



NMA REPORT #R-207, Revision 1  
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Edited By Capt. Richard A. Block

124 North Van Avenue  
Houma, LA 70363-5895  
Phone: (985) 851-2134  
Fax: (985) 879-3911  
[www.nationalmariners.org](http://www.nationalmariners.org)  
[info@nationalmariners.org](mailto:info@nationalmariners.org)

Asserting our right "...to petition the Government for redress of grievances."  
Amendment 1, U.S. Constitution, Dec. 15, 1791

## Training and Posting Lookouts

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### NAVIGATION RULE 5 (INLAND AND INTERNATIONAL)

Every vessel shall at all times 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.

**Discussion:** As a watch officer, you are expected to obey *all* of the Rules of the Road aka the Navigation Rules. These rules have very definite meanings both as written and, where those meanings may be unclear, they will be interpreted by a Court. Webster's dictionary defines a "Court" as "An assembly (including one or more judges) to conduct judicial business." This report provides two *examples* of a Court. The first example concerning posting a lookout was decided by a Coast Guard Administrative Law Judge (ALJ) and the decision was appealed to the Commandant of the Coast Guard resulting in the revocation of a mariner's license. In the second example, the judge was a Senior U.S. District Court judge and the penalty for failing to post a proper lookout was \$1,250,000 directed at a company. There are also Navigation Rules Civil Penalties for Navigation Rules violations that appear in Table 3-A in Enclosure 3 to COMDTINST 16200.3A ranging from \$1,000 to \$5,000. These amounts are increased periodically as a result of "inflation." ***We did not prepare this report to intimidate you. However, not posting a trained and effective lookout can turn into a real horror story for all concerned.***

To start with, Rule 4 states that this rule applies in "any condition of visibility." Keeping a proper lookout is often termed the first rule of good seamanship. Whoever keeps a lookout must be able to give proper attention to that task and must not be assigned or undertake duties that would interfere with this function.

On vessels with an unobstructed, all-round view from the steering station, as on certain pleasure craft, fishing boats, and towing vessels, where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout.

However, you must only follow this practice after carefully assessing the situation on each occasion and determining without doubt that it is prudent and safe to do so. You must *consider all relevant factors* including, but not limited to, the state of the weather, conditions of visibility, traffic density, the proximity to navigational hazards and the burden imposed by communicating with other vessels or governing authorities.

Most vessels constructed for U.S. inland waterways have the wheelhouse station designed with clear and unob-

structed vision in all directions, including aft, since the pilot of the vessel must constantly observe the conditions that surround him and check the lateral position of his vessel (and tow) in relation to fixed landmarks and marine aids to navigation.

It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety. The burden of proof continues to be on the vessel(s) involved in a collision to establish that employing additional lookout procedures would not have prevented the accident.

The Rules of the Road are clear and forthright. If you choose to bend them to fit your own purposes or those of your employer or those of an unwilling lookout, you do so at your own risk.

## 45 "MUSTS" FOR EFFECTIVE WATCHKEEPING

The term "watch" means to be alert, attentive, or vigilant. The older connotation of the word was to continue without sleep, keeping vigil, or continually being on one's guard.

The term "officer of the watch," that we shorten to "watch officer," is the licensed officer in charge of the watch who is responsible for navigating the vessel in the absence of the Master or commanding officer-to use military terminology so we do not ignore naval watchkeeping responsibilities which parallel those of the merchant marine.

The most interesting point about watchkeeping revolves around the size of the vessel. On a small commercial vessel with only a licensed Master and deckhand, these two individuals make up the entire watch and are responsible for every one of the points of standing an effective watch on deck, in the engine room, on the radio, while at anchor or when underway, during daylight or darkness, and in varying degrees of visibility. This is a tall order for any mariner and covers much more than you may think. Collisions between very small and very large vessels is well documented and not uncommon. In many cases, this is the result of a human error—often a failure of "watchkeeping."

Consequently, the "Operator" of the smallest uninspected passenger vessel, Master of a tug or offshore supply vessel, and the Master of the largest cruise ship or tankship have something in common. Each must know how to maintain an effective watch on their vessel with the personnel they have available to them. While the terminology on small boats may differ from that used on large ships, the watchkeeping principles are basically similar. What you read here is what you would expect to find in a perfect world where there are no maritime accidents. At any rate, it contains a prescription for avoiding accidents and averting maritime disasters. By learning as much as possible from the experience of others, your experience at sea should be safer and more rewarding. It will probably never be perfect because there is always the "other guy." Study this carefully so you are not somebody else's "other guy!"

### Maintaining a Proper Lookout

Nothing can be more positive or absolute than the obligation to maintain a proper lookout.

**Rule 5** is so short and straight forward that it may mislead you as to the large number of points it really covers. As it applies to small vessel operators, you must consider and balance quite a few factors to be sure you have established a "proper lookout" in compliance with Rule 5. You must then continually evaluate your lookout's effectiveness. This is a tall order if you happen to be doing the entire job single-handedly as is common on many small vessels! It is particularly difficult if your employer expects you to violate the 12-hour rules that were established to protect mariners.<sup>(1)</sup> *[<sup>(1)</sup>Request a copy of our Report #R-258, Rev.2. Watchkeeping and Work-Hour Limitations on Towing Vessels, Offshore Supply Vessels (OSV) and Crewboats Utilizing a Two-Watch System. This contains a copy of Coast Guard Policy Letter #G-MOC 04-00, Rev. 1]*

A "lookout" has been defined by the federal courts as a person who is **specially charged** with the duty of observing the lights, sounds, echoes, or any obstruction to navigation with the thoroughness that the circumstances permit. As a watch officer, do not assume a crewmember is your lookout unless he is trained and that you specifically assign him lookout duties.

In considering the duties of a lookout, you must not only consider vessels of the size and type your license will cover but also the entire spectrum of vessels you may encounter at sea because a collision obviously is not restricted to another vessel of the same type and size as your vessel. Over the years, considerable case law has evolved concerning the duties of a lookout. Therefore, the following list serves a set of guidelines to what is expected of you in complying with Rule 5. As a licensed officer you will be called on to perform lookout duties as well as to monitor and instruct other lookouts. In many cases you may find it difficult to comply with the letter of these guidelines. However, you will be expected to be "effective" in avoiding collisions no matter how you handle each individual situation.

### **Lookout Guidelines.**

Consider these points in regard to establishing a proper lookout:

1. The owners of a vessel in a collision may be liable for damages for neglecting to maintain a proper lookout unless the other vessel was discovered as soon as a proper lookout, if properly stationed, could have discovered her.
2. The vigilance of a lookout is often judged by his effectiveness in preventing a collision. Failing to discover the lights of a vessel in time to avoid collision is equivalent to not posting a proper lookout.
3. A lookout's duty is considered to be continuous and unbroken while other watchstanders (i.e., persons on watch) often may have other types of duties to perform.
4. A lookout must be assigned no other duties that could detract from keeping a proper lookout. He must devote his complete attention to being a lookout. Consequently, a helmsman or officer in charge of the watch cannot properly fulfill the duties of a lookout.
5. After a collision, courts may take into consideration the number of seamen available on board in considering whether a vessel maintained a "proper lookout."
6. There have been more reported cases of improper lookouts aboard merchant vessels with smaller crews than with comparably-sized naval vessels with larger crews.
7. About three times as many cases of improper lookout are reported on inland waters as on the high seas. This may be a result of the relative congestion of inland waters.
8. Lookouts must be stationed in sufficient numbers, as circumstances require so that the vessel can avoid risk of collision. Avoiding collision is of paramount importance.
9. A vessel must maintain a proper lookout for both up-bound and down-bound vessels on a river before starting and while making a turn.
10. The absence of key personnel from the pilothouse or bridge invariably leads to charges of maintaining an improper lookout.
11. Using radar as a general lookout does not relieve a vessel of maintaining a visual and aural<sup>(1)</sup> lookout.  
[<sup>(1)</sup>**Vocabulary:** *Aural* = listening by ear.]
12. The fact that visibility is clear does not eliminate the need to maintain a general radar lookout at night.
13. Vessels can be faulted for maintaining a bad radar lookout and for faulty evaluation of available radar information.
14. Lookouts must be both vigilant and alert at all times.
15. The lookout's vigilance must not be reduced because his vessel may have the right of way.
16. The degree of vigilance required of a lookout underway in fog is greatly increased. If he cannot see through the fog, at least he can listen. Remember that no vessel has the right of way in fog.
17. Large vessels in fog have a positive obligation to station enough lookouts to give the earliest possible warning of vessels approaching from any direction.
18. Lookouts must be properly stationed and must know exactly what their duties are.
19. Lookouts must be trustworthy, perform their jobs faithfully, and must be qualified by their service at sea for a

reasonable period.

20. The proper position for a lookout is as low down and as far forward as the conditions allow. This position allows his eyes to follow the surface of the water and detect anything low down that his vessel may be approaching. In this position, he is best able to hear as well as see. Additionally, his hearing may be less impaired by the noise of the engines or by radios. Although you may believe that some other position is "just as good," the burden of proving this may fall on your vessel in event of a collision.
21. The pilothouse may not be the proper place to station the vessel's lookout unless one has been first stationed in the bow.
22. A lookout freezing from exposure cannot be expected to be vigilant. Adequate clothing and protection from the weather are factors that require a watch officer's consideration.
23. Seamen who divide their attention among other duties are not proper lookouts. Such distractive duties, no matter how welcome or admirable, may include running errands and serving hot coffee to the crew.
24. A watch officer who simultaneously uses an automatic pilot and undertakes clerical duties rather than focusing his full attention on being a lookout is not considered to be a "proper lookout." In other words, do not try to do all the work by yourself.
25. A tug with a long tow (or other vessels with their gear extended) must extend their watchfulness to include the full length of the tow.
26. A tug must keep a lookout at the bow of a tow "on the hip" where it projects beyond the tug.
27. There is a recognized obligation to maintain a proper lookout on the bow of the lower deck of a ferryboat.
28. The Master of a sailing vessel standing abaft the wheel is not in a proper position for a lookout when sailing full and free with a strong wind. Observations reported from such a position may be partial, interrupted, incomplete, and entitled to less weight in court than those of a properly stationed lookout.
29. Lookout reports must be made promptly and correctly in all conditions of visibility.
30. Failure of a lookout to promptly report a vessel with which his vessel could possibly collide or that could in any way affect the navigation of his vessel is considered neglect of duty.
31. Lookouts should report every light that might be material or meaningful in the existing situation as soon as it becomes meaningful. Perfection only comes with experience, good training, and a thorough briefing at every assignment to lookout duties.
32. A lookout should report navigation or anchor lights and be able to determine what course another vessel is following. Reporting lights, vessels, and objects comes first; identification of these reported targets comes later! A lookout should report an "object" immediately even if not certain it exists.
33. The watch officer should be able to properly appreciate a developing situation based on his own observation as well as accurate and timely reports from his lookouts. Proper appreciation also involves a certain knowledge that his vessel's navigation lights and navigational equipment are functioning properly.
34. A lookout must be watchful for small vessels and objects both adrift and stationary.
35. A proper lookout is expected to listen for and, if possible, hear sound signals.
36. A proper lookout is expected to observe another ship's alteration of course.

37. A lookout, once he reports the light of another vessel, must not leave his post, unless properly relieved.
38. Making use of "all available means appropriate" is not restricted to the use of radar. Binoculars should be used not only by the lookout but also by other personnel in the pilothouse<sup>(1)</sup> and, when necessary, through an open window or from the bridge wing or equivalent location. [<sup>(1)</sup>**Comment:** *In the 1912 allision (and subsequent sinking) of the RMS TITANTIC with an iceberg, there were not enough binoculars on board the ship for the watch officer and the lookouts each to have a pair. If there had been, the accident might have been avoided.*]
39. Failure to make accurate observations of compass bearings constitutes an improper lookout.
40. Maintaining a proper lookout involves listening and giving adequate consideration to VHF radio information. This implies listening to the correct channel(s).
41. On occasion, such as when backing from a slip or backing while turning in a channel, a vessel requires a lookout in the stem. However, an overtaken vessel is not required to station a lookout on her stem. Nevertheless, it is always "good seamanship" to look astern before making a turn so as not to "embarrass" an overtaking vessel.
42. A vessel securely anchored in a safe harbor displaying the proper lights in ordinary weather generally does not require a lookout. However, under certain extreme weather conditions and in places where navigation is dangerous or difficult, such a lookout may be required. In these cases providing a watch on deck may not be sufficient if there is no one specifically detailed as lookout to warn off an approaching vessel.
43. A vessel is liable for damages to other vessels caused by dragging her anchor. This makes a proper lookout imperative when conditions make dragging anchor a possibility.
44. The Coast Guard in certain geographic areas has specific requirements for vessels at anchor near and while servicing oilfield installations.
45. The rules for maintaining a proper lookout apply to small as well as large vessels.

<b>POST A PROPER LOOKOUT OR BE PREPARED TO DEFEND YOUR LICENSE</b>
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*[Both statutes and regulations support work hour limitations and the need to provide an adequate lookout "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." **Although you may take short cuts and may get away with them, you take these shortcuts at your own risk.** As a mariner, your license is essential to your continued employment. By ignoring the need to post a proper lookout, you risk having your license suspended or revoked. Unless you are prepared to sign a "settlement agreement" with a Coast Guard Investigator following an accident, you will have to defend your license before an Administrative Law Judge. To do this, you will need a lawyer. In the case that follows (2576 – AILSWORTH) you will see how the results of several short cuts were judged by an ALJ and later by the Commandant on appeal. Our emphasis is shown in bold type taken from an actual appeal.]*

#### **Decision of the Commandant No. 2576**

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated Dec. 3, 1992, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's merchant mariner's license. The revocation was based upon finding proved charges of violation of law, **negligence, and misconduct.**

The two specifications supporting the negligence charge alleged that on Sept. 13, 1991, Appellant, while acting as Master of the towing vessel, M/V JACQUELINE A, under the authority of the above captioned license, negligently navigated the vessel resulting in an allision with a privately owned dock and vessel in the Wicomico River; and, on that same date, ***failed to maintain a proper lookout.***

The specifications supporting the charge of misconduct alleged that on Sept. 13, 1991, ***Appellant wrongfully worked on his vessel for more than 12 hours in a 24 hour period*** and wrongfully failed to give his name, address,

and identification of his vessel to the owner of the property damaged. The violation of law charge was supported by a single specification alleging that on Oct. 18, 1991, Appellant, while acting as master of the towing vessel, M/V JACQUELINE A, under the authority of the above captioned license, wrongfully worked for more than 12 hours in a 24 hour period.

The hearing was held at Norfolk, Virginia, on Feb. 11, 12, and 13, 1991. Appellant appeared personally with legal counsel at the hearing. Appellant denied all charges and specifications.

After the hearing, the Administrative Law Judge rendered a Decision and Order (D&O) in which she concluded that the charges and specifications had been found proved. The Administrative Law Judge's written Decision and Order was served on Appellant on Dec. 14, 1993, twenty-two months after the hearing. This D&O **revoked Appellant's merchant mariner's license** no. 670146 and all other valid licenses and certificates issued to Appellant by the Coast Guard. APPEARANCE: R. John Barrett, Law Offices of Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, VA 23510.

### Findings of Fact

Appellant served as master of the M/V JACQUELINE A, on Sept. 12 and 13, 1991, and on Oct. 18, 1991, under the authority of temporary Merchant Mariner's License No. 670146. Appellant's temporary license authorized service as: "Master Inland Steam or Motor Vessels of not more than 2,000 gross tons; first class pilot steam or motor vessels of not more than 2,000 gross tons upon Chesapeake Bay and tributaries." The M/V JACQUELINE A is a 119 gross ton, uninspected towing vessel with a length of 59.8 feet.

The M/V JACQUELINE A departed Southern States Cooperative, Inc., at Kilmarnock, Maryland, for Salisbury, Maryland, at approximately 1736 hours on Sept. 12, 1991, pushing a 195 foot hopper barge, the SL-185. The M/V JACQUELINE A terminated this voyage at Perdue's Terminal in Salisbury, Maryland, at approximately 0800 hours on Sept. 13, 1991. Thus, the voyage was in excess of 12 hours within a 24 hour period. Appellant and his deck hands ó William Ailsworth (his son) and Robert Apperson ó were the only personnel aboard the M/V JACQUELINE A during this voyage from Kilmarnock to Salisbury. **Appellant was the only licensed individual on board the M/V JACQUELINE A.**

During the morning of Sept. 13, 1991, while the Appellant navigated the M/V JACQUELINE A upriver on the Wicomico River near Whitehaven, Maryland, the visibility was limited by fog with visibility ranging from 1/8 to ¼ of a mile. There was an incoming tide on the river. Fog is not an uncommon occurrence on the Wicomico River in the Whitehaven area during mornings with an incoming tide.

At approximately 0420 on the morning of Sept. 13, 1991, the M/V JACQUELINE A and her barge, SL-185, were in the area of a dock owned by Mr. Thomas Lilly. A loud crash was heard by Thomas Lilly's neighbor, Calvin Peacock, at approximately 0420 on Sept. 13, 1991. Mr. Peacock lives upriver approximately ¼ to ½ mile from Thomas Lilly's dock.

After maneuvering for approximately 20 to 25 minutes in the area of the Lilly dock, the M/V JACQUELINE A continued its journey upriver towards Salisbury and passed a quarter of a mile above the Whitehaven ferry at approximately 0505.

During the time Appellant operated in the area of the Lilly dock, he sent a crewmember to the bow of the SL-185 to act as a lookout. The crewmember remained on the bow for approximately four seconds. Appellant then sent the other crewmember to the bow. He remained on the bow for one to two minutes. After leaving the area of the Lilly dock, Appellant had a crewman maintain a radar watch. The rest of the time, Appellant acted as his own lookout from the pilot house of the M/V JACQUELINE A using the radar. A 20 foot recreational fiberglass vessel, P/V HIGH HOPES, which is owned by Thomas Lilly, was moored between his dock and pilings on the west (downriver) side of the dock. The P/V HIGH HOPES had its bow facing the river when last seen at dusk on Sept. 12, 1991. The P/V HIGH HOPES was struck on its port side and twenty-seven to twenty-eight feet of the Lilly dock was sheered off by a force moving upriver.

According to a Maryland Natural Resources Police Officer, the only other vessel besides the M/V JACQUELINE A that had passed through the Route 50 bridge from dusk on Sept. 12, 1991, to 0750 on September 13, 1991, was the M/V NIKKI JO C, which passed outbound at 1945 on Sept. 12, 1991. A Maryland Natural Resources Department Police Officer took white fiberglass fragments from the barge SL-185 and the damaged P/V HIGH HOPES on Sept. 13, 1991. These particles were microscopically examined at the Maryland State Police Crime Laboratory by a forensic chemist. The chemist concluded, after examination, that the white fragments taken from the barge SL- 185 were consistent with the fragments taken from the fiberglass hull of the P/V HIGH HOPES. Appellant did not notify Mr. Lilly of the allision between the M/V JACQUELINE A's barge, SL-185, and Lilly's

dock and vessel.

Appellant also served as Master of the M/V JACQUELINE A on Oct. 17, 1991, under the authority of the above-captioned temporary license. On that date, the M/V JACQUELINE A, together with the barge SL-185, got underway at approximately 1730 for a scheduled voyage from Cargill Incorporated, Chesapeake, Virginia, to Cargill, Incorporated, Seaford, Delaware, on the Nanticoke River. Another licensed person, William Oliver, was supposed to accompany Appellant on this voyage; however, he did not make the trip for personal reasons. Appellant departed on the voyage at 1730 without an additional licensed operator. The scheduled trip of the M/V JACQUELINE A from Cargill in Chesapeake, Virginia, to Cargill in Seaford, Delaware, was a voyage of approximately 120 nautical miles. Appellant expected the trip to take at least fourteen hours.

During the voyage to Seaford, the M/V JACQUELINE A did not moor, anchor, or otherwise cease its underway operations until approximately 1600 on October 18, 1991. The only other person on board the M/V JACQUELINE A on this voyage was Robert Apperson, an unlicensed crew member. The underway time of the M/V JACQUELINE A on the voyage from Chesapeake to Seaford was approximately 22½ hours.

### **Bases of Appeal**

This appeal has been taken from the order imposed by the Administrative Law Judge. The Appellant contends:

1. That he was faced with an **emergency situation** in both instances when he operated his vessel in excess of 12 hours in 24 hour periods and, thus, no violations of 46 U.S.C. 8014(h) occurred.
2. The chain of custody for physical evidence was improperly maintained and, therefore, the evidence should not have been admitted.
3. The Administrative Law Judge improperly dismissed the testimony of Appellant's expert and relied on mere suspicion or speculation in finding the allision occurred.
4. The presumption of negligence does not apply to Appellant; therefore, the burden is on the Coast Guard to establish an independent basis for negligence, which it failed to do.
5. **The Appellant maintains that he properly served as his own lookout.**

### **Opinion 1-A**

Appellant contends the conditions present when he operated his vessel in excess of 12 hours in a 24 hour period amounted to emergency situations. Title 46 U.S.C. 8104 provides: "On a vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency." 46 U.S. Code §8104(h). Therefore, Appellant claims he was not in violation of 46 U.S.C. 8104(h).

Without addressing whether 46 U.S. Code §8104(h) permits an operator to work a continuous twelve hour watch, I disagree that the situations faced by the Appellant were "emergencies". Appellant has improperly interpreted the meaning of "emergency" in 46 U. S. Code §8104(h). Title 46 U.S.C. §8104 represents a recodification and compilation of several different statutes that were codified together as part of a comprehensive effort aimed at making Title 46, U.S.C. less redundant and easier to understand and apply. See H.R. Rep. No. 338, 98th Cong., 1st Sess., at 113-117. Accordingly, those statutes dealing with watches and work hour limitations were generally grouped within 46 U.S.C. 8104, Id. at 113-117, 180. Because the term "emergency" is not defined within 46 U.S.C. 8104 nor further clarified within 46 U.S.C. 8104(h), the various sections of the recodification of 46 U.S.C. 8104 should be read in consonance with each other. Id. at 180 ("The Committee intends that these sections [of Section 8104] to be [sic] interpreted in a manner consistent with one another."); see also, Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Railway Company, 274 F.2d 641, 647, (8th Cir. 1960), quoting, 73 Am.Jur.2d Statutes, 191 at 389 ("[t]he general intention is the key to the whole act, and the intention of the whole controls the interpretation of its parts"); Sutherland Stat. Const. 51.02 (5th Ed) (1995) (discussing construction of statutes on the same subject matter but with differing or omitted language). Prior to the recodification, provisions in 46 U.S.C. 8104(h) were found in 46 U.S.C 405(b), and provisions in 46 U.S.C. 8104(b) and (c), which also limit work hours, "except in an emergency," were found in 46 U.S.C. 235 and 673. Unlike the 46 U.S.C. 8104(h) provision imposing work hour limitations "except in an emergency," those in 46 U.S.C. 8104(b) and (c) impose the limitations "except in an emergency when life or property are endangered."

I do not consider the absence of the phrase "when life or property are endangered" from 46 U.S.C. 8104(h) to expand the application of the work hour limitation exception to additional emergency situations not imposed by 46 U.S.C. 8104(b) and (c). In order to apply the recodified sections of 46 U.S.C. 8104 in consonance with each other, I conclude that the work hour limitation in 46 U.S.C. 8104(h) also applies except in emergencies when life or

property are endangered. The Appellant was not faced with situations where life or property were endangered on either, Sept. 13, or Oct. 18, 1991, when he operated his vessel in excess of 12 hours within 24 hour periods; therefore, he was not faced with emergencies under 46 U.S.C. 8104(h).

### Opinion 1-B

Appellant argues that because "emergency" is not specifically defined in 46 U.S.C. 8104(h), a Webster's dictionary definition should be used. The Appellant wishes to define emergency as, "[a] sudden, generally unexpected occurrence or set of circumstances demanding immediate action." Appellant's Brief at 2.

However, even if the conduct of the Appellant is reviewed under the standard of the Webster's Dictionary definition, it falls short. For the misconduct occurring on Sept. 13, 1991, **Appellant contends that the fog encountered forced him to slow the M/V JACQUELINE A so that he was unable to complete his voyage within twelve hours and comply with 46 U.S.C. 8104(h).**

Appellant's son/deckhand testified that the weather conditions were, "hazy and starting to get foggy around the edges of the bank and stuff, like it usually does in there." Transcript (TR) at 355 (emphasis added). He went on to say, "We didn't know whether to stop, you know, because it usually gets worse upriver." TR at 356 (emphasis added). Additionally, Appellant's testimony reveals that, at the time of the voyage and with the existing tide conditions, fog was not an unusual occurrence. TR at 542. The record is clear that the Appellant knew fog was an expected occurrence in the area to be transited. Thus, Appellant cannot claim that the expected fog created a "generally unexpected occurrence or set of circumstances" forcing him to violate the statute.

Appellant seeks to categorize the voyage of Oct. 17 and 18, 1991, in excess of 22 hours from Chesapeake, Virginia, to Seaford, Delaware, as an emergency situation because the licensed crewmember he had scheduled cancelled. **Appellant claims his actions fall under the emergency exception because the person who cancelled did so to take his wife to the hospital and because the voyage had already been delayed by bad weather and could not be delayed any longer.** While the cancellation may be considered a generally unexpected circumstance, it certainly did not demand immediate action. In this scenario, Appellant stretches the meaning of emergency to extend to the economic loss he might incur while searching for a licensed replacement. Following Appellant's logic, a mariner would be permitted to avoid the work hour limitations of 46 U.S.C. 8104(h) for situations which are created by the mariner's own design. Plainly, these types of situations are not emergencies and I decline to accept them as such.

### Opinion 2

Appellant asserts that the custody chains for the samples of physical evidence collected and analyzed by the Maryland State Police were not properly maintained and, therefore, that evidence should not have been admitted. I disagree.

Appellant argues that the chain of custody is suspect because the police officer who took two samples from the barge SL-185 placed them in two separate plastic bags and the evidence log only indicates one sample.

Appellant's argument is specious. After a thorough review of the record, it is clear that the Investigating Officer established an adequate chain of custody for the admission of the lab results into evidence. The testimony of the police officer taking the samples indicates that two distinct samples were taken from the barge SL-185. TR at 322. One sample was scrapings of metal fragments and the other sample was of white particles. TR at 323. Each sample was put in a separate plastic evidence bag and labeled. TR at 322, 323. The two samples were then placed in one package and sent to the Maryland State Police Crime Laboratory for analysis. TR at 321-323. The custody log of the Maryland State Police did indicate that only one envelope was received; however, it contained two evidence bags, one with the metal fragments and one with fiberglass scrapings, both from the SL-185. TR at 323, IO exhibit No. 10. It is also clear that samples from the P/V HIGH HOPES and samples from the barge SL-185 were never mixed, as evidenced by the receipt from the Maryland State Police Crime Laboratory. IO exhibit No. 10. The laboratory examiner concluded that the white fragments from the barge SL-185 were consistent in color and microscopic appearance to the white fragment from the P/V HIGH HOPES. IO exhibit No. 10.

In addition, Appellant claims the samples were not properly secured because they were left in an unlocked storage compartment on the police vessel for 19 days and civilians were allowed to ride on the police vessel. These assertions by the Appellant are not supported by credible evidence in the record.

The samples of physical evidence collected by the Maryland State Police were kept on board the police vessel in a storage container from Sept. 13, 1991 through Oct. 2, 1991; however, the vessel was locked when the police officers were not present. TR at 155. The vessel may have been unlocked on occasion, but usually only when the

officers were in the area. TR at 169-171. The Maryland State Police did not permit civilians to ride on the vessel as Appellant claims. TR at 156-157. Furthermore, discrepancies in the chain of custody go to the weight of the evidence, not to its admissibility. *United States v. Shackelford*, 738 F.2d 776, 784 (11th Cir. 1984), *United States v. Jefferson*, 714 F.2d 689, 696 (7th Cir. 1983), *United States v. Lampson*, 627 F.2d 62, 65 (7th Cir. 1980); see also (Appeal Decision, 2202 (VAIL)).

Arguing that the samples taken were not credible, the Appellant also asserts that the presence of the white particles on the SL-185 is not determinative that the SL-185 allided with the Lilly dock and vessel. However, the Administrative Law Judge simply considered the similarity of the particles found on the barge SL-185 to the P/V HIGH HOPES as "some evidence to weigh" and not as determinative of the allision. D&O at 10. I do not find any significant breaches in the chains of custody for the samples collected from the vessels involved and, therefore, find that the samples were properly admitted into evidence and given credible weight by the Administrative Law Judge.

### Opinion 3

The Appellant contends that the Administrative Law Judge ignored the testimony of his expert witness and relied on mere suspicion or speculation in reaching her findings that he negligently navigated his tug and barge so as to collide with the Lilly dock and pleasure vessel. I disagree.

Appellant contends that the evidence presented by his expert was entitled to be given more weight than evidence presented by the Maryland State Police Officer because of his greater experience. The Administrative Law Judge, as the trier of fact, is the judge of credibility and determines the weight to be given to the evidence. "Appeal Decisions (2302 FRAPPIER), (2290 (DUGGINS), (2156 (EDWARDS), (2017 TROCHE), (2365 EASTMAN), (2551 LEVENE). **Seeing no reliance by the Administrative Law Judge on inherently incredible evidence, that judgment will not be disturbed on appeal.** Appeal Decisions, (2541 RAYMOND), (2522 JENKINS), (2492 RATH), (2333 (ALAYA). My review of the record does not indicate the testimony of the Maryland State Police Officer was inherently incredible. It also indicates that the Appellant's expert's testimony was discredited.

Appellant maintains that the testimony of his expert witness regarding the physical evidence proves the barge SL-185 could not have been involved in the allision. The Appellant's expert witness, Mr. David Barto, testified that, in his opinion the damage to the P/V HIGH HOPES was inconsistent with being hit by the barge SL-185. TR at 468-469. However, on cross examination, Mr. Barto conceded that, in order to reach the conclusion that the barge SL-185 did not cause the damage to the P/V HIGH HOPES, he would have to make assumptions on the speed of the barge SL-185 and the strength of the P/V HIGH HOPES and the pier. He further admitted that none of these factors were known to him or tested by him. TR at 483. This cross examination discredited the Appellant's expert witness testimony. In finding that the barge SL-185 struck the P/V HIGH HOPES and Lilly dock, the Administrative Law Judge relied on evidence that proved the physical possibility of the accident including: the depths of the water around the Lilly dock, the sandy quality of the bottom, the draft and contour of the barge SL-185, and testimony and evidence presented by the State Police. D&O at 11. Additionally, I note that the SL-185 was in close proximity to the Lilly dock and vessel at the time of the crash, and that the only other vessel in the Wicomico River, the M/V NIKKI JO C, was eliminated as a possible cause of the allision because it was traveling in the opposite direction and not in the area at the time of the allision. It is well established that the Administrative Law Judge is not bound by the testimony of expert witnesses. Appeal Decisions (2294 TITTONIS), (2365 (EASTMAN). **The decision of the Administrative Law Judge to dismiss an expert's testimony will not be overturned unless arbitrary, capricious or an abuse of discretion.** Appeal Decision (2365 EASTMAN).

Furthermore, the findings made by the Administrative Law Judge need not be consistent with all the evidentiary material contained in the record so long as sufficient material exists in the record to justify such a finding. Appeal Decisions (2282 LITTLEFIELD), (2395 LAMBERT), (2450 FREDERICK). I find the Administrative Law Judge's decision to discredit the Appellant's expert witness's testimony and find that the barge SL-185 struck the P/V HIGH HOPES and dock are well reasoned and based on credible evidence in the record. Therefore, I will not overturn them on appeal.

### Opinion 4

Appellant argues that the presumption of negligence that may arise when a vessel strikes a stationary object is not applicable in this case because the offending vessel is not clearly known. Appellant also argues that, because the Coast Guard failed to establish that an allision occurred, the specification for failure to give his name and address to the owner of the property damaged, Mr. Lilly, must also fail. TR at 265 & 551. Because I have already found that the Administrative Law Judge's finding that the barge SL-185 struck the P/V HIGH HOPES and dock is

supported by credible evidence in the record, this basis for the Appellant's appeal is eliminated and I decline to address it further.

### Opinion 5

**The Appellant maintains that he properly served as his own lookout by using the M/V JACQUELINE A's radar.** Appellant contends, citing Capt'n Mark v. Sea Fever Corp., 692 F.2d 163, (1st Cir. 1982), that the rule requiring a lookout to be on the bow at all times and to have no other duties is an unrealistic requirement to impose on small vessels with limited crews, especially those equipped with radar.

The Appellant misreads the ruling in Capt'n Mark. **The question is not whether a dedicated lookout should have been posted on the bow of the barge SL-185 at all times, only whether Appellant could properly serve as the lookout in light of all the attendant circumstances.** See Capt'n Mark, supra, at 166.

Rule 5 of the Inland Rules of Navigation provides: "Every vessel shall at all times maintain a proper lookout 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." 33 U.S. Code §2205.

**The adequacy of the lookout is a question of fact to be determined in light of all existing facts and circumstances.** Capt'n Mark, supra, at 166-165; Anthony v. International Paper Co., 289 F.2d 574, 580 (4th Cir. 1961) ("the question of the sufficiency of the lookout in any instance is one of fact to be realistically resolved under the attendant circumstances, bearing in mind that **the performance of lookout duty is an inexorable requirement of prudent navigation**").

In Coast Guard suspension and revocation proceedings, in order to determine the adequacy of the lookout, the Administrative Law Judge must carefully consider all of the surrounding circumstances faced by the lookout and determine whether those circumstances permitted the lookout to adequately perform lookout duties. See Appeal Decisions (2319 PRAVELEC), (2390 PURSER), (2421 RADER), (2474 CARMENKE), (2482 WATSON), (2046 HARDEN). The facts on the record indicate that the Appellant, while the M/V JACQUELINE A and the SL-185 were transiting the fog-laden Wicomico River, on two separate occasions sent a crewman to the head of the bow of the barge SL-185. Additionally, at other times, he performed lookout functions using the radar and had a crewman maintain a radar watch after leaving the area of the Lilly dock. TR at 545. Robert Apperson was sent to the bow while the M/V JACQUELINE A was in the area of the Lilly dock to act as a lookout and **he stayed there for approximately "four seconds". TR at 46. That was the only time he acted as a lookout.** TR at 47. The other crewman, William Ailsworth, went to the bow to act as a lookout after Robert Apperson returned from the bow. TR at 544. **He remained on the bow for "a minute, two minutes."** TR at 360. According to William Ailsworth, at this time, the fog was so thick at points that you could not see the bow of the barge from the wheelhouse of the M/V JACQUELINE A. TR at 357.

The conditions all the way up the Wicomico River, approximately 12 to 15 miles, continued to be thick blankets of fog with occasional clearings, with visibility limited to 1/8 to 1/4 mile. TR at 201, 363-365. The M/V JACQUELINE A would slow in the fog and speed up in clear spots, however, no lookouts were posted on the bow for the remainder of the journey to Salisbury. TR at 363. **The Administrative Law Judge held that, under the prevailing circumstances, and considering the length of tow and the fact the transit occurred during the darkness of night, a lookout should have been stationed at the head of the barge SL- 185.** D&O at 12. I find that the Administrative Law Judge properly reviewed all of the attending circumstances faced by the crew of the M/V JACQUELINE A and appropriately determined those circumstances did not permit the Appellant to serve as both the vessel operator and lookout on the Wicomico River during the morning of Sept. 13, 1991.

### Conclusion

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable law regulations. I find no error in the Administrative Law Judge's application of the law.

### Order

The decision of the Administrative Law Judge dated Dec. 3, 1992, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED. ROBERT E. KRAMEK Admiral, U.S. Coast Guard Commandant. Signed at Washington, D.C., this 7th day of July, 1996.

## POST A PROPER LOOKOUT OR PAY FOR THE CONSEQUENCES

United States District Court, Eastern District of Virginia

Civil Action No. 2:08cv377 (**Editorial Note:** Contains excerpts only)

In the matter of the Complaint of VULCAN MATERIALS COMPANY, owner of the Tug WILLIAM E. POLLE,  
for Exoneration from or Limitation of Liability.

### **Opinion and Order**

This suit in admiralty, arising out of the death of Freddie N. Porter, Jr. ("Porter"), comes before the Court following a four-day bench trial on Claimant Cassita Massiah's ("Massiah") wrongful death claim against Plaintiff Vulcan Materials Company ("Vulcan") and on Vulcan's claim for contribution against the United States.

The Court ruled from the bench at the trial's conclusion.

However, the Court reserved for later resolution the issue of whether the United States was properly a party to this action in light of the Feres doctrine, and withheld the entry of judgment until that matter was settled. The Court now sets forth its findings of fact and conclusions of law, thereby resolving all outstanding issues in this matter, and enters judgment in favor of Claimant Massiah.

### **1. Jurisdiction**

**Limitation of liability actions such as this one**, arising out of a maritime collision, fall within the Court's admiralty jurisdiction. See Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 206 (1996).

### **2. Factual Findings**

#### **A. The Navy RHIBs**

On October 11, 2007, nineteen-year-old Freddie N. Porter, Jr. and a number of fellow Navy personnel attached to Seal Delivery Vehicle Team Two departed from the United States Navy's Little Creek Amphibious Base ("Little Creek") in five rigid-hull inflatable boats ("RHIBs") for a navigation training exercise. The operation was part of a two-week coxswain course that Porter, a land-based supply clerk, had volunteered to attend. This would be the fourth and last training exercise of the course, and was intended, like the previous exercises, to give the students an opportunity to practice skills they had learned in the classroom over the duration of the course. Before leaving Little Creek, each RHIB's crew completed a pre-operation inspection, verifying, *inter alia*, the proper functioning of the boats' running lights.

Once underway, the RHIBs moved up the James River to Jordan Point, where their crews disembarked to have dinner and await their nighttime return to Little Creek.

When darkness fell, each crew conducted another pre-operation inspection, and again verified that all lights on the boats ó including an all-around white light mounted next to the radar dome on the aft mast, and a set of red and green running lights mounted forward in the RHIBs ó were functioning properly. This time the crewmembers also verified that each was wearing a functioning chemlight, which would help rescuers spot crewmembers in an emergency.

For this return trip, the crews were instructed to stay inside the shipping channel to minimize their chances of running aground or hitting obstacles such as crab pots.

Porter boarded his RHIB, call-sign **Tango-2**, in the forward lookout position, and fellow student Esteban Angeles ("Angeles") took the helm. Petty Officer Albert Bollinger ("Bollinger") also boarded **Tango-2**, as the safety observer and qualified coxswain. Bollinger had completed the two-week coxswain course, thereby becoming a qualified coxswain, in December 2006; he subsequently served as a qualified coxswain in several operations. Prior to December 2006, however, Bollinger had **no boating experience**, and as of October 2007 he had never been a safety observer and had never made the run to Jordan Point.

Other students and safety observers boarded **Tango-1** and **Tango-3**. Officer-in-Charge David Hupp ("Hupp") boarded a fourth RHIB, call-sign **Sierra Bravo**, along with Lead Petty Officer Julio Rodriguez Vargas ("Rodriguez"). Safety observer Eric Johnson, Chief Kord Nelson, and medical technician Elias Kfoury boarded the second safety boat and fifth boat overall, **Sierra Charlie**. **Tango-2** and **Sierra Bravo** left Jordan Point first, but were soon passed by the other three RHIBs.

## B. The Tug WILLIAM E. POOLE

Sometime before Porter and his classmates left Jordan Point for the return trip to Little Creek, Captain Rony Wooldridge maneuvered his tug, the WILLIAM E. POOLE, away from the Campostella docks in Norfolk, Virginia and headed up the James River pushing a six-barge flotilla that was three barges long and two barges wide. With thirty-three years of experience on the James River, Wooldridge had made similar trips thousands of times, most recently as an employee of the Vulcan Materials Company, which owned the POOLE.

The barges in front of the POOLE on this particular trip were empty; their decks were approximately twelve feet above the waterline, and a short wall around the perimeter of each barge's cargo box (the "cargo box wall") rose an additional two or three feet off the deck. After getting underway and approximately one hour before sunset, Wooldridge instructed his deckhand, Joseph Christensen, to position and illuminate the flotilla's running lights. Christensen placed the portable lights on the forward cargo box walls of the forward two barges ó a green light on the far starboard side, a flashing amber light as close to the center as possible, and a red light on the far port side.

From their perch in the POOLE'S wheelhouse, Wooldridge and Christensen had an expansive view of their surroundings, but a portion of that view was blocked by the empty barges, riding high in the water, that extended about five hundred and eighty-five (585) feet forward of the tug. In fact, the barges created a blind spot that extended approximately six hundred (600) feet forward of the flotilla's bow at water level. Thus, much like a driver's inability to see the road immediately in front of his car, Captain Wooldridge and his deckhand could not see the river ó or an object on the river, depending on its height ó for some distance in front of the flotilla.

After passing the James River Bridge, the POOLE flotilla proceeded north up the James River past Fort Eustis to Hog Island, where it picked up an additional two barges. These were arranged bow-to-stern and then placed on the port side of the of the existing flotilla, such that the enlarged flotilla comprised a forward row of three barges, a middle row of three barges, an aft row of two barges (in the center and starboard positions), and the POOLE, which was positioned behind the aft center barge. Christensen then relocated the red and amber lights to positions on the forward barges' front cargo box walls on the far portside and the center of the flotilla, respectively. Although placing the lights on the cargo box walls in this manner caused them to be higher up than if they were placed on the deck, it also created another blind spot, within which the lights could not be seen from someone on or in the water. This second blind spot extended approximately ninety feet forward of the bow of the flotilla at water level.

With the lights in position, the POOLE departed Hog Island at around 10:00 p.m. and continued along the James River toward Jamestown Island.

## C. The Collision

Winding inland from the Chesapeake Bay, the James River runs north past Fort Eustis and Hog Island, then makes an S-curve around the north end of Hog Island and the south end of Jamestown Island before continuing on to the northwest. Although the river is more than a mile wide throughout this area, the shipping channel through the bend at Jamestown Island is only three hundred (300) feet wide. The eastern end of the channel is marked by buoys 53 (on the south side of the channel) and 54 (on the north side of the channel). As the POOLE cleared the bend around Jamestown Island and headed toward these buoys, there was little if any ambient light; the shores, the water, and the sky were dark. It was windy and the water was choppy, with swells of one (1) to two (2) feet. The swells caused clutter on the POOLE's radar, making it difficult to see objects with small radar returns ó such as the RHIBs ó on the radar screen.

While the Poole was pushing upriver toward buoys 53 and 54, **Tango-2** and the other RHIBs were traveling downriver toward the same buoys. **Tango-2's** crew noticed but could not identify a white light in the direction of the buoys; the light was the POOLE's spotlight, which Captain Wooldridge had trained on the port bow of the flotilla so that he could better perceive the direction of the flotilla's movement in the water. Onboard **Tango-2**, Bollinger noted Angeles' confusion about the light and told him to slow down, make a decision about what to do, and then proceed. Angeles reduced throttle, and **Sierra Bravo**, trailing behind **Tango-2**, did the same; both boats drifted in the shipping channel with their bows pointed south while their crews tried to make out the source of the light. Rodriguez, who was at the controls of **Sierra Bravo**, saw a large object on his RHIB's radar, but was unable to visually identify the object. Hupp, also in **Sierra Bravo**, tried unsuccessfully to identify the object using a night vision monocular.

Meanwhile, **Tango-1**, **Tango-3**, and **Sierra Charlie** had crossed to the other side of the shipping channel and were proceeding downriver. They also saw the light, and eventually identified it as a spotlight on the tug. Kfoury, one of the crew of **Sierra Charlie**, testified that there was some radio chatter about the tug amongst the RHIBs, but neither Angeles nor Bollinger could recall hearing anything about the tug on Tango-2's radios. No one was using Tango-2's radar; Angeles, who was in the operator's chair, did not know the RHIB was equipped with radar, and Bollinger, the boat's safety observer, did not know how to use it. Although Rodriguez saw something on Sierra

Bravo's radar and Hupp saw something through his night-vision monocular, neither conveyed any information about the object to Tango-2's crew.

Within minutes after **Tango-2** and **Sierra Bravo** stopped in the shipping channel, the forward bow of the POOLE's flotilla emerged from the darkness on their port side. **Sierra Bravo** either maneuvered out of the way or was already out of the way, and avoided being hit. **Tango-2** was not so lucky. After a brief attempt to get the RHIB moving, Bollinger dived off the boat's stem, clear of the barges, and Angeles leapt over the starboard side. As the barges ran over him, Angeles tried to swim down, but his life jacket kept pulling him upward against the barges' hulls.

Just as he could hold his breath no longer, the flotilla passed and Angeles popped out from under the water. Both Angeles and Bollinger were soon picked up by **Sierra Bravo**, which had turned on its floodlights as the flotilla passed. All that could be found of Porter, however, was his chemlight, floating free in the water. Porter's body was later found washed up on the beach, with multiple injuries. The injuries had been inflicted by a propeller on the POOLE, and an autopsy conducted by Dr. Whaley, a state medical examiner, concluded that Porter had been conscious until he received a final fatal blow to the head.

Despite the chaos occurring at the front of their flotilla, neither Wooldridge nor Christensen observed anything out of the ordinary from the tug's wheelhouse. They had seen Sierra Charlie, Tango-1, and Tango-3 pass the flotilla on the port side, in formation; they also saw what appeared to them to be a fishing boat, floating outside buoy 54 on their starboard side, that turned on its floodlights as the POOLE passed by. Wooldridge briefly illuminated this boat with his spotlight, but again saw nothing out of the ordinary. The POOLE's crew knew nothing of the collision until they were contacted by the Coast Guard the following day.

Porter was survived by his mother, Cassita Massiah, of Garfield, New Jersey; his father, Freddie Porter, Sr. ("Porter, Sr."), of Brooklyn, New York; and seven siblings: Alexia M. Massiah-Alexis, Jacqueline Massiah-Robeiro, Corlette Massiah, Sophia Porter, Zarría Porter, Alicia Porter, and Dondre Porter. Cassita Massiah was Porter's custodial parent for most of his childhood, though Porter, Sr. had visitation rights and maintained a close relationship with his son. Indeed, Porter had a good relationship with each of his family members. Although he did send money to his mother on occasion, Porter had no dependants at the time of his death.

The parties stipulated that the fair market value of the POOLE immediately following the collision was one million five hundred thousand dollars (\$1,500,000.00). The United States made a death gratuity payment to Massiah of one hundred thousand dollars (\$100,000.00) shortly after Porter's death, and also reimbursed Massiah for Porter's funeral and burial expenses in the amount of seven thousand twenty dollars (\$7,020.00).

### 3. Legal Conclusions

The following legal issues require attention, and will be addressed in turn: (1) whether Vulcan is entitled to exoneration or limitation of liability; (2) whether the United States is liable for contribution to Vulcan; and (3) what damages, if any, are appropriate.

#### A. Vulcan's Claim for Exoneration or Limitation of Liability

Pursuant to Supplemental Rule F of the Federal Rules of Civil Procedure, Vulcan seeks exoneration from or limitation of liability arising out of the Oct. 11, 2007 collision between Tango-2 and the tug WILLIAM E. POOLE.

In a limitation of liability proceeding, the Court must first determine what acts of negligence proximately caused the collision, and then, if necessary, whether the limitation plaintiffs are entitled to limit their liability for their negligence. In re Nat'l Shipping Co. of Saudi Arabia, 147 F. Supp. 2d 425, 430 (E.D. Va. 2000).

In admiralty, proximate cause is defined as "that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened." Ente Nazionale Per L'Energia Elettrica v. Baliwag Nay., Inc., 774 F.2d 648, 655 (4th Cir. 1985) (quoting Olympic Towing Corp. v. Nebel Towing Co., Inc., 419 F.2d 230, 233 (5th Cir. 1969)).

#### 1. Negligence

The Court FINDS that both the United States and Vulcan were negligent on the night of Oct. 11, 2007, and the Court further FINDS that Porter's death was proximately caused by the negligence of both the United States and Vulcan. The United States negligently operated an unseaworthy vessel by manning **Tango-2** with an incompetent crew. See Dickens v. United States, 815 F. Supp. 913, 918 (E.D. Va. 1993) (citing Thezan v. Maritime Overseas Corp., 708 F.2d 175, 179 (5th Cir. 1983)) ("An improperly manned vessel is unseaworthy as a matter of law."). Neither the two students aboard **Tango-2** nor its safety observer were properly prepared to

operate a RHIB in a busy shipping channel at night. Even Bollinger, the safety observer, had pitifully little experience on the water, and as students neither Angeles nor Porter had sufficient experience to counteract this deficiency.

The crew's incompetence, and hence **Tango-2's** unseaworthiness, was manifest in part by other acts of negligence that night. As **Tango-2** and **Sierra Bravo** traveled downriver in the vicinity of Jamestown Island, they kept to the port side of the channel in violation of Inland Navigation Rule 9 ("Rule 9"), which requires vessels to stay on the starboard side of a channel. 33 U.S.C. §2009 (2006).

**Tango-2** safety observer Bollinger instructed Angeles to stop the boat when they were in the middle of the shipping channel, in further violation of Rule 9. Notwithstanding his responsibility for the safe completion of the entire training operation, Hupp failed to prevent or rectify these violations, even though his own RHIB, **Sierra Bravo**, participated in them. Rodriguez saw a large object on the tug and its flotilla on **Sierra Bravo's** radar screen, but, fixated on establishing visual identification of the object, he failed to understand the danger it posed and failed to provide an adequate warning to the crew of **Tango-2**.

Although **Tango-2** was also equipped with radar equipment that, if used, could have provided lifesaving information to its crew, safety observer Bollinger did not know how to use it and Angeles did not even know it was there.

**Vulcan too was negligent. Inland Navigation Rule 5 ("Rule 5") requires vessels to post a proper lookout.** Id. §2005. Vulcan's own credible expert witness, Captain Raymond Robbins, identified the factors to be considered in deciding whether to post a lookout: a dark night, bad weather, a narrow channel, a blind spot, and the presence of small boat traffic. These factors were present on October 11, 2007: the night was dark and windy; the water was choppy, which caused clutter on the POOLE's radar and made it difficult to see small boat traffic on the radar screen; the POOLE was in a narrow channel and, because of the eight barges it was pushing, had a significant blind spot; and Captain Wooldridge testified that small boat traffic is common on the James River.

Vulcan presented testimony that safety is better served by keeping both the captain and the deckhand in the wheelhouse, where they have an all-around view of the tug's operating environment, and the Court is persuaded that the deckhand can best contribute to the safe operation of the tug and tow from the wheelhouse. However, **Vulcan presented no evidence to suggest that a third individual could not be posted as a lookout when the above factors indicate that a lookout is required.**

When asked when he would post a lookout, Captain Wooldridge replied that he would do so when his vision was impaired. **Although the Captain denied his vision was impaired, the Court FINDS otherwise.**

First, the Captain kept his searchlight activated for an extended period of time in order to assist his vision while negotiating a difficult turning maneuver with this large flotilla in a narrow channel on a dark night in choppy waters.

Second, neither the captain nor his deckhand saw **Tango-2**, although they had no difficulty seeing **Tango-1**, **Tango-3**, **Sierra Charlie**, and what turned out to be **Sierra Bravo**, which they thought was a fishing vessel. Notably, **Tango-2** was in the middle of the channel, in the blind spot created by the eight-barge flotilla riding high in the water while being pushed by the POOLE. **Clearly the Captain's and his deckhand's visions were impaired by the totality of these conditions.** A lookout stationed at the bow of the forward barge probably could not have warned the Captain in time to change his course, but a properly equipped lookout could have warned **Tango-2** and alerted the Captain to sound his whistle (horn) as a further warning to **Tango-2**.

Vulcan also argued that there was insufficient time to post a lookout from the moment Wooldridge and Christensen saw the first three RHIBs pass to the estimated time of the collision. While this is no doubt correct, **the small boat factor becomes relevant not just when the presence of small boat traffic has been confirmed, but also when previous experience suggests – as it did here – that small boat traffic is to be expected.** All of the factors that inform whether to post a lookout pursuant to Rule 5 were therefore satisfied on Oct. 11, 2007, and Vulcan was negligent in failing to post one.

**Vulcan's expert witness, Captain Robbins, focused persuasively on the desirability of locating the deckhand in the wheelhouse, but he did not address the option of a third crewman being posted on the bow of the forward barge. Vulcan regularly operates flotillas at night through this narrow channel with a difficult turn where small boat traffic is to be expected, and it should have manned its crews with a properly equipped third member in order to maintain a proper lookout.** Claimant's expert witness, Mitchell Stoller, accused Vulcan of multiple acts of negligence, but only the improper lookout is proven by the evidence.

"Liability for maritime collisions is allocated proportionately to the comparative degree of fault." Nat'l Shipping, 147 F. Supp. at 430 (citing United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975)). While both the United States and Vulcan were negligent, the negligence of the United

States far outweighed that of Vulcan. Accordingly, the Court FINDS that the United States was eighty percent (80%) at fault and Vulcan was twenty percent (20%) at fault for Porter's death.

## 2. Limitation of Liability

Having found Vulcan negligent, the Court must now determine whether Vulcan is entitled to limitation of liability. By statute, "the liability of the owner of a vessel for any claim, debt, or liability . . . shall not exceed the value of the vessel and pending freight" if the claim, debt, or liability arose "without the privity or knowledge of the owner." 46 U.S.C. §30505 (2006). "Privity and knowledge, as used in this statute, have been construed to indicate that a shipowner knew or should have known that a certain condition existed." *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634, 638 (4th Cir. 1987). If a negligent act or condition could have been discovered by the shipowner through reasonable diligence, the shipowner will be charged with knowledge. *Id.* (citing *Empresa Lineas Maritimas Argentinas S.A. v. United States*, 730 F.2d 153, 155 (4th Cir. 1984)). A shipowner seeking limitation of liability bears the burden of proving a lack of knowledge or privity. *Id.* (citing *Coryell v. Phipps*, 317 U.S. 406 (1943)).

**The Court FINDS that Vulcan had privity and is therefore NOT entitled to limitation of liability. Vulcan should have known that a flotilla traveling on the James River, under the circumstances that prevailed on Oct. 11, 2007, would need a lookout on the bow of the forward barge. Further, it was Vulcan's responsibility to make provisions for the availability of such a lookout. As Captain Wooldridge testified, his deckhand was best utilized as a second observer in the tug's wheelhouse. Thus, a third individual was needed to act as lookout, and Vulcan, NOT Captain Wooldridge, was responsible for providing that individual.**

## B. Liability of the United States

Vulcan contends that it is entitled to contribution from the United States. "Contribution rests upon a finding of concurrent fault." *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 114 (1974). The Court in *Cooper Stevedoring* explained that when two parties are both at fault, "[t]he interests of safety dictate that ... they should bear the damage equally, to make them more careful." *Cooper Stevedoring*, 417 U.S. at 111. **Today, however, the "preferred method of federal contribution is allocation on the basis of comparative fault."** *Franklin Stainless Corp. v. Mario Transport Corp.*, 748 F.2d 865, 871 (4th Cir. 1984); see also *Reliable Transfer*, 421 U.S. at 411.

The Court has already found that the United States shares fault with Vulcan for Porter's death, suggesting that contribution would be appropriate. However, because the United States has challenged this Court's jurisdiction over Vulcan's contribution claim, the Court must address that issue before concluding whether contribution is merited.

By motion filed on Sept. 15, 2009, Doc. 51, and again in its Proposed Findings of Fact and Conclusions of Law, Doc. 76, the United States asserts that this Court lacks subject matter jurisdiction over the claims against the United States under the *Feres* doctrine. Because of the timing of the motion and the desirability of a complete record, the Court declined to rule on the United States' motion before trial, but it will do so now.

*[Editorial note: We deleted considerable text material on "Sovereign Immunity" that did not focus directly on the main theme of this report.]*

**[NMA Comment: Sovereign Immunity is a doctrine precluding the institution of a suit against the sovereign [government] without its consent. Though commonly believed to be rooted in English law, it is actually rooted in the inherent nature of power and the ability of those who hold power to shield themselves.]**

## 4. Judgment

Having FOUND Plaintiff Vulcan Materials Company to be jointly and severally liable for the wrongful death of Freddie N. Porter, Jr., and in accordance with the damages provisions of Virginia law, the Court GRANTS judgment for Claimant in the amount of **one million two hundred fifty thousand dollars (\$1,250,000.00)**

Norfolk, VA December 17, 2009

Henry Coke Morgan, Jr, Senior United States District Judge

## THE REAL WORLD OF OUR LIMITED TONNAGE MARINERS

Since our limited-tonnage mariners do not live in the perfect world envisioned by the Navigation Rules, we find that some of them take shortcuts and develop bad habits. Our Association published an entire series of reports on work hour abuses under the existing two-watch system. These reports also show a number of ways that licensed mariners may be forced to violate the 12-hour statutes. These reports include:

- #R-370, Rev. 3. Watchstanding and Hours of Service Limits Using the Two-Watch System. 16p.
- #R-370-A, Rev. 2. Report to Congress: Fifth Anniversary of the Webbers Falls I-40 Fatal Bridge Accident: Unresolved Issues Revisited. 12p. .
- #R-370-B, Rev. 4. Violation of the 12-Hour Rules: The Tug Chinook Strikes & Damages the Lake Washington Bridge. 14p.
- #R-370-D, Rev. 6. Whistleblower Protection, Work-Hour Abuse, and Deadhead Transportation. 16p.
- #R-370-E. Crew Endurance: Work-Hour Laws and Regulations Need Review. 8p..
- #R-370-F Crew Endurance Management Systems. 9p.
- #R-370-G Crew Endurance: The Call Watch Cover-up. 10p.
- #R-370-H. 12-Hour Rule Violations: Harbor Tugs and The One-Watch System. 4p.
- #R-370-I. Safe Management of Crew Travel Time.
- #R-370-J. The 12/24 Hour Rule by LCDR Tom Beistle. 18p.
- #R-370-K. 12 Hour Rule Violation: The Verret Case. 12p.
- #R-370-L, Rev. 1. The National Transportation Safety Board Views on Fatigue and Hours of Service Regulations. 21p.

While statutes provide for a 12-hour workday for licensed officers, we have been unable to convince Congress that unlicensed ratings like deckhands and ordinary seamen who are used as lookouts must have adequate lookout training as well as adequate sleep to perform properly.

The American Waterways Operators, the tug and barge industry in its Responsible Carrier Program suggests that deckhands should not be worked more than 15 hours in a 24-hour period. On vessels covered by the International Maritime Organization's Standards of Training, Certification and Watchkeeping (STCW) allows a 14 hour workday but also insists upon 10 hours of rest in the 24-hour period. Our Association seeks a 12-hour limit for all mariners!

The Coast Guard consistently resists requiring mariners to show their hours on duty in their logbooks. Consequently, widespread work-hour abuses continue unchecked. However, Congress has proposed legislation in H.R. 3619 to close the logbook loophole after the huge Mel Oliver-Tintomara oil spill in the Lower Mississippi River in July 2007.

Bringing towing vessels under inspection will require the Coast Guard to set minimum manning levels for each vessel on its Certificate of Inspection. Yet, in the past, we have seen other inspected vessels with crews that are unable to adequately serve the needs of the vessel. Our Association believes that this entire process must no longer be a closed partnership between the Coast Guard and the vessel owners that allows this undermanning of vessels to continue. We want our mariners to have a seat at the table while these manning standards are set and when they are applied to each vessel. These manning decisions directly impact mariner health, safety, and welfare. It is precisely this that has diminished the attention given to posting lookouts on many limited-tonnage vessels.

To make improvements, there must be enough crewmembers on the vessel to carry out the Lookout function required by Rule 5. Lookouts must be trained to perform the required functions day or night, in all weather conditions. A lookout cannot be effective if he is in the galley watching television or making coffee. A lookout cannot be effective sitting on a settee with his line of sight below the base of the pilothouse windows. Nor can he function effectively if he has neglected his night vision.

Failing to post a proper lookout can lead to problems for mariners and for their employers as shown in the two cases presented in this report. While 46 CFR §164.11(a)(b) requires that the wheelhouse is constantly manned by persons who direct and control the movement of the vessel and who fix the vessel's position are competent to perform that duty, the regulation only applies to vessels of 1,600 or more gross tons. The accident on the James River should convince Congress to require training and competency as a lookout on all commercial vessels.