



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

Greetings,

It is a privilege for me to address you as the new chief of the Coast Guard Hearing Office. I relieved Captain Trabocchi on August 9, 2010, and she has moved on to a new assignment with the Coast Guard. I want to thank Captain Trabocchi for her capable leadership of the Hearing Office from 2007 to 2010, and wish her continued success in her Coast Guard career.

This is not completely new territory for me, as I served as Commanding Officer, Coast Guard Hearing Office from 2000 to 2003, when I retired from active duty after thirty years of service. For the most part, the types of cases we see has not changed very much and the fundamentals of the civil penalty process are still the same. The mission of the Coast Guard Hearing Office is set out above, just under the masthead. All of us here will continue to work hard to accomplish that mission, while always being mindful of the need to demonstrate that ours is a process that is fair and impartial. The civil penalty process is designed to be informal and efficient, giving the parties notice of the alleged violations and an opportunity to be heard, without incurring great expense. I hope you will continue to find that this newsletter provides valuable insight into the civil penalty hearing process.

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



HEARING OFFICE NEWS

As mentioned in the adjoining column, Mr. Robert Bruce has relieved Captain Trabocchi and he is serving now as the chief of the Coast Guard Hearing Office. Over the last few years, the Coast Guard and the Office of the Judge Advocate General (Chief Counsel) have undergone a modernization of their organizational structures. The position of the Coast Guard Hearing Office has changed along with other organizations supervised by the Judge Advocate General. The Hearing Office Command was recently disestablished, and the Hearing Office was briefly reorganized as a detachment of the Judge Advocate General’s staff. Currently, the Coast Guard Hearing Office is organized as a staff element within the Office of the Judge Advocate General, with the chief of the Hearing Office reporting to the Deputy Judge Advocate General. What has not changed throughout this process is the separation of the Coast Guard Hearing Office from the Coast Guard programs and units that conduct boardings and inspections, identify alleged violations, and produce the civil penalty cases that are forwarded to the Hearing Office for adjudication. Instead, the Coast Guard Hearing Office is supervised by the Office of the Judge Advocate General, which is primarily concerned with assuring that the civil penalty process is conducted fairly and impartially, in accordance with the law. With the modernization of the Office of the Judge Advocate General largely complete, the place of the Coast Guard Hearing Office in the organization’s structure seems fixed for some time to come.

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MUCH ADO ABOUT RING LIFE BOUYS

CDR E. Hudspeth

The Coast Guard Commandant’s approval and associated number, the amount, size, length of attached line, color, markings, availability, and condition are all requirements for ring life buoys on board commercial fishing industry vessels. This article will briefly identify where exactly these requirements are found in Title 46, Code of Federal Regulations, Part 28 (46 CFR 28).

According to 46 CFR 28.105(b), lifesaving equipment must be approved by the Commandant of the Coast Guard. However the acceptable approval numbers; whether a buoyant cushion, ring life buoy, or no throwable flotation device is required; the amount; the size; and the color are all specified in 46 CFR 28.115 on Table 28.115, and depend on the length of the vessel. A copy of the table is provided below.

Table 28.115--Throwable Flotation Devices

Vessel length	Devices required
Less than 16 feet (4.9 meters)	None.
16 feet (4.9 meters) or more, but less than 26 feet (7.9 meters)	1 buoyant cushion, or ring life buoy (Type IV PFD).
26 feet (7.9 meters) or more, but less than 65 feet (19.8 meters)	1 ring life buoy approval number starting with 160.009 or 160.050; orange; at least 24 inch (0.61meters) size.
65 feet (19.8 meters) or more	3 ring life buoys, approval number 160.050; orange; at last 24 inch (0.61 meters) size.

In addition to the above table, 46 CFR 28.115 (a) describes the length of line (60 feet or 90 feet) needed for at least one life ring buoy on board, again depending on the length of the vessel (less than 65 feet, or 65 feet and greater).

Also, according to 46 CFR 28.115 (b), if certain conditions are met, the size of the ring life buoy may be 20 inches or larger, instead of the 24 inch or larger size described in Table 28.115.

Markings for ring life buoys are covered in 46 CFR 28.135, Table 28.135, and include the requirement for the name of the vessel to be in block capital letters, and the requirement that Type II retroflective material be arranged to meet IMO Resolution A.658(16).

Finally, the requirement for the ring life buoys to be readily accessible and in good working order is covered in 46 CFR 28.140.

When it comes to ring life buoys, it seems apparent from the applicable regulations that the smaller the vessel, the fewer the requirements.

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PENALTY ASSESSMENT FACTORS APPLICABLE TO VIOLATIONS OF 33 U.S.C. § 1321 (b)(3)

CDR M. Hammond

In determining an appropriate civil penalty amount for violations found proved under Title 33 United States Code (U.S.C.), Section 1321(b)(3) for a discharge of oil or a hazardous substance into the navigable waters of the U.S., Hearing Officers are required by 33 U.S.C. § 1321 (b)(8) to consider the following:

“the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.”

In considering these factors, (whether aggravating or mitigating), Hearing Officers can only rely on the information contained within the case file; (i.e., the Coast Guard’s enforcement activity case and the evidence the party presents). The case file should contain a sufficient amount of detail in order for the Hearing Officer to fully address these considerations. In addition to specific details of the discharge (i.e., product type, source, amount, location responsible party, cause, etc.), the case file should contain among other factors information regarding the responsible party’s culpability, the impact of the discharge, the party’s response and mitigating efforts (or lack thereof); and the success of such efforts to minimize the impact of the discharge. Depending on the circumstances of the case, the degree of a party’s culpability for a discharge, and their actions taken to minimize environmental impact could significantly influence the Hearing officer’s determination of the final assessed civil penalty amount.

Because the Hearing Officer must by law, consider several factors in determining the final assessed penalty amount for violations under 1321(b)(3), careful attention should be given to documenting important details in support of the above factors when putting a case together, or when responding to a preliminary assessment letter.

This will greatly assist the Hearing Officer in formulating an appropriate final assessment commensurate with the circumstances of each case while supporting the overarching goal of compelling compliance and deterring future violations.

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DISTRICT COURT REJECTS CHALLENGES TO THE ASSESSMENT OF A CIVIL PENALTY

Robert Bruce

On July 26, 2010, the Honorable Judge Coar of the U.S. District Court for the Northern District of Illinois issued his Memorandum Opinion and Order in the case of *Egan Marine Corporation v. Allen*. In this case, the plaintiff, Egan Marine Corporation (Egan), raised several challenges against a \$21,000.00 penalty assessed for six violations involving the failure to have tank barges properly inspected. Egan asserted that the Coast Guard’s civil penalty process denied it due process because it was not afforded a hearing before an impartial factfinder, it did not have a meaningful opportunity to question Coast Guard witnesses, and the penalty was not assessed in a timely manner. Judge Coar rejected these assertions. He stated that Egan’s argument, that the civil penalty process was not impartial because the penalty was assessed by the same agency that brought the charges against it, was frivolous. Judge Coar also stated that Egan’s subjective opinion that the Coast Guard could not be impartial did not give Egan the right to bypass the Coast Guard’s administrative process and have the case tried in district court instead. Judge Coar also stated that the hearing officer’s determination that the evidence did not prove some of the charges showed that the hearing officer was capable of impartial judgments.

Regarding the claim that Egan had been denied a meaningful opportunity to question Coast Guard witnesses, Judge Coar found that Egan had not raised this issue in its appeal to the Commandant of the Coast Guard, and that the record did not support Egan’s claim that it was not advised of its right to request witnesses because the record included correspondence in which Egan was advised of the regulations governing civil penalty hearings. Those regulations explain the right to request witnesses.

On the issue of timeliness of the assessment of the civil penalty, Judge Coar rejected the claim because Egan did not show that it was prejudiced by any relevant delay in assessing the penalty. He found that Egan offered only speculation that certain Coast Guard witnesses may have been unavailable and noted that Egan never even tried to have Coast Guard witnesses testify at its hearing.

Finally, Judge Coar rejected Egan’s claim that the civil penalty violated the Excessive Fines Clause of the Eighth Amendment. Egan asserted that the \$21,000.00 penalty was excessive because it violated the Coast Guard’s own guidelines and because the Coast Guard did not consider Egan’s ability to pay the penalty. The judge found that Egan had not raised these issues in its appeal to the Commandant of the Coast Guard. Additionally, he found that the guidelines relied upon by Egan were only recommendations and that they did not apply to a case such as this where one party was charged with a series of recurring violations. Judge Coar also noted that the assessed penalty was only about one/ninth of the maximum penalty that could have been assessed. With respect to ability to pay, the judge found that Egan had not offered any information about ability to pay at its hearing.

Ultimately, Judge Coar found that the Coast Guard action assessing the civil penalty was supported by substantial evidence and was not arbitrary and capricious. He granted the United States’ motion for summary judgment and dismissed the case.

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KNOT
(Knowledge Note Or Tip)



1. Although a passenger “bowriding” on a recreational vessel is specifically addressed in many State’s boating regulations, for purposes of Coast Guard law enforcement it is typically charged as “negligent operations.” One way to prove negligence is to show that the action alleged violated an applicable state law. As a result, if an applicable state law was violated, the case file should include the state law and a description of how it was violated. Where there is no state law, or the alleged action does not violate state law, a detailed description of the “bowriding” event is needed in order to determine if the vessel operator was negligent. Helpful information for the boarding officer to include would be the type of vessel (sailing or motor); the approximate speed of the vessel; the sea conditions; the location of the "bowrider" in relationship to the gunwale and/or rails; and whether the vessel is designed in such a way as to safely accommodate riding on the bow of the vessel.

2. Often times in BUI cases the party refuses to cooperate with any field sobriety tests (FST). This alone does not create a presumption of intoxication. 33 CFR

95.040 states: "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."

33 CFR 95.040 expressly requires that the chemical test be directed by the law enforcement officer. Refusal to perform FSTs, along with the observations that make the administration of FSTs appropriate, can provide reasonable cause to direct a chemical test. But, if the boarding officers do not specifically direct a party to submit to chemical testing, after the refusal to perform FSTs, the refusal to perform FSTs by itself will not give rise to a presumption of being under the influence as provided for in 33 CFR 95.040.

Boarding officers must not assume that refusal to perform FSTs means the party is also refusing to submit to a chemical test. If a party refuses to perform FSTs and the boarding officer has reasonable cause to suspect the individual of being in violation of the standards in 33CFR 95.020 or 95.025, the boarding officer must specifically direct the party to conduct a chemical test in order for a refusal to raise the presumption under 33 CFR 95.040.

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JUST FOR FUN

Alicia Scott, YN3 Victor Anderson

Test your knowledge; choose the right answer.

1. In the mid- 1960s the U.S. Coast Guard was asked by the Army, Navy, and Air Force to participate in this war.
 - a. World War II
 - b. World War I
 - c. Vietnam War
 - d. Operation Desert Storm

2. During the Vietnam War, the Navy lacked _____ water craft for operations inshore.
 - a. Shallow
 - b. Deep
 - c. Armed
 - d. Bullet proof

3. The Coast Guard provided twenty-six of these _____ Cutters to Vietnam.
 - a. 82-Foot
 - b. 65-Foot
 - c. 110-Foot
 - d. 123-Foot

4. During the Vietnam War, Coast Guard pilots flew combat search and rescue with the Air Force in South-east Asia, under the inter-service exchange program.
 - a. True
 - b. False

5. How Many Coast Guardsmen served in Vietnam?
 - a. 259
 - b. 3692
 - c. 5000
 - d. 8000

6. On _____ Secretaries of the Navy and Transportation Signed a memorandum of agreement creating the Maritime Defense Zones(MDZ's).
 - a. March 13, 1979
 - b. December 25, 1984
 - c. March 07, 1984
 - d. April 01, 1985

7. The Coast Guard assisted the U.S. Army with port security and harbor security to bring in the ammunitions needed for the Vietnam War.
 - a. True
 - b. False

8. During the Vietnam War, Coast Guard Buoy tenders in the Pacific made periodic trips to Vietnam to install and maintain buoys for navigation.
 - a. True
 - b. False

(See answers on last page)

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DECKPLATE RIVETS



Copies of all documents in the civil penalty case file are provided to the charged party; therefore careful attention should be given to what is included, and what is not. Personally identifiable information (PII) of persons other than the charged party should not be included in the case file if not directly relevant to the alleged charge. All PII should be removed from a case file or the PII itself should be redacted. If redacting the PII, ensure the redacting method used is effective, so that there is no possibility that the PII can be read.

For enforcement cases forwarded to the Hearing Officer for adjudication where an Notice of Violation (NOV) was previously issued and declined, be sure to include a copy of the declined NOV in the case file. If the NOV was declined via letter from the charged party, include a copy of the party's declination letter.

The Coast Guard does not conduct "preliminary breath tests" (PBTs). The Coast Guard administers chemical breath tests to confirm an individual's BAC level after determining reasonable cause exists that an individual is suspected of being under the influence in accordance with the standards described in 33 CFR 95.020. In BUI cases, reasonable cause to direct a chemical breath test should be well-documented.

Case Processing officials should pay close attention to the quality of case enclosures; particularly when generating the party's copy of the case file. A party has the right to review all evidence contained within the case file. Copies of case documents that are of poor quality or are not legible altogether must be regenerated and can delay the adjudication process.

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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's some Coast Guard Hearing Office metrics that provide a "how goes it" glimpse into our work:

Number of case files received by the Coast Guard Hearing Office with violation dates in 2007: 1449

Number of case files received by the Coast Guard Hearing Office with violation dates in 2008: 944

Number of case files received by the Coast Guard Hearing Office with violation dates in 2009: 1410

Number of case files received by the Coast Guard Hearing Office with violation dates in 2010: 491

Number of case files received by the Coast Guard Hearing Office Jan 2010 - Aug 2010 regardless of violation date: 888

Number of preliminary assessments issued Jan 2010 - Aug 2010: 913

Number of final assessments issued Jan 2010 - Aug 2010: 164

Number of violation case files returned to the program manager for deficiencies Jan 2010 - Aug 2010: 88

Number of hearings held Jan 2010 - Aug 2010: 9

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Quiz Answers: 1.) C 2.) A 3.) A 4.) A 5.) D
6.) C 7.) A 8.) A