



[REDACTED]  
[REDACTED]  
[REDACTED]

16780  
March 06, 2009

RE: Case No. 2491150  
[REDACTED]  
[REDACTED]  
\$750.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2491150, which includes your appeal as operator of the unnamed recreational vessel [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$750.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2302(c)	Operating a vessel under the influence of alcohol or a dangerous drug.	\$750.00

The violation is alleged to have been observed on July 23, 2005, during a Coast Guard boarding of the unnamed recreational vessel [REDACTED] while it was underway on Rehoboth Bay, near Dewey Beach, Delaware.

On appeal, you expressly deny that you were operating the vessel while under the influence of alcohol on July 23, 2005. In so doing, you reiterate your belief that "the fact that...[you]...were found not guilty by trial...in a Delaware court and then found not guilty by a DNREC hearing ...should weigh heavily on...[my]...decision whether to proceed with the charge." With regard to the operating under the influence violation, you argue, citing 33 CFR 95.035, that "the Coast Guard had no reasonable cause for directing a chemical test" in your case and, in so doing, assert that you were asked to submit to a chemical test "before any tests were administered on the boat and then again after the ashore field sobriety tests." In addition, with regard to the chemical test, itself, you note that you were "specifically" asked to "take a portable breath test," and argue that "[i]t is well documented that...[portable breath tests]...are inaccurate at times and the only reliable breath test method is a certified intoxilizer which is very different from" the test you were offered. At the same time, you note that "many states, including Delaware, actually prohibit the use of portable breath testing results as evidence at trial in a DUI case." You further assert that you were "never asked by the Coast Guard to take an intoxilizer, which, when refused

creates an admissible presumption of intoxication,” a fact which you contend was “discussed” during your trial. Addressing the Hearing Officer’s conclusion that you operated a vessel under the influence of alcohol under the standard set forth at 33 CFR 95.020(c), you contend that there is no evidence in the record that would “lead a reasonable person to conclude that...[you]...were intoxicated” on the evening of the boarding. In that vein, you note that your “speech was clear” and your “balance was perfect” and, in so stating, note that the record supports a conclusion that you “flawlessly gathered and presented all the items requested from around the boat [during the boarding] including PFDs for all passengers, a fire extinguisher, a whistle, a throw[able] flotation device...[your]...boating registration, drivers [sic] license, and boating license.” At the same time, you note that none of the statements contained in the record “state in any way that...[you]...had a difficult time maintaining...[your]...balance on the rocking boat or that...[your]...speech was impaired” and note that the only affirmative evidence of intoxicated noted in the record, that your eyes were watery and blood shot and that you had a “facial droop,” is explained by the time of the boarding, your level of fatigue, and that you were engaged in boating activities prior to the boarding. You further contend that the boarding officer’s assertion that you exhibited an odor of alcohol was noted while you were onboard your vessel, too far from the boarding officers to be smelled, and imply that because none of the boarding officers documented that they observed an odor of alcohol coming from you while you were on land in close proximity to them, a “reasonable person” should not believe that there was any odor of alcohol on the relevant evening. Finally, with regard to the Hearing Officer’s conclusion that you performed poorly on the Field Sobriety Tests administered, you contend that you are “perplexed as to why...[the Hearing Officer]...chose to ignore and not address the evidence proving that the Coast Guard did not follow proper procedure for the ashore tests.” In that regard, you note that you have provided evidence to show that the boarding officers did not wait the required 15 minutes before administering the ashore battery of sobriety tests” and add that afloat tests “were also administered incorrectly and...[were] close to impossible to pass.” At the same time, you contend that it is “well documented” the field sobriety tests administered “under optimal conditions have a relatively low accuracy rate.” You conclude by noting that because the tests at issue in your case were not administered properly, they are “certainly not a valid evidence of intoxication.” Your appeal is denied for the reasons discussed below.

I will begin by addressing the factual circumstances surrounding the violation. The record shows that Coast Guard personnel first observed your vessel at approximately 1:04 a.m. on July 23, 2005, while they were patrolling Rehoboth Bay. The boarding officers immediately pulled over to your vessel and began conducting an administrative inspection in an attempt to determine whether any safety violations were present. Although your vessel was found to be in compliance with all applicable safety laws and regulations, throughout the course of the administrative portion of the boarding, the boarding officers determined that you appeared to be intoxicated and “had a smell of alcohol” about you. Moreover, one of the boarding officers observed “several empty Miller Light beer cans in a bucket located in front of the helm consol and one opened beer can located in the left rear corner of the vessel.” As a result of these observations, the boarding officers began administering Afloat Field Sobriety Tests (hereinafter “FSTs”) to you. Because you allegedly failed all of the afloat tests, the boarding officers assumed control of your vessel and took you and your passengers to the nearest marina so they could conduct ashore sobriety tests. At the same time, the boarding officers contacted the Delaware Department of Natural Resources and Environmental Control (hereinafter “DNREC”) and requested that they meet

them at the Pier Point Marina, where the ashore FSTs were to be conducted. At approximately 1:57 a.m., the boarding officers began administering ashore FSTs to you. After you performed poorly on the two ashore tests administered, the boarding officer asked you if you would submit to a Preliminary Breath Test (hereinafter "PBT"). When you declined the test, the boarding officer informed you of the presumption of operating under the influence created by your refusal. Irrespective of that fact, you "declined multiple opportunities" to submit to PBT testing after the FSTs were concluded. At approximately 3:05 a.m., an officer from the DNREC arrived at the scene and even though the officer explained the applicable state law and Delaware's implied consent law in the area of intoxicated operation, you refused the DNREC officer's subsequent offer to submit to chemical testing. Thereafter, the DNREC officer instructed you to review a paper outlining Delaware's Informed Consent Law. The record shows that you reviewed the relevant paper and signed it, indicating that you understood the law. At approximately 3:17 a.m., you were charged with operating a vessel under the influence by the State of Delaware and informed that the Coast Guard would be terminating your voyage.

The Coast Guard's civil penalty program is a critical element in the enforcement of numerous marine safety and environmental protection laws. The civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties by Coast Guard Hearing Officers when violations are found proved. The Coast Guard's civil penalty procedural rules, at 33 CFR 1.07, are designed to ensure that parties are afforded adequate due process during informal adjudicative proceedings. These procedures have been sanctioned by Congress and upheld in Federal courts. *See* H. Rep. No. 95-1384, 95th Cong., 2d Sess. 27 (1978); S. Rep. No. 96-979, 96th Cong., 2d Sess. 25 (1980); H. Rep. No. 98-338, 98th Cong., 1st Sess. 133 (1983); *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979).

A thorough review of the record reveals that while your case was pending before the Hearing Officer, you questioned the propriety of the boarding of your vessel, itself (implying that the boarding officers who boarded your vessel were actually operating a sobriety check point in the area of several popular local bars on the relevant evening). While you do not reassert this issue on appeal, I believe that it is beneficial to note that the courts have long held that the Coast Guard may exercise plenary authority under 14 USC 89(a) to stop and board vessels on the navigable waters of the United States to conduct safety and documentation inspections even in the complete absence of suspicion of criminal activity. *See e.g. United States v. Kubiak*, 704 F.2d 1545, 1547-48 (11<sup>th</sup> Cir. 1983); *United States v. Clark*, 664 F.2d 1174, 1175 (11<sup>th</sup> Cir. 1981); *United States v. Williams*, 617 F.2d 1063, 1086 (5<sup>th</sup> Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2928 (1980). Furthermore, 14 USC 89(a) makes clear that "[f]or such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance." As such, there can be no question as to the Coast Guard's authority to stop and board your vessel on the evening of July 23, 2005.

I will next address your concerns regarding a finding of "not guilty" in the related state court action. As I noted above, you contend that since you were found "not guilty" of boating under

the influence by the State of Delaware and because the DNREC elected not to suspend your boating rights after the incident and both actions found that there was “no explicit evidence” that you were under the influence at the time of the violation, I should dismiss the charge at issue here. I do not agree. The Coast Guard’s actions in this case are in no way barred by any of the proceedings in the related state actions. That is because the waters of Rehoboth Bay are subject to concurrent Federal and state jurisdiction. As such, the Coast Guard has jurisdiction to assess a civil penalty against you without regard to any action by the State of Delaware or its related agencies. Neither the applicable statute nor any known theory regarding the enforcement authority of the Federal and state governments precludes the Coast Guard from assessing a civil penalty in this case. Indeed, the Federal government is not precluded from imposing both criminal and civil sanctions for the same conduct. *See, One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489 (1972).

A careful review of the Hearing Officer’s decision shows that he found the violation proved based both on recorded observations of your manner, disposition, speech, muscular movement, general appearance or behavior and the presumption of under the influence created by your refusal to submit to chemical testing on the evening of the incident. After careful consideration of your appeal arguments, I believe that it would be beneficial to begin by addressing the Coast Guard’s operating under the influence regulations in general terms.

46 USC 2302(c) makes clear, in relevant part, that “[a]n individual who is under the influence of alcohol, or a dangerous drug in violation of a law of the United States when operating a vessel, as determined by standards prescribed by the Secretary by a regulation...is liable to the United States Government for a civil penalty.” In that regard, 33 CFR 95.030 states that “[a]cceptable evidence of when a vessel operator is under the influence of alcohol or a dangerous drug includes, but is not limited to: (a) Personal observation of an individual’s manner, disposition, speech, muscular movement, general appearance, or behavior; **or** (b) A chemical test.” (emphasis added) 33 CFR 95.020(c) further provides that an individual is considered to be under the influence of alcohol or dangerous drugs when “[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person’s manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.”

According to the Coast Guard’s version of the events surrounding the boarding, when the boarding officers first observed your vessel, several empty Miller Light beer cans were present in a bucket located in front of the helm consol and one open beer can was seen in the vessel’s left rear corner. As the boarding officers began conducting a safety check of your vessel, they noticed that your face was flushed in color with a slight facial droop. Moreover, as the boarding officers continued talking to you, they noticed a strong odor of alcohol coming from your person. As a consequence, the boarding officers asked you to submit to field sobriety testing. To that end, the Field Sobriety Test Performance Report, contained in the record, shows that you performed poorly on all afloat tests administered: on the “Alphabet Test,” you sang; on the “Backwards Count” test, you missed numbers and hesitated at the number 13; on the “Finger Count” test, you failed to speed up and improperly touched and counted your fingers; on the “Palm Pat” test, you failed to speed up and slid your fingers; on the “Finger to Nose” test, you missed your nose and used an incorrect finger and, on the “Horizontal Gaze Nystagmus” test, you lacked smooth pursuit and showed distinct nystagmus at max deviation, onset prior to 45

degrees in both eyes. As a result of your performance on the afloat battery of tests, the boarding officers determined that it would be necessary to administer ashore sobriety tests and, to facilitate such testing, they assumed control of your vessel and took you and your passengers to the nearest marina so that you could be removed from the vessel for further testing. A review of the record and the FST report shows that after you were removed from your vessel, you were allowed to sit and rest to “regain your equilibrium” before commencing ashore testing. Irrespective of that fact, the record shows that you performed poorly on both ashore FSTs administered: on the “Walk & Turn” test, you improperly turned and on the “One Leg Stand” test, you swayed and put your foot down. According to the statements of the boarding officers, you were asked to submit to chemical testing after you finished the afloat battery of tests, after the vessel moored at the marina, and after you completed the Ashore tests. Even though you were, at all times, informed that a refusal to submit to chemical testing would result in the creation of a presumption of operating under the influence in any subsequent proceeding, you refused to submit to any chemical testing. As a consequence, you were found to be operating your vessel under the influence of alcohol, your voyage was terminated and you were taken into the custody of the DNREC for further prosecutorial action.

As I have already mentioned, on appeal, you contend that “[t]here is nothing that would lead a reasonable person to conclude that...[you]...were intoxicated” in the record and point out that the Hearing Officer ignored evidence which supports a conclusion that you were not under the influence of alcohol at the time of the boarding. In that regard, you contend that your “speech was clear,” your “balance was perfect,” and you were able to “flawlessly...present all the items” requested during the administrative portion of the boarding. You further contend that the evidence that the boarding officers presented to support an assertion that you were under the influence of alcohol during the boarding—you were “flushed” and had “facial droop”—is easily explained by the fact that you were tired and had been operating a vessel prior to the boarding. At the same time, you contend that I should accord the contention that an odor of alcohol was present on your breath light evidentiary weight on consideration of the fact that the boarding officers contend to have observed the odor when they were far away and down wind from you and note that a review of the statements of the boarding officers shows that none of the officers documented noticing an odor of alcohol when you were off the vessel and in close proximity to them. Finally, you contend that the Hearing Officer erred in concluding that you performed poorly on the field sobriety tests because none of the tests were administered properly. To support your assertion in that regard, you note both that you “assume that the tests given to...[you]...on the boat were never designed to be administered on the water in the first place” and that the ashore tests were not administered in accordance with Coast Guard procedure because you were not allowed to wait a full 15 minutes prior to their administration. Finally, you assert that “neither the Federal Government...nor medical science considers touching your finger to your nose, saying the alphabet, or counting backwards as valid sobriety tests” and that “it is well documented that the other field sobriety tests under optimal conditions have a relatively low accuracy rate.” As such, you conclude that because your FSTs were “improperly administered,” they are “not a valid evidence of intoxication.” After a thorough review of the record, I do not find your assertions in this regard persuasive.

I will begin by addressing your assertion that the afloat FSTs used in this case are insufficiently reliable to provide credible evidence to support the Hearing Officer’s conclusion that you

operated a vessel under the influence of alcohol under the standard 33 CFR 95.020(c). First and foremost, I note that all of the regulations in 33 CFR Part 95, including those establishing the standard of operating under the influence at issue here, were implemented via a proper Notice and Comment Rulemaking. The Coast Guard enacted the regulations—substantially unchanged for nearly 20 years—to combat the problems associated with drug and alcohol use by individuals operating recreational vessels. *See* Operation of Vessel While Intoxicated; Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 18,900, 18,900-901 (May 23, 1986). The afloat FSTs administered in this case are the same FSTs administered in all Coast Guard operating under the influence cases; regardless of the view of any court, such tests are accepted in Coast Guard civil penalty proceedings as providing evidence that can support a charge of operating under the influence. Irrespective of that fact, however, I note that one of the FSTs administered, the horizontal gaze nystagmus test, is generally accepted as providing scientific evidence that can be indicative of intoxication. That is because there is a causal connection between the ingestion of alcohol and the detectable presence of exaggerated horizontal gaze nystagmus in a person's eyes. *See e.g., U.S. v. Horn*, 185 F. Supp. 2d 530 (D.Md. 2002); *U.S. v. Daras*, 1998 WL 726748 (4<sup>th</sup> Cir. 1998) (unreported); *Hulse v. State*, 961 P.2d 75 (Mont. 1998); *State v. Superior Ct.*, 718 P.2d 1358 (Ariz.App.1989); *Whitson v. State*, 863 S.W.2d 794 (Ark. 1993); *State v. Duffy*, 778 A.2d 415 (N.H. 2001); *State v. O'Key*, 899 P.2d 663 (Or. 1995); *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997); *Smith v. State*, 11 P.3d 931 (Wyo. 2000). Accordingly, I am not persuaded by your assertions regarding the afloat FSTs.

I will next address your assertions regarding the Hearing Officer's finding that the record contained substantial evidence to support a conclusion that there was a "strong" odor of alcohol on your breath at the time of the boarding. On this issue, you and the Coast Guard present decidedly different versions of the incidents surrounding the boarding. Although you contend, based on the particular circumstances of the boarding at issue here, that it would have been impossible for the boarding officers to detect the presence of alcohol on your breath, the record contains statements from two boarding officers that indicate that an odor of alcohol was observable on your breath during the initial stages of the boarding. In Coast Guard civil penalty proceedings, it is the Hearing Officer's responsibility to decide the reliability and credibility of evidence and to resolve any conflicts presented in the evidence. As such, given the evidence contained in the record, even though you argue that it would have been impossible for the boarding officers to detect the odor of alcohol on your breath during the initial stages of the boarding, I do not find that the Hearing Officer erred in accepting that boarding officers' assertions to the contrary.

Finally, I will address your assertions regarding the ashore battery of FSTs. You contend that the boarding officer did not allow you to wait for 15 minutes after exiting the vessel to begin administering the ashore battery of FSTs and have provided cellular phone records that you claim show that the 15 minute period did not elapse prior to the administration of the tests. At the same time, I note that the Coast Guard Field Sobriety Test Performance Report, contained in the record shows that the vessel came ashore at 1:35 a.m. and that testing began at 1:57 a.m. After a careful review of the record, I do not find your assertions to this end persuasive. The cellular phone records that you provided are not persuasive on this issue; at best, they show only that your cellular phone was in use at 1:30 a.m. and then again at 2:00 a.m., thirty minutes later. Accordingly, I do not find that the Hearing Officer erred in relying on your ashore FST results in

reaching his decision in this case. Accordingly, given the evidence contained in the record, including recorded observation of your manner, disposition, speech, muscular movement and behavior and your FST results and the totality of the circumstances of the boarding, I do not find that the Hearing Officer erred in finding that the record contained substantial evidence to support a conclusion that you operated a vessel under the influence of alcohol under the standard set forth at 33 CFR 95.020(c).

Irrespective of my findings with regard to the standard of operating under the influence set forth at 33 CFR 95.020(c), I note that the Hearing Officer's Final Letter of Decision reveals that he also found substantial evidence in the record to support a conclusion that you operated a vessel while under the influence of alcohol based on the operation of the presumption of operating under the influence created by your refusal to submit to chemical testing on the evening of the incident. Indeed, in his Final Letter of Decision, the Hearing Officer found as follows on that issue:

A reading of 33 CFR 95.040(a) indicates that refusal to submit to testing creates a presumption of intoxication. You contend that you refused the test based on your understanding and the advice of others about the testing device. It is too bad that you were not advised about the presumption created by refusing to take the test. The presumption, in effect, shifts the burden to you to prove that you were not under the influence. This is a very heavy burden to meet and I do not find sufficient evidence in the material presented to conclude that you have overcome the presumption. Furthermore, it appears that the Boarding Officer advised you of the consequences of refusing to submit to the test and you still refused knowing about the presumption.

On appeal, you contend that the Hearing Officer erred in so concluding because you were offered a chemical test that is notoriously inaccurate (a portable breath test) and because there was not reasonable cause to allow the boarding officers to request that you submit to chemical testing. After a thorough review of the record, I do not find your assertions in this regard persuasive.

As I have already noted, in "operating under the influence" cases like this one, "[a]cceptable evidence of when a vessel operator is under the influence of alcohol...includes, but is not limited to: (a) Personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior; or (b) A chemical test." Moreover, 33 CFR 95.040(a) makes clear that:

If an individual refuses to submit to or cooperate in the administration of a timely chemical test when directed by a law enforcement officer based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and the individual will be presumed to be under the influence of alcohol or a dangerous drug.

Reasonable cause exists when "[t]he individual is suspected of being in violation of the standards in §§ 95.020 or 95.025." *See* 33 CFR 95.035(a)(2). The standard applicable to the instant case is found at 33 CFR 95.020(c): "[t]he individual is operating any vessel and the effect of the

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intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." As I stated above, the Coast Guard Report of the incident shows that you had a "strong" odor of alcohol on your breath, that your face was "flushed" and that you performed poorly on all FSTs administered. Regardless of your arguments to the contrary, I find, based on this evidence, that the boarding officers did, in fact, have reasonable cause to suspect that you were intoxicated during the boarding and to request that you submit to the administration of a chemical test.

On appeal, you further contend that the term "chemical test" "means different things to different people" and imply that because you were offered what you believe was an unreliable test, the presumption of operating under the influence should not be effective in your case. First and foremost, I note that you have not provided any evidence, other than your own self-serving statements, to support your assertion that the chemical test offered to you was not reliable. Irrespective of that fact, I note that the chemical test at issue meets the definition of the term applicable to the instant proceeding. Indeed, the applicable regulations define the term "chemical test" as "a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use." *See* 33 CFR 95.010. Since the test that you were offered would have tested your breath, it was an appropriate "chemical test" under the Coast Guard's definition and your assertion to the contrary is not persuasive.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violation occurred and that you are the responsible party. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed. For the reasons discussed above, I find the \$750.00 penalty assessed by the Hearing Officer, rather than the \$5,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$750.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties  
P.O. Box 70945  
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 1.00% accrues from the date of this letter if payment is not received within 30 days. Payments

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received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

DAVID J. KANTOR  
Deputy Chief,  
Office of Maritime and International Law  
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office  
Commanding Officer, Coast Guard Finance Center