

THE LOOKOUT RULE
Daryl F. Sohn, Goldstein and Price, L.C., St. Louis, MO

The lookout rule along with the other navigation rules has the force of a federal law. It is codified as both a statute (33 USC 2005) and a regulation (33 CFR 83.05).

In 1980 Congress created the 38 Inland Navigation Rules by using the 1972 international rules of the road (collision avoidance regulations, or "COLLREGS") as a starting point and then evaluated and combined the 7 separate sets of then-existing inland rules (Western Rivers, Great Lakes, etc.). In 2004 Congress gave the Department of Homeland Security authority to revise the navigation rules as it saw fit (33 USC 2071, 14 USC 1). The DHLS adopted the 38 rules as regulations but thus far has not revised them.

The 1980 Inland lookout rule is the same as the 1972 COLLREG lookout rule. It simply says that 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."

The foregoing language makes it clear that the degree of vigilance necessary, and the means to be used, depends on all of the circumstances. Generally the obligation becomes more onerous as the size and power of the vessel increases, traffic increases and visibility decreases. *The Adriane*, 80 U.S. 475 (1871). "Prevailing circumstances" may also include other factors such as the likelihood of an accident (which would increase with increased speed) and the potential harm (which would increase as the size of the tow increases, or when pushing tank barges with flammable cargo or operating near pleasure boats). Factors peculiar to the river system that may not be as important in coastal areas like the Intracoastal Waterway is the fact that a down-bound vessel must deal with cross currents and requires a longer stopping distance in a rising river as the current strength increases.

Courts have held that a proper lookout may require the use of radar. *American Hull Syndicate v. Allied Towing Corp.*, 661 F.2d 1044 (5th Cir. 1981). It may also include constant monitoring of the radio to listen for the location of other vessels, and periodically calling over the radio to announce your vessel's location and check for others in the area. See the *American Hull Syndicate* case above.

When Congress enacted the Inland Navigation Rules, it stated in its written comments that generally the person assigned to be a lookout "should not be assigned or undertake (other) duties that might interfere with this function." In a vacuum this language makes it sound like a vessel's pilot could not serve as his own lookout. However, in its comments, Congress went on to specifically say that vessels which have a "unobstructed all-round view" from the steering position may not necessarily need a separate lookout other than the pilot. Congress cited "towing vessels" as an example of a vessel that may have an unobstructed all-round view from the pilot's station. Congress stated however, that such vessels may only dispense with posting a separate lookout after it is "clearly established" that a separate lookout is unnecessary after "all relevant factors" including visibility, traffic and other hazards have been "carefully assessed." *Senate Report 96-979*.

Therefore, in clear weather when other traffic is minimal, courts have held that a towboat pilot may not need to post a separate lookout. *Inland Oil and Transp. Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983); *Marport, Inc. v. Stabbert and Associates, Inc.*, 771 F.2d 1216 (9th Cir. 1985). On the other hand, when a towing vessel is operating in fog or other reduced visibility, even when the pilot is using radar courts may find he should post a separate lookout. When a towboat is pushing ahead the obvious position for the lookout would be at the very head of the tow. *American Hull Syndicate v. Allied Towing Corp.*, 661 F.2d 1044 (5th Cir. 1981); *Hygrade Operators v. The Tug Tahchee*, 2003 AMC 2802 (D.N.J. 2003).

The obligation to post a separate lookout at the head of the tow increases if the barges partly obscure the pilot's view of the river ahead. *Hygrade Operators v. The Tug Tahchee*, 2003 AMC 2802 (D.N.J. 2003). Presumably every pilot can calculate roughly how long and wide the blind spot is in front of and to the side of the tow, based upon the eye level of the wheelhouse, the length of the tow and whether the barges are loaded or empty. The size of this blind spot is an important factor to consider in determining whether to post a separate lookout, especially during pleasure boat season.

At least one court has specifically stated that the decision of whether to post a separate lookout is best left up to the captain or pilot at the wheel, because they are in the best position to observe the prevailing conditions in the area they are operating. That court held that a vessel owner will not lose its right to limit its liability for an accident to the value of its vessel, under the Limitation of Liability Act, just because it does not instruct its pilots to post a separate lookout, because this decision is best left up to each pilot's discretion. *Illinois Constructors Corp v. Logan Transp., Inc.*, 715 F.Supp. 872 (N.D.II. 1989). Despite this ruling, some companies that operate in areas with heavy pleasure boat congestion have experimented with stationing a deckhand with a radio at the head of the tow 24/7 during summer months. Assuming a video camera has adequate quality including night vision technology, installing a video camera at the head of the tow could avoid the need to post a deckhand there (which can expose the deckhand to an increased risk of falling overboard or otherwise getting injured especially in the event of a collision). Once a company undertakes to implement either of these practices, however, it is important to realize that a momentary lapse in enforcing them could itself be a basis for liability.

The requirement to maintain a proper lookout applies to all vessels, including those anchored or tied to shore, at least if they are in a position where other vessels might operate. *Cliffs-Neddrill Turnkey Int'l v. M/T RICH DUKE*, 947 F.2d 83 (3rd Cir. 1991).

The three primary legal consequences of failing to maintain a proper lookout are (a) the federal government can assess up to a \$5,000 civil fine against both the pilot and the vessel operator under 33 USC 2072 (\$25,000 if personal injury results, 46 USC 2302), (b) the Coast Guard may pursue license suspension or revocation proceedings against the pilot, and (c) in a civil lawsuit seeking money damages against the vessel operator, the violation of law brings into play the Pennsylvania Rule which requires the operator to be found at least partly at fault unless it can prove not only that its failure to maintain a proper lookout did not contribute to cause the accident but that it could not have been a factor. In addition, if negligence of a pilot or other vessel official results in wrongful death, they can be charged with a crime carrying a prison sentence of up to 10 years. 18 USC 1115.