



REASONABLE CAUSE IN THE BUI ARENA

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Often we see angst over whether a boarding officer had reasonable cause to direct a chemical test in a potential boating under the influence (BUI) violation. So we thought we would generally reiterate the laws, regulations, and definitions.

Where's the law? See 46 USC 2302(c) Where's the regulations? See 33 CFR part 95.

What's required for a BUI? A person *operating* a vessel while impaired or intoxicated by a drug or alcohol.

What's *operating*? Having an essential role in the operation or control of a recreational vessel *underway*, or in the matter of a commercial vessel be a crewmember, pilot, or watchstander.

What is *underway*? Not at anchor, not made fast to the shore, and not aground.

What is the limit for intoxication by alcohol? For recreational vessel operators the limit is .08 unless on waters within a State's geographical boundaries if that State has established a blood alcohol level for purposes of finding "under the influence." In that case, the State level applies. For instance, Michigan has a limit of .10 and so recreational vessel operators are not considered to be under the influence at .09 as they might in most other States. For commercial vessel personnel, the limit is .04.

How can a BUI be determined? In the case of a recreational vessel operator, evidence that is sufficient to show that the person was in fact operating the vessel. In other words, documentation of the actual observation of the person operating the vessel to include some description of the person and his / her clothing, position held on the

vessel (ie, master, passenger, crew, etc) and location of the person when observed “operating.”

Additionally, acceptable evidence of intoxication is necessary. Acceptable evidence includes documented personal observations and / or a chemical test. Observations of the person's manner, disposition, speech, movement, appearance, and behavior might be sufficient to conclude a person was under the influence. A chemical test (ie, breathalyzer) to determine alcohol content (discussed above) may be sufficient to conclude a person was under the influence. Often both observations and a chemical test are documented in a case file. Where no chemical test is directed, detailed documentation of the observations that led to a conclusion that the person was intoxicated is critical to support a violation.

The administration of a chemical test first requires reasonable cause to believe that the operator is in violation of the stated limit (discussed above). Reasonable cause might be established by an articulation of those reasons that would motivate a person of ordinary intelligence under the circumstances to believe that the operator is suspected to be in violation of the standards. The Field Sobriety Tests (FSTs) are typically conducted as a reliable means to establish reasonable cause. Documentation, whether FSTs or statements, should “articulate” the basis for finding reasonable cause. The ultimate question is whether the tests, observations, etc provide a basis to suspect that the person is in violation of the standards articulated in 33 CFR 95.020 or 95.025. Only after finding reasonable cause can a chemical test be directed.

How is the chemical test administered? The operator is first informed that he or she is suspected of being in violation of the legal limit for boating under the influence and that he or she is being directed to undergo a chemical test. Documentation (ie, boarding officer statement) that reflects that the operator has been so advised and directed is always helpful. A chemical test is administered and the results are documented.

What is a refusal of a chemical test? A refusal by the party is an express or demonstrated determination not to submit to or cooperate in the administration of a chemical test. Such refusal is generally

documented on the FSTs form. If not, it should be documented in a statement.

What does a refusal do? A refusal creates a presumption that the operator is under the influence of alcohol or a dangerous drug. The burden shifts to the person to overcome this presumption with evidence.

A word about reasonable suspicion, reasonable cause and probable cause. From time to time we see boarding teams and parties alike get wrapped around the axle with these terms. Legal experts and pundits alike have tried to define these terms in varying degrees over the years. There are several “dictionaries” that define reasonable cause as probable cause and add that reasonable cause is more than reasonable suspicion which is more than mere suspicion. While a lively dissertation might be written here, it is not necessary to the topic. The only term used in the federal regulations, 33 CFR 95, is reasonable cause. It is this that must be established to administer a chemical test.