U.S. Department of Homeland Security
United States Coast Guard

Commandant
United States Coast Guard

2703 Martin Luther King Jr. Ave. SE
STOP 7794
Washington, DC 20593-7794
Staff Symbol: CG-094C
Phone: (202) 795-6910
Fax: (202) 372-8321

16200
NOV 16, 2020

[ATTORNEY]
[LAW FIRM]
[ADDRESS]

RE: Activity No. 5745371
[PARTY]
[VESSEL 1]
$1,000.00

Dear [ATTORNEY]:

The Coast Guard Hearing Office has forwarded the file in Civil Penalty Case No. 5745371, which includes your appeal on behalf of your client, [PARTY], as operator of the recreational vessel [VESSEL 1]. The appeal is from the action of the Hearing Officer in assessing a $1,000.00 penalty for the following violation:

LAW/REGULATION	NATURE OF VIOLATION	ASSESSED PENALTY
46 U.S.C. § 2302(a)	"RECREATIONAL VESSEL" Operating a recreational vessel in a negligent manner or interfering with the safe operation that endangers life, limb or property of a person.	$1,000.00

The violation is alleged in connection with a collision between your client's vessel [VESSEL 1] and the small passenger vessel [VESSEL 2] that occurred on July 25, 2017, near Isla Magueyes off La Parguera, Puerto Rico. The Hearing Officer found that your client was negligent in failing to maintain a proper lookout, failing to operate at a safe speed, and failing to use all available means appropriate to determine whether a risk of collision existed. These failures violated the standard of care established by Navigation Rules 5, 6, and 7, respectively.[1]
On appeal, you object to the Hearing Officer's conclusions that your client violated the cited Navigation Rules. You also argue that, but for the alleged negligent conduct of [VESSEL 2], your client's vessel [VESSEL 1] would not have collided with that vessel.

[1] I note that some materials in the file refer to the Inland Navigation Rules. This is a mistake. According to 33 CFR § 80.738, with the exception of San Juan Harbor, "the 72 COLREGS shall apply on all other bays, harbors and lagoons of Puerto Rico. . . ." Hence the applicable rules are the International Regulations for Preventing Collisions at Sea (72 COLREGS, or COLREGS). The texts of Rules 5, 6, and 7 are identical in the Inland Navigation Rules and the COLREGS.

As explained by the Hearing Officer in his letter of February 5, 2019, the aim of this civil penalty proceeding is "solely to determine, based on the preponderance of the evidence in the case file, whether your client operated his vessel in a negligent manner on July 25, 2017." Whether or not [VESSEL 2] was also operated in a negligent manner is irrelevant to this proceeding. However, some details of [VESSEL 2]'s operation are relevant. Notably, the Hearing Officer found that, contrary to your assertions, the all-round white light of [VESSEL 2] was displayed before the collision.

A vessel operator violates 46 U.S.C. § 2302(a) when he or she fails to exercise the care that a reasonable person would exercise in like circumstances. In your client's case, the finding of negligent operation is based on alleged violations of three Navigation Rules—5, 6, and 7. These Rules provide the standard of care expected of a prudent and reasonable vessel operator, including a recreational vessel operator. If your client operated his vessel in violation of one or more of those Rules, that would provide a legal basis for the Hearing Officer to find a violation of § 2302(a).

I will address, in turn, each of the three alleged Rule violations. According to Rule 4, these Rules apply in any condition of visibility. Unlike later Rules, their application is not limited only to vessels in sight of one another.

Rule 5 provides that vessels shall maintain a proper look-out "by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision."

The Hearing Officer found that, on the night of the collision, [VESSEL 1] was equipped with an operational radar, but your client was not using that radar to avoid collision.

You do not dispute these findings of fact. In rebuttal, you note that the Hearing Officer cites no law or regulation *requiring* a vessel like [VESSEL 1] to use a radar.

You are correct in stating that there exists no such requirement. However, Rule 5 does not limit the means by which a look-out is to be maintained to those means that are statutorily required—the Rule requires use of all *available* means appropriate. It is undisputed that radar was available to your client on the night of July 25, 2017, and that he chose not to use that radar.

The next question is whether radar was an "appropriate" means of maintaining a look-out, given the prevailing circumstances. It is undisputed that July 25, 2017 was a moonless and dark night; that your client was operating his vessel at a speed of approximately 11 knots in an area of known vessel traffic; and that it was known to your client that tour boats operating in this area would at times extinguish their navigational lights to prevent being followed by other boats or to better observe bioluminescence. I agree with the Hearing Officer that, in those circumstances, Rule 5 obliges a vessel operator with access to operational radar to monitor that radar, in addition to maintaining a visual and auditory lookout.

You also provide an expert witness report, arguing that, if your client's failure to maintain radar watch was in error, that error was harmless, because [VESSEL 2] would have presented a poor radar target, and it has not been demonstrated that a radar watch would have prevented the collision.

I will not address the merits of this argument because, while it may be relevant to civil litigation grounded in tort law, it is irrelevant to this administrative civil penalty proceeding. Causation of damages is not required to prove a charge of negligent operation. To put it another way, this proceeding does not need to, and does not seek to, answer whether your client's violation of Rule 5, or of any other navigational rule, caused the collision.

I note that you have previously argued that if [VESSEL 2] had its navigational lights on, [VESSEL 1] would have been able to see it. You also argued that if [VESSEL 2] had been keeping a proper look-out, the collision could have more than likely been prevented. Similarly, given the finding that [VESSEL 2] was displaying navigation lights, [VESSEL 1]'s failure to see [VESSEL 2] before the collision suggests that [VESSEL 1] was not keeping a proper look-out by sight.

There is sufficient evidence in the record to support the Hearing Officer's conclusion that your client failed to maintain a proper look-out on the night of July 27, 2015, and that conclusion establishes a violation of 46 U.S.C. § 2302(a).

Turning to the next Rule: Rule 6 provides that vessels shall proceed at a safe speed, "so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."

In his December 18, 2018 letter, the Hearing Officer found that, immediately prior to the collision, [VESSEL 1] was proceeding at a speed of approximately 11 knots, "with the bow of your vessel riding high." The Hearing Officer concluded that your client's speed at the time of the collision was excessive, in light of the prevailing circumstances and conditions: "your vessel was traveling at a high rate of speed . . . . It was dark and you knew other vessels in the area would turn off their navigation lights to see the [bioluminescence]."

On appeal, you do not dispute that your client was proceeding at a speed of approximately 11 knots, but argue that this was a safe speed, given the prevailing circumstances and conditions. This argument relies primarily on the opinion of your expert witness. That witness, a master mariner and marine consultant, maintains that, given the maximum speed of [VESSEL 1]—50.8 knots—a speed of 11 knots was "21.6% of full ahead speed, which is equivalent to slow or dead slow ahead by marine industry standards." According to your expert, [VESSEL 1]'s stopping distance, at 11 knots, would be "2 or maybe 3 boat lengths," demonstrating that a speed of 11 knots complied with Rule 6.

Your expert's opinion does not convince me that 11 knots was a safe speed for the circumstances your client encountered on the night of July 25, 2017. The "marine industry standard" speeds of "slow" and "dead slow," as referenced by your expert, are both questionable and irrelevant. While "dead slow ahead" is not a defined regulatory term, in common maritime usage it is taken

to mean the slowest speed that allows a vessel to maintain steerageway. To characterize a sport fishing vessel transiting, on a plane, at 11 knots, as a vessel proceeding at "slow ahead" or even "dead slow ahead" is, frankly, laughable.

In any event, Rule 6 makes no reference to slow or dead slow ahead. "[S]afe speed does not depend on stopping distance alone, but on the peculiar circumstances of every case." *Otal Investments Ltd. v. M.V. Clary*, 494 F.3d 40, 55 (2d Cir. 2007). Rule 6 itself makes clear that the question of a safe speed is dictated, in every case, by the circumstances, and not by absolutes of vessel performance:

> In determining a safe speed the following factors shall be among those taken into account: . . . (i) The state of visibility; (ii) The traffic density including concentration of fishing vessels or any other vessels; (iii) The maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions; (iv) At night, the presence of background light such as from shore lights or from back scatter of her own lights; (v) The state of wind, sea and current, and the proximity of navigational hazards; (vi) The draft in relation to the available depth of water.

Vessels like [VESSEL 1], equipped with operational radar, are obliged to take into account the limits of that radar when determining a safe speed. (This obligation presupposes the use of that radar. As discussed earlier, your client was not using radar on the night in question.)

Your expert further maintains that [VESSEL 1]'s likely minimum speed, in "clutch ahead," would be "6 to 7 mph," compared to the 11 knots, or 12.6 statute miles per hour, she was making on the night of July 25, 2017. Because the proffered minimal speed differed from the "incident speed" by "maybe 6 mph," your expert claims "it is splitting hairs to consider that the incident speed was in violation of the principles of Rule No. 6 Safe Speed."

This is sophistry. 6 statute miles per hour is about half the incident speed of 12.6 mph. While a difference of "6 or 7 mph" might be negligible if we were discussing the difference between a vehicle travelling at 80 mph or at 86 mph, in these circumstances, the difference between 6 mph and 12.6 mph was very significant. It is likely, for one thing, that your client's vessel could not have remained on a plane, bow up, if proceeding at only 6 mph, and his ability to maintain a look-out and avoid collision might thereby have been improved. There is likewise little doubt that his stopping distance would have been reduced at a lower speed, thereby requiring less time to react and avoid a collision. Finally, even if your client still had not seen [VESSEL 2], the damages resulting from the collision would surely have been less severe, if your client had been proceeding at a speed of 6 mph.

In sum, your expert's opinion has not convinced me that the Hearing Officer was wrong to find that 11 knots was an unsafe speed to proceed on the night of July 25, 2017, given the prevailing circumstances at that time.

Finally, Rule 7 provides that every vessel shall use all available and appropriate means to determine whether a risk of collision exists. A vessel equipped with operational radar shall make proper use of that equipment.

The Hearing Officer found that your client's failure to use his operational radar to determine whether risk of collision existed was a violation of Rule 7. Your expert witness argues that this is a misapplication of Rule 7, a Rule that, in his opinion, applies only "when a vessel is underway and meeting or encountering another vessel . . . . If there is no known vessel in the area, a vessel is not under risk of collision as intended by the Rule." To paraphrase this argument: if, as you maintain, [VESSEL 2] had no navigational lights lit and was therefore invisible to your client, then there was no "known vessel" in the area, no risk of collision, and Rule 7 was inapplicable.

First, as to the idea that [VESSEL 2] was "invisible," the Hearing Officer found, based on substantial evidence in the record, that [VESSEL 2]'s navigational lights were lit at the time of collision. There is no reason to disturb this finding of fact on appeal.

Second, I disagree with your expert's interpretation of Rule 7. Rule 7(b) makes clear that its obligations are not limited to situations where a vessel is visible: "Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision". A mariner's obligation to determine if risk of collision exists does not begin when he or she spies another vessel; it is an ongoing obligation.

To apply Rule 7 to your client's case, let us assume, for the sake of argument, that [VESSEL 2] was showing no lights as your client approached, and was therefore invisible. It does not follow that your client was relieved of Rule 7's obligations. Your client was travelling at 11 knots in an area of known vessel traffic on a dark, moonless night. As noted by the Hearing Officer, your client was aware that vessels sometimes transited the area without lights. Failure to use his operational radar to assess risk of collision was a violation of Rule 7.

The evidence and argument going to show the three Rule violations discussed have a certain degree of overlap. Indeed, the Hearing Officer's analysis of Rule 7 duplicates his analysis of Rule 6, and concludes by noting that Rule 7 required him to use his radar, the same basis on which he found a violation of Rule 5. Overlap is to be expected; the Navigation Rules are written not as itemized and discrete code but as a holistic standard of seamanship. Excessive speed can overwhelm what might otherwise be a proper look-out, and failure to look out obviously can prevent the identification of a risk of collision. In this case, the three Rule analyses all go to prove the single charge of negligent operations, by establishing that your client violated the standard of care embodied by the Rules.

I find that there is substantial evidence in the record to support the Hearing Officer's conclusion that the violation occurred. The penalty amount was within the authorized range. The Hearing Officer's decision was neither arbitrary nor capricious and is hereby affirmed.

In accordance with the regulations governing civil penalty proceedings, 33 CFR Subpart 1.07, this decision constitutes final agency action.

Payment of **$1,000.00** 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 979123
St. Louis, MO 63197-9000

Interest at the annual rate of 2% accrues from the date of this letter but will be waived if payment is received within 30 days. Payments 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,

L. I. McCLELLAND
Civil Penalty Appellate Authority
By direction of the Commandant

Copy: Coast Guard Hearing Office
Coast Guard Finance Center