



Coast Guard Hearing Office

*“Hearing Office is our Name,
Maritime Safety and Security is our Aim”*

Adjudicate civil penalty cases in support of the Marine Safety Mission and Vision, in the Coast Guard’s Marine Safety Performance Plan, regarding compliance enforcement, to: ensure the safety of U.S. mariners, passengers on ferries and other vessels, and recreational boaters; protect the marine environment; and minimize disruptions to maritime commerce.

GREETINGS

From Robert Bruce
Chief, Coast Guard Hearing Office



HEARING OFFICE NEWS

Hearing Officers are very conscientious about performing their duties in civil penalty proceedings. They work hard to be fair and impartial in every case, and to sort through the evidence in case files to make accurate findings of fact. When the facts show that a violation has occurred, Hearing Officers are thoughtful about considering any factors required by law before finally assessing a penalty, and about assessing a penalty that is remedial rather than punitive. That means that the Hearing Officer will strive to assess a penalty that is fair and that will achieve the remedial goals of compliance and deterrence.

Coast Guard personnel and the parties charged in civil penalty cases both have opportunities to properly influence the Hearing Officers’ decisions, in compliance with the rules for the civil penalty process. It is important for both the Coast Guard personnel preparing civil penalty cases and the charged parties to understand the relevant issues and to focus their efforts on persuading the Hearing Officer on the issues in dispute with sound evidence and discussion of the law.

In order to effectively persuade the Hearing Officer, it is important to understand the regulation or statute that is cited for the alleged violation and the elements involved in proving a violation of the law, including the meaning of terms that are defined in the law. Taking the time to understand the relevant issues in a case should be a great help in preparing submissions for the Hearing Officer that are credible and persuasive.

These newsletters are posted on our website www.uscg.mil/legal/cgho and on the Coast Guard’s website [HOMEPORT](#).

As of now, the Hearing Office is receiving mostly cases with a violation date in 2012, with only a very small number of cases from earlier years. In September, we received about 130 new cases as opposed to about 100 cases a month in July and August. September, October and November are generally the months in which the Hearing Office receives the largest number of new cases. As a result, this is the busy season for the Hearing Officers and their support staff. Even so, the Hearing Office much prefers to see cases submitted in a timely manner, rather than many months or even years after the alleged violations. To the extent a case involves lack of compliance, the sooner a civil penalty can achieve compliance the better. Similarly, if a civil penalty is going to be assessed to deter future violations of the same sort, the sooner the case can be processed the better.



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THE RECOMMENDED PENALTY

(Reprinted from the July 2009 Newsletter)



THE RECOMMENDED PENALTY

Periodically parties will question the “recommended penalty” amount on an Enforcement Summary and also the preliminary penalty amount assessed by a Hearing Officer.

The recommended penalty amount reflected on an Enforcement Summary is simply an amount that the processing official recommends as appropriate for the cited violations. It is but one factor among many factors that the Hearing Officer considers.

All too often, a processing official fails to articulate the factors that led to the determination of the recommended penalty amount thereby diminishing its usefulness as a factor for consideration by the Hearing Officer. Hearing Officers consider all evidence from the unit including any aggravating factors that are articulated and sufficiently explained.

It is important to understand that Hearing Officers are impartial and independent in the execution of their duties and are not bound by the recommended penalty amount. They make a determination as to the penalty amount based on the facts and circumstances of the violation.

Remember, the goals of the civil penalty amount are compliance and deterrence. Penalty amounts are formulated to gain mariner compliance with laws and regulations that the Coast Guard enforces and to deter mariners from future violations.

For these reasons, the Hearing Officer’s preliminary penalty may be higher than the recommended penalty. The civil penalty process is not a process that seeks to punish mariners for violations as a criminal process might do. Therefore, penalty amounts are not determined in the context of being “punishment” for violations. In a case of a declined Notice of Violation (NOV), the party is not “punished” in the civil penalty process for declining the NOV. Penalty amounts are determined in such cases in the same manner as non-NOV civil penalty cases.

Additionally, it is important to remember that the recommended penalty is based on the unit’s view of the alleged violation. Often the final penalty is substantially lower than what the unit might have recommended. The unit at the time of determining the recommended penalty amount does not have the benefit of having seen or heard the party’s evidence.

The Hearing Officer in formulating the final penalty considers all of the party’s evidence in defense, mitigation, and extenuation. It is this evidence that often causes the final penalty to be lower than the recommended penalty amount.

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ENFORCEMENT OF COMMERCIAL FISHING VESSEL SURVIVAL CRAFT REQUIREMENTS (Revisited)

CDR M. Hammond, USCG

This topic was previously discussed in an article that appeared in Volume VI, October 2009, of the Hearing Office Newsletter. The article is reprinted here (in edited form) to provide a brief overview of the commercial fishing vessel (CFV) survival craft regulations and to re-emphasize some of the key elements that should be considered when units are processing enforcement cases for Hearing Officer adjudication.

Survival craft carriage requirements are contained in 46 CFR § 28.120. This part applies to all U.S. flag, uninspected vessels that are commercial fishing, fish processing, or fish tender vessels. This part applies to documented vessels and vessels numbered (registered) by a state. Specific carriage requirements vary significantly depending on a number of factors, including the vessel's documentation status, the number of individuals on board, the vessel's area of operation, as well as the temperature of the water in which the vessel is operating.

When processing an enforcement case for an alleged violation of survival craft carriage requirements, careful consideration should be given to capturing and documenting the following essential elements of information.

Vessel Details / Number of Individuals on board

Specific requirements for survival craft are contained in 46 CFR § 28.120 and are listed within tables 28.120(a), 28.120(b), and 28.120(c). The tables breakdown the requirements for the following categories of vessels:

- Documented vessels
- Undocumented vessels with not more than 16 individuals on board
- Undocumented vessels with more than 16 individuals on board

A detailed description of vessel type (documented or undocumented) should be included in the enforcement summary as well as an accurate count of the number of individuals on board. The vessels must carry the appropriate survival craft in aggregate capacity to accommodate the total number of individuals on board.

Location, location, location

Location information is crucial for processing a violation case under the survival craft regulations. This information is used to establish carriage requirements based



on distance from the coastline, and is also used in making cold water determinations which can significantly alter specific carriage requirements. It is vitally important to document the location of the boarding in the Enforcement Summary and to verify its accuracy. It is also important to ascertain and document the vessel's typical route. The specific areas of vessel operation that trigger the various survival craft requirements are delineated in the regulations as follows:

- Beyond 50 miles of the coastline
- Between 20 and 50 miles of the coast line
- Beyond the boundary line within 20 miles of the coastline
- Beyond the boundary line, within 12 miles of the coastline
- Inside the boundary line, or lakes, bays, sounds, or rivers
- Great Lakes (beyond and within 3 miles of the coastline)

Cold vs. Warm Water

Water temperature is another key factor in properly determining survival craft carriage requirements.

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For example, a 37-foot documented CFV that operates within 12 miles from the coastline in cold waters is required to carry an Inflatable Buoyant Apparatus, whereas the same vessel, if operating the same distance from the coastline in *warm* waters, is only required to carry a Life Float. For the purposes of this regulation, cold water means water where the monthly mean low water temperature is normally 59° F or less. Detailed information regarding cold water determinations, with associated chartlets broken down by month for the Atlantic and Pacific Ocean, are contained in Navigation and Vessel Inspection Circular No. 7-91 (available via homeport.uscg.mil within the “Library” tab).

Exceptions

These requirements do not apply to vessels less than 36 feet, with three or fewer individuals on board that operate within 12 miles of the coastline. For vessels greater than 36 feet, with 3 or fewer individuals on board, and operating within 12 miles of the coast line, they currently may substitute a Buoyant Apparatus for the survival craft requirement.

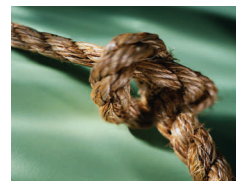
Always remember: Details are important! A well-documented, detailed violation case can go a long way toward achieving compliance goals, to improve the safety of the commercial fishing industry, as well as help deter violations in the future.

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K.N.O.T.

(Knowledge Note or Tip)



Fire Extinguisher Violations

(Know the regs and choose the appropriate cite)

The Hearing Office receives many cases each week involving alleged violations of the fire extinguishing equipment requirements. These cases typically involve the failure to have the required number of Coast Guard approved fire extinguishers on board because of the fire extinguisher/s’ unserviceability, insufficient charge, or complete absence.

Two cites cover the bulk of the violations: 46 CFR § 25.30-20 and 46 CFR § 28.160. Note that although the first paragraph of 28.160 makes the requirements of 46 CFR Part 25, Subpart 25.30, applicable to commercial fishing vessels, 28.160(b) is the actual charging cite for fishing vessels 65 feet or more in length. For commercial fishing vessels that are less than 65 feet in length and are missing the required number of fire extinguishers, use 46 CFR § 25.30-20.

Oftentimes, however, charging units apply the wrong cites for such violations and, as a result, cases are returned, slowing the adjudication process. For example, we see cases in which parties are charged under 46 CFR 25.30-10(g), for having a fire extinguisher (without a pressure gauge) that has been determined to be unserviceable or empty.

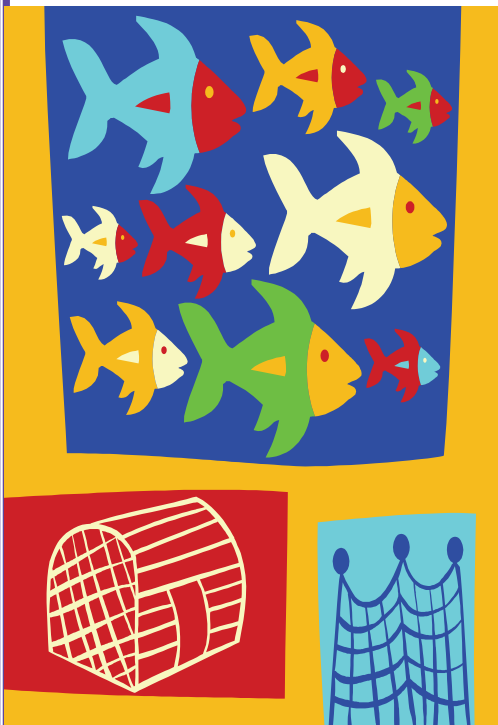
It is important to note however, that just because an empty or unserviceable fire extinguisher does not have a pressure gauge, it does not necessarily mean a violation of § 25.30-10(g) has occurred. It is important to have a good understanding of the elements of this regulation to determine whether the cite applies to a particular case.



46 CFR § 25.30-10(g) states in part: “The use of dry chemical, stored pressure, fire extinguishers not fitted with pressure gauges or indicating devices,

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manufactured prior to January 1, 1965 may be permitted on motorboats and other vessels so long as such extinguishers are maintained in good and serviceable condition...” (Emphasis added). Obviously, in order for a violation to have occurred under this cite, there

must be evidence to support that the particular fire extinguisher is not fitted with a pressure gauge or indicating device, and was manufactured prior to January 1, 1965.

46 CFR § 25.30-10(h) states: “The dry chemical, stored pressure fire extinguishers without pressure gauges or indicating devices manufactured after January 1, 1965, shall not be labeled with the marine type labeled in § 162.028-4 of this title nor shall such extinguishers manufactured after January 1, 1965, be carried on board motorboats or other vessels as required equipment.” (Emphasis added.)


So, for cases where a required fire extinguisher with no pressure gauge or indicating device is found on board a vessel and it is determined to be empty or unserviceable, unless there is evidence to show the extinguisher was manufactured prior to January 1, 1965, the most appropriate cite to use would be 46 CFR § 25.30-20 or 46 CFR § 28.160 depending on the vessel size. This is because the vessel failed to have the required number Coast Guard approved fire extinguishers on board.

Here’s the K.N.O.T.: Know the regulations and ensure the charged cite is appropriate to the alleged violation by verifying that the case file contains


supporting evidence. Getting it right the first time will help avoid delays in the adjudication process.

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DECKPLATE RIVETS

 The Coast Guard issued a final rule on 28 March 2012 entitled, “Changes to Standard Numbering System, Vessel Identification System, and Boating Accident Report Database” (77 FR 18689-01).

The rule became effective 27 April 2012. The rule amends several sections in 33 CFR Part 173 “to align with statutory language.” For example, the words “use” and “used” in 33 CFR § 173.21 have been replaced with the words “operate” and “operated,” respectively. Similarly, the word “using” in § 173.23 is now “operating,” and the word “use” in § 173.25 is now “operate.” Boarding Officers, especially, should take note of these changes.

 The Hearing Office has recently received a rash of Activity Summary Reports featuring bad spelling. Spelling errors are avoidable. Today there are innumerable free on-line tools to assist the writer, for example: dictionary.com, oxford-dictionaries.com, and dailygrammar.com. At least get someone to proofread your work. Remember that the party and/or his/her representative will be reading the Activity Summary Report. A narrative containing simple, complete, declarative sentences that are free of spelling errors reflects well on the Coast Guard.



Commercial Activity ≠ Coastwise Trade

Mr. Robert Bruce

The Hearing Office occasionally receives a case alleging that a vessel has engaged in coastwise trade without a Certificate of Documentation evidencing a coastwise endorsement. This type of case would involve an alleged violation of 46 U.S.C. § 12102 (a), 46 C.F.R. § 67.323, § 67.325, or § 67.327. In order to prove that such a violation occurred, there must be evidence that the vessel was engaged in coastwise trade, among other things.

Coastwise trade is defined in various sections of 46 U.S.C. Chapter 551. The Coast Guard is authorized to enforce the coastwise laws (14 U.S.C. § 100), but Customs and Border Protection is the agency responsible for determining what activities are included within the definition of coastwise trade. It may be that coastwise trade always involves some commercial activity, but it is not true that all commercial activity is coastwise trade. For example, a vessel that lays cable or pipe in a U.S. harbor may not be engaged in the coastwise trade if it does not transport any passengers or merchandise.

In cases where the vessel’s activity clearly falls within the statutory definition of coastwise trade, it may be sufficient to provide evidence showing the activity in which the vessel was engaged. For example, a ferry carrying passengers from Orient Point, New York to New London, Connecticut, would fall squarely within 46 U.S.C. § 55103 and there could not be much of an argument that it was not engaged in coastwise trade.

In cases that are more ambiguous, the Hearing Officer will need to be provided with evidence that clearly shows the activity the vessel was engaged in, plus some authority for the Coast Guard’s position that the vessel is engaged in coastwise trade. A valid authority would be a ruling by Customs and Border Patrol or a decision by a court of competent jurisdiction. In an ambiguous situation, a determination by the Coast Guard that a vessel activity con-

stituted coastwise trade would not necessarily be persuasive, because the Coast Guard is not the agency responsible for making those determinations.

In the past few months, the Hearing Office has been presented with two problematic cases. One involved a vessel laying pipe in a harbor. The case file only vaguely described the activity the vessel was engaged in and contained no authority that laying pipe was coastwise trade. In another case, a vessel carried passengers on a harbor cruise that started and ended at the same point. Again, the case file did not include any authority to support the allegation that such an activity is coastwise trade.

In some cases, the issue of proving that the vessel was engaged in coastwise trade can be avoided by using a different approach. For instance, in the passenger vessel case above, it is likely that a Coast Guard Certificate of Inspection (COI) would be required for carrying passengers for hire. If the vessel did not have a valid COI, then a civil penalty case could be based on the invalid or missing COI, rather than on a coastwise trade violation.

A civil penalty case involving proof that a vessel engaged in coastwise trade can require more research and preparation than the typical civil penalty case. If in doubt, contact your servicing legal office for assistance.

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ANTIFOULING SYSTEMS

According to the CG-CVC Policy Letter #12-08 dated 15 October 2012, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS Convention) was adopted by the International Maritime Organization “to prohibit the use of harmful organotins in anti-fouling paints used on ships and to establish a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems.



“Starting on November 21, 2012, U.S flagged vessels, wherever located, and foreign flagged vessels in the internal waters of the United States, in any port, shipyard, offshore terminal, or other place in the United

States, must comply with the applicable portions of the AFS Convention” as outlined in the Policy Letter document.

The Policy Letter goes on to say, “[f]or applicable U.S. vessels, the Coast Guard or Recognized Classification Society (RCS), will verify compliance with the provisions of the AFS Convention and issue [International Anti-fouling Systems] IAFS Certificates and...[Record of Anti-fouling Systems]...ROAFS during routine scheduled inspections...

The Policy Letter is guidance and is not intended as a substitute for applicable legal requirements. The Letter suggests that in egregious cases of non-compliance with the AFS Convention, the Captain of the Port may wish to pursue a civil penalty against the offending vessel.

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WHAT’S IN A NUMBER?

A number is nothing in and of itself. A number is a creation used in counting and measuring. Numbers can convey “magnitude “ or “degree.” Numbers are relative and can be expressed as a ratio or percentage. Sometimes numbers are used simply as convenience for certain functions such as telephone numbers, lock combinations, etc. Today we hear much about business measures or business metrics. Often these “metrics” are used to measure the success or failure of a desired outcome.

Here are some Coast Guard Hearing Office metrics (as of SEP 30, 2012) that provide a “how goes it” glimpse into our work:

Number of case files received by the Hearing Office with violation dates in 2008: 947

Number of case files received by the Hearing Office with violation dates in 2009: 1444

Number of case files received by the Hearing Office with violation dates in 2010: 1498

Number of case files received by the Hearing Office with violation dates in 2011: 1619

Number of case files received by the Hearing Office with violation dates in 2012: 623

Number of case files received by the Hearing Office in 2012 regardless of violation date: 905

Number of preliminary assessments issued in 2012: 902

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2012: 732

Number of violation case files returned to the program manager for deficiencies in 2012: 115

Number of hearings held in 2012: 10

JUST FOR FUN by Ms. Alicia Scott

TERMS IN THE COAST GUARD

I J I R I S A D E W B O J N R I U B S G J S K
 H C J L U Z Y Z D I F B Z R E A V X O L N P L
 M J T S G H E C I W K V V Z K A D N P I L Z J
 Z E W X A L A O S V W E N N C B E U S F C M L
 H A B L E Y Y M P B C M F P A U C O R E G X Q
 B Y H A B C E P O S I E L V R P K G A J A L U
 S O H D D P M A T R E O N D T I T P K A T S A
 N I B D L X B R F J P P F M E R K V U C Y R R
 I Q T E I Q Z T L P C M A Y C R V P Y K T O T
 Y J G R G B T M S J D Z W E N V Y L V E U L E
 U Q O V F Y U E K R Q W D K A H D R V T L O R
 B M A A M C W N C H I V K H M J B Q X S N C D
 U A D D R K F T A I Y A E D R U J E H K U R E
 Q R J Z U O V D R B Y A L P O U S F L F G W C
 Y E Z M K W R U U I D O L F F Y A R S O K O K
 M Z G K A S Y W Z J M X R L R R X F M Z W E G
 A S C U T T L E B U T T N Y E X B W D C R P D
 M Y T Z V Q S T B G J B G E P N I E I K P V W
 Z Z B U L K H E A D W B X Q X R B X L Q E N U
 K O D M S A Q V A V A S T M O E X E T A G C X
 K G G J V T Z X U H K V C S Q X M T S H Y J E
 B X J P Y T B X S P M D L O V E R H E A D P G
 N O I T C E P S N I F O E T A C I F I T R E C

Note: THE WORDS CAN BE IN ANY DIRECTION.

AVAST	COMPARTMENT	PERFORMANCE TRACKER
AYEAYE	DECK	QUARTERDECK
BELAY	FLAIRS	RACK
BELOW	HEAD	SCUTTLEBUTT
BUI	LADDER	SIR
BULKHEAD	LIFE JACKETS	SWAB
CERTIFICATE OF INSPECTION	MAAM	TOPSIDE
COLORS	OVERHEAD	

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