Volume 14

Newsletter Date
January 2012

Coast Guard Hearing Office

"Hearing Office is our Name,
Maritime Safety and Security is our Aim"

Adjudicate civil penalty cases in support of the Commandant's maritime safety and security strategy to compel compliance with federal laws and regulations, and deter violations in the maritime domain. By balancing national interests, fairness, and the fundamental right to due process, we promote protection of the environment, and the safety and security of vessels, facilities, ports, and waterways.

GREETINGS

From Robert Bruce
Chief, Coast Guard Hearing Office

Best Wishes for 2012. In this January Newsletter we have a couple of articles that are mainly directed to the boaters who receive notice of a civil penalty case, or their representatives. One article discusses the options for responding to a notice of a civil penalty case. One important take-away from this article is the fact that Hearing Officers do not have authority to negotiate plea bargains or settlements in civil penalty cases. Hearing Officers must decide cases based on the evidence before them and, upon proof of a violation, they must assess an appropriate civil penalty. That does not mean that Hearing Officers do not have a great deal of discretion in deciding cases. It just means that their decisions must be based on the merits of the case, as revealed by the evidence presented, rather than by agreement in advance of their decision.

Another article discusses the factors that go into determining if a person charged with boating under the influence was the operator of a vessel. The take-away from that article is that when operation of the vessel is an issue, you can prepare a better case if you have become familiar with the regulations that explain the violation and what must be proved to establish that the violation occurred. Of course, that is a point that does not just apply to alleged boating under the influence cases.

If you read this Newsletter, I hope that it and the other Newsletters posted with it at the Hearing Office web site will help you to understand our informal process better. You can find our web site at: http://www.uscg.mil/Legal/CGHO/default.asp.

HEARING OFFICE NEWS

The Coast Guard Hearing Office begins the new year with plenty of cases in progress. We ended 2011 with more than 700 cases on-hand, in various stages of adjudication. In each quarter of 2011 the Hearing Office received more new cases than in the corresponding quarter of 2010. As you can see on page 10, the Hearing Office opened 1769 new civil penalty cases in 2011. That compares with 1420 new civil penalty cases opened in 2010. The Hearing Officers are working hard to ensure that every case receives fair consideration and a timely resolution.

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Articles in this Issue:

RESPONDING TO CHARGES – (*HEARINGS vs. WRITTEN RESPONSES*)

CDR Mark Hammond

When a violation case is received at the Hearing Office for action, the Hearing Officer assigned to the case makes a preliminary examination of the case file. If, after a preliminary examination of the case file, the Hearing Officer finds that the violation, as alleged, appears to have occurred, the Hearing Officer sends a Preliminary Assessment Letter (PAL) to the party. The PAL provides the charged party with notice of the violation(s) alleged to have occurred, the preliminarily assessed civil penalty for each charge, and a copy of the entire case file assembled by the charging unit. The PAL also explains the party's options in responding to the charges.

According to Title 33 Code of Federal Regulations (CFR), section 1.07-25: "Within 30 days after receipt of a notice of the initiation of the action as described above, the party, or counsel for the party, may request a hearing, provide any written evidence and arguments in lieu of a hearing, or pay the amount specified in the notice as being appropriate."

This regulation gives the charged party three mutually exclusive choices of how to respond to the notice of an alleged violation (although a charged party who requests a hearing is not precluded from submitting written evidence and arguments). The middle option is to submit written evidence and arguments *in lieu of a hearing*. Some charged parties will submit written evidence and arguments, but also ask for a hearing if the Hearing Officer is not going to dismiss the case or meet some other demand regarding the outcome of the case. That kind of response does not conform to any of the three options allowed by 33 CFR § 1.07-25, and it will result in a hearing being scheduled unless the charged party unconditionally waives his/her right to a hearing.

Hearing Officers are not authorized to engage in "plea bargaining" or negotiation of civil penalty cases. Hearing Officers must give the charged party an opportunity to comment by submitting evidence and arguments, and then the Hearing Officer must adjudicate the case based on the evidence submitted by the Coast Guard and the charged party. As a result, Hearing Officers are not in a position to accept an offer from the charged party to waive his/her right to a hearing in return for a guaranteed outcome of the case, such as a dismissal or a warning. If the charged party does not unconditionally waive his/her right to a hearing, a hearing must be promptly scheduled once all preliminary matters have been completed.

If the charged party wants to rely on written evidence and arguments *in lieu of a hearing*, then the right to a hearing must be waived without any preconditions as to how the Hearing Officer will decide the case.

A party may demand a hearing prior to any final assessment of a penalty. It is important to note, however, that hearings are not conducted for the purpose of merely "discussing" matters, venting spleen, or resolving personal issues that a party has with the way the Coast Guard conducts its business. Hearings are intended to provide a meaningful op-

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portunity for the party to present evidence in defense, extenuation, and mitigation relative to the specific charges in the case. Unfortunately, however, and more often than not, the party will present nothing more at the hearing than the same evidence and argument that was initially submitted in writing. Nothing is really gained by having a hearing in those circumstances because the information presented has already been considered by the Hearing Officer.

The Hearing Officer treats written evidence and argument submitted in lieu of a hearing in the same way as though it were presented in-person at a hearing. There is no "extra credit" given for attending a hearing. After considering the weight of all the evidence presented by the party (*whether it was submitted in writing or presented during a hearing*), along with the other evidence in the case file, the Hearing Officer makes a final determination as to whether the alleged violation(s) did or did not occur and, if there is a violation, assesses a civil penalty as appropriate under the circumstances.

Parties are reminded that in order for a hearing to be scheduled, they must provide the issues in dispute that they desire to raise at the hearing. This is required by Title 33 Code of Federal Regulations (CFR), section 1.07-25. Issues in dispute are statements identifying the facts and circumstances surrounding the alleged violations for which they have a dispute, explanation, or mitigating evidence. If a party does not specify the issues to be addressed at the hearing, in writing, the applicable regulations will generally preclude consideration of those issues. In effect, this may result in the party forfeiting his/her right to have a hearing at which his/her issues can be considered.

Upon receipt of a PAL from the Hearing Office, the charged party should carefully read the PAL, the entire case file, and the enclosed informational trifold entitled "Your Alternatives in the Coast Guard Civil Penalty Process." Understanding the process and the different options available will help parties make informed decisions on how best to respond in a timely and meaningful fashion.

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CIVIL PENALTY CHARGE SHEETS

Mr. Robert Bruce

The "Details of the Violation" section should contain allegations addressing each element of the charged violation(s) and an explanation of how the charged party allegedly committed the charged violation(s). In addressing each element, the person preparing the Charge Sheet should reference the evidence in the case file that establishes that the element has been met. The Civil Penalty Case Guide, available on the Hearing Office web page, further explains what should be included in the Details of Violation section.

The *allegations* in the Details of the Violation section of the Charge sheet are assertions; they are *not evidence*. Every allegation should be supported by evidence elsewhere in the civil penalty case file. Statements or other material being offered as evidence do not belong in the Charge Sheet. Instead, such evidence should be made an exhibit in the case file. The Details of the Violation should provide a "roadmap" for the Hearing Officer to locate the specific exhibits related to each element. In a simple case, the signed "Narrative Overview" and the Boarding Report may contain all of the evidence needed to prove the case.

Hearing Officers do not treat statements included in the Details of the Violation as evidence. If a statement in the Details of Violation contains necessary information that is not supported by evidence elsewhere in the case file, the Hearing Officer will not give any weight to the statement. And without that necessary information, the charge will not be found proved.

The Details of the Violation section of the Charge Sheet is an important tool for both the person preparing a civil penalty case and the Hearing Officer. It provides a checklist of elements that must be met to prove the alleged violation. It is important to recognize, however, that allegations are not evidence and they have no evidentiary value. The Details of the Violation should only contain allegations and references to the evidence in the case file supporting those allegations. Evidence to be weighed by the Hearing Officer, and referred to in the charge sheet, must be included elsewhere in the case file.

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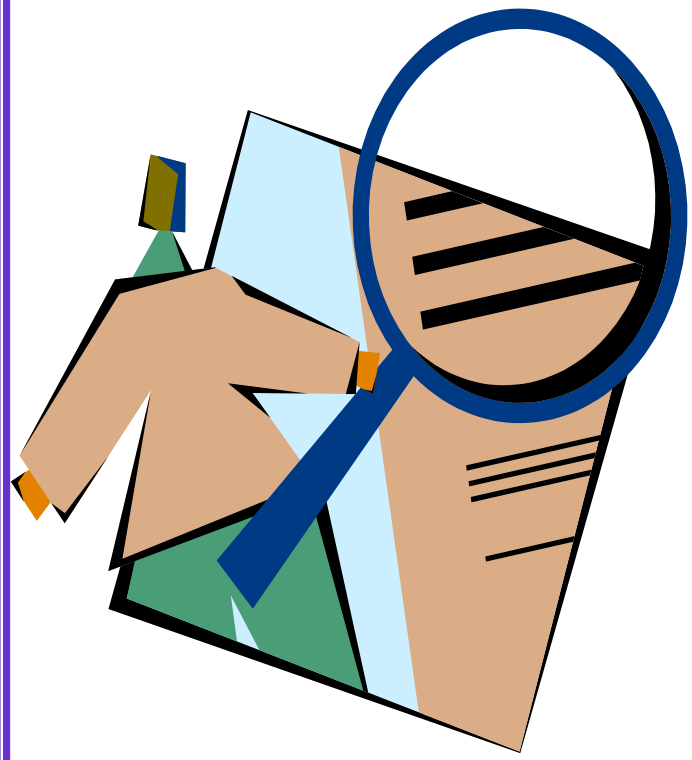

I DRANK, BUT I DIDN'T DRIVE

CDR Evan Hudspeth

Particularly during the holiday season, many have heard the warnings about not drinking alcohol and driving a *vehicle*. Hopefully it makes sense that this warning is also applicable to drinking alcohol and operating a *vessel*. In order to establish that a boating under the influence (BUI) violation has occurred, evidence should indicate that not only was the subject under the influence, but also that the subject was operating a vessel. Sometimes a *recreational* boater will respond to the BUI allegation admitting the first element (being under the influence), but disputing the second (operating a vessel). These arguments often fail to focus on the significant issues because the boater does not have a good understanding of Title 33, Code of Federal Regulations, Part 95 (33 CFR § 95.001 and following), which sets forth the regulatory framework by which a person is determined to be operating a vessel under the influence.

First, a few definitions are necessary in order to fully understand the terms the Hearing Officer will consider when deciding if a violation has occurred. According to 33 CFR § 95.010, a "*Vessel* includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." So it is quite likely that, besides a motorboat, a sailboat, a rowboat, or a raft could also be considered a vessel. Additionally, "*Underway* means that a vessel is not at anchor, or made fast to the shore, or aground." So even if a vessel is drifting, it is still considered underway.

If the boater was on a vessel, and the vessel was underway, as those terms are defined by the regulations, the Hearing Officer will next determine whether or not the boater was operating the vessel. According to 33 CFR § 95.015, "… an individual is considered to be operating a vessel when… The individual has an essential role in the operation of a recreational vessel underway, including but not limited to navigation of the vessel or control of the vessel's propulsion system."

Although some examples are given, the term "an essential role" is not defined. Therefore evidence that describes the specific circumstances must be considered to determine operation of the vessel. Simply having a "designated driver" at the controls does not exclude another from also operating the vessel. If physical actions (handling the oars, sails, throttle, rudder, tiller, or helm) or verbal directions (where to go, or how to operate) are involved, then the charged boater can be considered to have had "an essential role" in the operation of the vessel. Other considerations (when provided) include the purported operator's (and/or charged boater's) age, experience level, and familiarity with the area.

So, before alleging a violation, or disputing a BUI charge, consider the applicable regulations discussed above, and ensure your evidence or arguments are focused on the matters that will really tend to prove or dispute the alleged violation.

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PREFERRED CITE FOR VIOLATIONS OF THE INTERNATIONAL "RULES OF THE ROAD."

Mr. Robert Bruce

Navigation rules, or "Rules of the Road," apply to all vessels of the United States or any vessels navigating on waters subject to U.S. jurisdiction. Depending on where the vessel is operating, either the inland or international navigation rules will apply. International rules apply seaward of the demarcation line for inland waters. The President of the United States was given authority by 33 U. S. Code Chapter 30 to proclaim the "International Regulations" in the Federal Register, and a civil penalty may be assessed against vessels violating the International Regulations. The International Regulations are commonly referred to as "COLREGs."

After the President proclaimed the COLREGs in the Federal Register, they were for a time reproduced in both the Code of Federal Regulations and in the U.S. Code. A note at the end of 33 USC § 1602 indicates, however, that the Coast Guard removed the text of the COLREGs from the Code of Federal Regulations in 1996, because the text was duplicated in the U.S. Code. The note states that subsequently the editors of the Code decided to no longer include the COLREGs text. As a result, the text of the COLREGs is now neither available in the U.S. Code nor the Code of Federal Regulations.

The fact that the COLREGs themselves do not appear in either the U. S. Code or the Code of Federal Regulations presents a problem in terms of deciding how best to cite an alleged violation of the COLREGs. We have seen cases where units have cited 33 USC § 1602 and the COLREGs rule that was allegedly violated. However, this cite is unacceptable because 33 USC § 1602 only authorizes the President to proclaim the COLREGs and publish them in the Federal Register. Section 1602 does not require compliance with the COLREGs or include any other requirement that a person could violate. A more appropriate cite for a violation of the COLREGs is 33 USC § 1608, which states that a civil penalty can be assessed for operation of a vessel in violation of 33 USC Chapter 30 (including 33 USC §§ 1601-1608). Within Chapter 30, 33 USC § 1603 requires compliance with the COLREGs by vessels subject to the jurisdiction of the U.S. Section 1603 would also be an acceptable cite for violations of the COLREGs.

The case file should also specifically identify the COLREGs rule that was allegedly violated. The charged party should be able to determine from this information how s/he is alleged to have failed to comply with the Rules of the Road. If the violation is proved, Hearing Officers are authorized by 33 USC § 1608 to assess a civil penalty.

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ALONG FOR THE RIDE

Lieutenant Commander Michele Bouziane

On 24 October 2011 this Hearing Officer was afforded the opportunity to observe, for familiarization purposes, a commercial fishing industry vessel inspection performed by a couple of Vessel Inspectors from U.S. Coast Guard Sector Baltimore.

What might have been a dry, snore-worthy exercise ended up being an entertaining education. This is because the vessel was the National Historic Landmark, the HILDA M. WILLING, which, at the time, was owned and operated by Mr. Barry Sweitzer, a part-time waterman.

Much has been written about the HILDA M. WILLING (HILDA M. in this article). For example, you can find the National Park Service's 1993 National Historic Landmark Study of the HILDA M., which describes the vessel in detail at: www.cr.nps.gov/maritime/nhl/willing.htm. Mr. Sweitzer has also been in the news recently. A 6 November 2011 article in HometownAnnapolis.com stated that he had put the HILDA M. up for sale.

The HILDA M. is one of the Chesapeake Bay's six last working "skipjacks," which are sloops used for oystering. Mr. Sweitzer had modified the vessel, which was originally built in 1905, and had kept it in pristine condition. The vessel belonged to Mr. Sweitzer's father, also a waterman. Mr. Sweitzer used to work for his father, harvesting oysters on the vessel. For the past 11 years, Mr. Sweitzer has been master and owner of the HILDA M.

Mr. Sweitzer speaks a mile a minute and has a smile a mile wide. He pointed out with pride the 30' keel made of white oak, the 12' x 12' Douglas Fir bowsprit, the copper sheathing on the bow, and the original davits, which he refinished. The wood boom is flexible, thanks to applications of 60% linseed oil. The vessel is also equipped with two dredges (the only skipjack allowed two dredges) and a 210 horsepower pushboat.

The vessel "sailed through" the inspection, though it never left the dock. All life-saving equipment was in good condition and "immediately available," that is, it could be reached by a person on the vessel within five seconds.

November 1 through March 31 is oystering season, and not usually a busy time for the Baltimore Police Department Marine Division, where Mr. Sweitzer has been a police officer for the past 25 years.

Mr. Sweitzer smiled as he described how, during oystering season, he pays and feeds his crew well,

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but insists they work hard for it. "You get 15 minutes for lunch and you're working non-stop. You stand up, dump the dredge, then you're down on your knees sorting. You got three minutes to sort—clean, sort, and measure for undersized oysters. I keep the crew on a rhythm—they can't get sloppy."

According to Mr. Sweitzer, there are 200 oysters in a bushel, and each bushel weighs about 80 pounds. His Maryland bay dredging license allows him to dredge a maximum of 150 bushels per day, which he only achieved one year: 2008. In 2010 he dredged 98 bushels per day. Mr. Sweitzer noted that as the water in the Upper Bay has gotten more brackish, the oysters have been growing more slowly. He estimates approximately 1 ½ years for an oyster to reach marketable size.

The HometownAnnapolis.com article states that on 2 November 2011, Mr. Sweitzer only dredged 10 bushels off the Western Shore of the Chesapeake Bay, when he expected to dredge 120 bushels. Many of the oysters he dredged were dead. That is why he put the HILDA M. up for sale.

Mr. Sweitzer thought his boat, still in mint condition after 106 years of service, would end up in a museum some day. He says he got calls from more than one museum. "You're a couple of weeks too late," he told them. He sold the vessel in mid-November to "a young guy from Deal's Island."

The new owner is apparently using the HILDA M. WILLING to successfully oyster in Maryland's Lower Bay. Mr. Sweitzer says that the oysters have survived in the Lower Bay because the influx of water from recent storms apparently did not dilute the salinity levels, as it did in the Upper Bay.

"I wanted it to [continue to] be a working boat," said Mr. Sweitzer, who, recently upon request, updated this story. Looks like the museums will have to wait a little longer. (Photos courtesy of Mr. Sweitzer)

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NIFTY NAMES FOR BOATS

Names on vessels sometimes inspire, amuse and/or confuse people. The following are listed because they are clever or fun:

DEVOCEAN

NAUTI BOYS

GET REEL

S-CAPE

HAPPY OURS

SEA WIFE

WEEKEND MONEY

AIN'T GOT TIME

TRIPLE RIPPLE

GIT-R-DONE

Here are a couple of websites that list popular and unusual boat names:

http://www.boatus.com/boatgraphics/names_top10.asp

http://www.coolboatnames.com/unusual-boat-names.html

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K.N.O.T.

(Knowledge Note or Tip)

Most vessels owned by United States citizens and operating on the navigable waters of the United States must have either a Certificate of Documentation (COD) or a Certificate of Number (CON) on board when operating. A vessel, equipped with propulsion machinery and operating on U.S. waters, must have on board a valid (current/not expired) Certificate of Number (CON), or temporary certificate, unless the vessel qualifies under an exception listed in 33 CFR § 173.11. Most vessel owners obtain the CON from the state in which they spend the most time operating (the state "in which the vessel is principally used," per 33 CFR § 173.21(a)(1)). Vessels under 26' and leased for recreational purposes for less than 7 days must have the lease agreement on board when operating, according to 33 CFR § 173.21(a)(2).

Alternatively, qualifying vessels may operate under a U.S. Coast Guard-issued COD. The minimum requirements for a COD are that the vessel must be: 1) at least five net tons and 2) wholly owned by a U.S. citizen (or an entity which qualifies as a U.S. documentation citizen). See 46 CFR § 67.5.

A party operating a vessel must keep the original document on board. A party whose vessel has a COD or CON, but does not have the respective document on board, would be appropriately charged with a violation of either 46 CFR § 67.313(a) for lack of COD, or 33 CFR § 173.21(a)(1) for lack of a state CON. When Coast Guard Boarding Officers conduct law enforcement boardings on U.S. documented or state numbered vessels, they will almost certainly ask to see the COD or CON. Boarding Officers usually confront one of three situations: 1) the valid COD or CON is on board, and is presented to the Boarding Officer; 2) the COD or CON is not on board; or 3) the party claims to have a COD or CON, but cannot locate it at the time the Boarding Officer asks to see it.

The Hearing Office sees many cases alleging a violation of 33 CFR § 173.23 when the party claims to have the CON, but cannot locate it (the comparable regulation for a COD is 46 CFR § 67.315). This regulation states that persons operating vessels shall present the CON to "any federal, state or local law enforcement officer for inspection upon his or her request." It is good practice, therefore, for Boarding Officers to document the Boarding Officer's request for the CON in the narrative of the Activity Summary Report. Additionally, because Coast Guard enlisted members below the grade of E-4 are not law enforcement officers, the evidence should show that the request was made by a member in the grade of E-4 or above. Most narratives, however, skip over these necessary elements and state, "Party could not produce CON," or words to that effect.

Section 173.25 of title 33 is charged almost as often. That section essentially states that no person may operate a recreational vessel (or, to be more precise, a vessel described in 33 CFR § 173.11) unless the Certificate of Number is carried in a manner that it can be shown to a person authorized by 33 CFR § 173.23. That section is most pertinent when the CON is being carried on board the boat; then the focus of the regulation is on how the document is carried on the boat.

The Boarding Officer is presented with two basic scenarios when it comes to state-issued numbers. Either there is no CON on board the vessel, or the CON is not readily presentable to a law enforcement official. In a case where the Coast Guard can

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prove that the CON was not onboard the vessel, or that the vessel's CON is expired or otherwise invalid, the appropriate cite for the alleged violation is section 173.21(a)(1). In a case where the party credibly states that the CON is on board but cannot be located/is not accessible, then the charging unit can choose between sections 173.23 and 173.25.

Boarding Officers should document the facts of the boarding that correspond to the elements of the charge, for example, a statement by the party that the vessel: a) had a Certificate of Number from state X; b) had a temporary CON from state X; c) did not have a valid CON; d) was under 26' and leased for recreational purposes for less than 7 days; or e) had a COD. The following should also be documented: There was no COD or CON onboard or, 1) the Boarding Officer asked to see the respective document; and 2) the document was: a) not on board; or b) on board but inaccessible (for example, the vessel owner or operator credibly states that the CON is onboard but that it is in an inaccessible compartment or box, or under a pile of gear that is too heavy to move).

To recap: When operating a vessel in U.S. waters, the party must have the original document on board, must show it to the Boarding Officer when the Boarding Officer requests it, and must carry it on board in such a way that it can be shown to the Boarding Officer. In cases where the document is not presented, but there is some doubt about whether the document is on board the vessel, it is appropriate to allege the failure to present the document or carry it in a manner so it can be shown. If the document is clearly not on board, it is more straightforward to allege operation of the boat without a document on board.

For more on this subject, see "CON vs. COD," CG Hearing Office Newsletter Vol. 8.

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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 December 31, 2011) that provide a "how goes it" glimpse into our work:

Number of case files received by the Hearing Office with violation dates in 2008: 946

Number of case files received by the Hearing Office with violation dates in 2009: 1443

Number of case files received by the Hearing Office with violation dates in 2010: 1494

Number of case files received by the Hearing Office with violation dates in 2011: 1264

Number of case files received by the Hearing Office in 2011 regardless of violation date: 1769

Number of preliminary assessments issued in 2011: 1560

Number of final assessments (FLAP, FLAN, FLW, and FLD) issued in 2011: 976

Number of violation case files returned to the program manager for deficiencies in 2011: 208

Number of hearings held in 2011: 17

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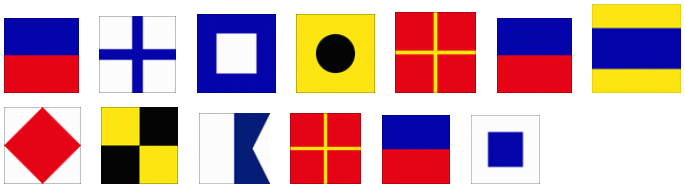
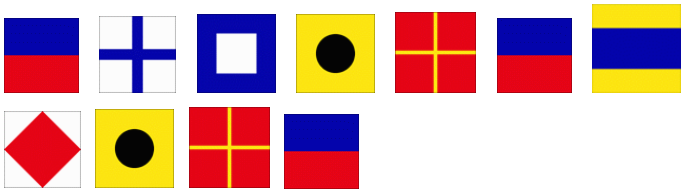
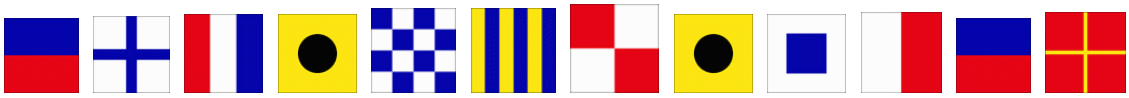
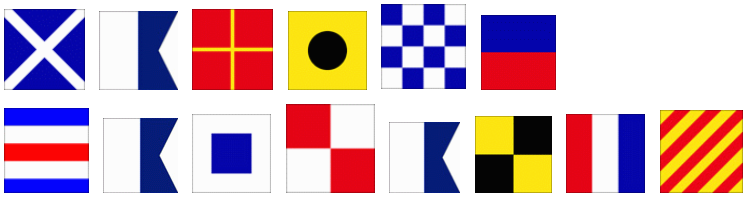
JUST FOR FUN

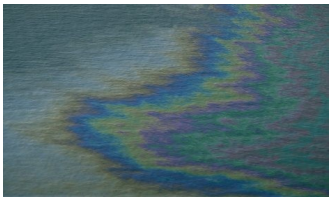
Match the International Alphabet Flags to the Picture.











To figure it out, see:
http://www.navy.mil/navydata/navy_legacy_hr.asp?id=273