time of 1800-2000 hours.

6. The P/V WILLAMETTE QUEEN was captained by Mr. Richard Albert Chesbrough as required by law or regulation. (12)

Accepted and incorporated.

7. On May 09, 2012, Mr. Richard Albert Chesbrough acted under the authority of Merchant Mariner License # 1215480. (4) & (13)

Accepted and incorporated.

8. On May 09, 2012, there were 66 passengers (60 teens & 6 adults from Chemawa Indian School) for hire onboard the P/V WILLAMETTE QUEEN. (4)

Accepted and incorporated.

9. On May 09, 2012, at approximately 1900 hrs, the P/V WILLAMETTE QUEEN, entered into the Willamette River. (2) & (3)

Accepted and incorporated.

10. On May 09, 2012, at 1900 hrs, the Willamette River gauge reading was 11.25 feet. (7)

Accepted and incorporated.

11. The dinner cruise ran from approximately 1800 hrs until 2000 hrs. There was approximately one hour that the P/V WILLAMETTE QUEEN was dockside. During the dinner cruise at approximately 1900 hrs, on May 09, 2012, Mr. Chesbrough navigated the P/V WILLAMETTE QUEEN into the Willamette River. (3)

Accepted and incorporated.

12. Salem River gauge readings for the Willamette River on May 09, 2012 were above 11 feet. (6) & (7).

Accepted and incorporated.

13. The Salem River gauge is the only accurate way of checking the actual river height. There are no other river gauges in Salem, OR. (10)

Accepted and incorporated.

14. The U.S. Geological Survey provides updates and accurate real time river gauge readings every 15 minutes on USGS' website. (9)

Accepted and incorporated.

15. USGS conducted an accuracy check on the Salem River in April, May and June 2012 with no discrepancies identified. (8)

Accepted and incorporated.

16. Upon entering the Willamette River, Mr. Chesbrough committed an act of mariner misconduct by operating the P/V WILLAMETTE QUEEN in violation of a condition of the vessel's COI. (5) & (14)

Rejected as a proposed conclusion of law rather than finding of fact.

The Coast Guard's Proposed Conclusions of Law

1. On May 09, 2012, the Respondent had knowledge of the river stage and the restrictions on the vessels COI; and he made the decision to enter the river in violation of the COI. Based on the definition of Misconduct in 46CFR5.27, the respondent violated a formal duly established rule.

Accepted and incorporated.

The Respondent previously violated the 11 ft amendment of his Certificate of Inspection (Docket # 2011-0224- D & O is on appeal).

Rejected. Docket #2011-0224 is not yet final agency action, thus I cannot conclude that the findings made in the Decision in that case constitute evidence of a previous violation.

Respondent's Proposed Findings of Fact and Conclusions of Law

As stated in the Decision, a document entitled Respondent's Post-Hearing Brief (Proposed Findings of Fact, Proposed Conclusions of Law, and Argument in Support Thereof) was submitted on the behalf of the Respondent. The cover sheet states the sender's name as Richard Chesbrough, but the document was apparently prepared by Barbara Chesbrough, the owner of the WILLAMETTE QUEEN. She is also Respondent's wife. This document does not conform to the regulations found at 33 C.F.R. § 20.303(c) in that it was filed by a person other than the respondent or an authorized representative and it is not signed. This non-conforming

document contains testimony of an unsworn person who was not designated as a witness and additional argument. The testimonial content has been rejected and the argument considered to the extent relevant to the Decision. As the document does not comport with the regulations, I will not rule on the proposed findings of fact and conclusions of law. However, I note that proposed findings 1-13 correspond to stipulations of fact already entered into the record. I also note that the remaining proposals are primarily in the nature of argument and would not be accepted as proposed findings of fact or conclusions of law in any event. I have, however, considered the arguments contained in this filing in preparing my decision.