DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 20

46 CFR Part 5

[USCG–1998–3472]

RIN 2115–AF59

Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard

AGENCY: Coast Guard, DOT.

ACTION: Interim rule and request for comments.

SUMMARY: The Coast Guard is revising the rules for Practice, Procedure, and Evidence for Administrative Proceedings. We are revising the rules to consolidate all Coast Guard adjudicative procedures for the suspension and revocation (S&R) of merchant mariners' licenses, certificates of registry, and documents and for class II civil penalties. The rule will eliminate unnecessary procedures from S&R proceedings and will use the Coast Guard's adjudicative resources more efficiently.

DATES: This interim rule is effective on June 23, 1999. Comments must reach the Coast Guard on or before July 23, 1999.

ADDRESSES: You may submit your comments and related material by only one of the following methods:

(1) By mail to the Docket Management Facility, (USCG–1998–3472), U.S. Department of Transportation, room PL–401, 400 Seventh Street SW, Washington, DC 20590–0001.

(2) By hand to room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(3) By fax to the Docket Management Facility at 202–493–2251.

(4) Electronically through the Web Site for the Docket Management System at http://dms.dot.gov.

The Docket Management Facility maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza Level of the Nassif Building at the same address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also access this docket on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: For questions on this interim rule, call George J. Jordan, Attorney-Advisor, Office of the Chief Administrative Law Judge, telephone 202–267–0006. For questions on viewing, or submitting material to, the docket, call Dorothy Walker, Chief, Dockets, Department of Transportation, telephone 202–366–9329.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking [USCG–1998–3472] and the specific section of this document to which each comment applies, and give the reason for each comment. Please submit one copy of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing to the DOT Docket Management Facility at the address under **ADDRESSES.** If you want acknowledgment of receipt of your comment, enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this interim rule in view of the comments.

The Coast Guard plans no public meeting. Persons may request a public meeting by writing to the Marine Safety Council at the address under **ADDRESSES.** The request should include the reasons why a public meeting would be helpful to this rulemaking. If an opportunity for oral presentations will help the rulemaking, the Coast Guard will hold a public meeting at a time and place announced by a later notice in the **Federal Register**.

Regulatory History

On April 6, 1998, we published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (63 FR 16731), entitled ''Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard.''

On May 20, 1998, we published a notice, in the **Federal Register** (63 FR 27700), reopening the NPRM comment period for an additional 30 days. The Coast Guard received seven letters commenting on the proposed rulemaking.

We received one request for a public meeting. Since we received a total of only seven comments during both comment periods, we held no public meetings on this rulemaking.

Background and Purpose

The Coast Guard derives its authority to issue this interim final rule in part from 46 U.S.C. 7702, amended by the *Oil Pollution Act of 1990 (Pub. L. 101–380).* The Coast Guard also derives its authority to issue rules affecting class II proceedings from 33 U.S.C. 1321(b)(6).

This rulemaking is necessary as part of a Coast Guard effort to improve both: (1) The administrative efficiency of all Coast Guard adjudicative procedures; and (2) the specific procedures related to actions involving mariners' credentials. It follows an overall Coast Guard initiative to streamline its resources, yet maintain effectiveness in all affected areas.

The Coast Guard maintains two separate sets of procedural rules that govern administrative adjudication. 46 CFR Part 5 contains the rules for Suspension and Revocation (S&R). These rules have their basis in criminal procedure. 33 CFR Part 20 contains the rules for class II civil penalties. These rules have their basis in the Model Rules of Administrative Procedure and on other modern rules for civil procedure. Both sets of rules, however, contain outdated and inefficient procedures, many of which are not effective in the adjudication of Coast Guard actions.

This rulemaking will consolidate both sets of rules in 33 CFR Part 20. It will remove those procedures that impede the efficient handling of cases. In addition, it will revise those rules that are not consistent with relevant legal standards and practices.

The Coast Guard has reduced the number of administrative law judges (ALJs) and field offices in a major effort to streamline its resources. Only six full-time ALJs are available to preside over 900–1000 S&R cases annually in 60 cities throughout the United States and its Commonwealths and Territories. The reduction in personnel that handle adjudicative matters creates the need for a system that can docket and process cases more efficiently.

The ALJ Docketing Center now operates such a system. It manages cases of class II civil penalty, of S&R, and of civil penalties and permit sanctions for the National Oceanographic and Atmospheric Administration (NOAA). This rule will assist in the processing of Coast Guard S&R cases at the ALJ Docketing Center. This rule will allow the Center to better administer the adjudication of Coast Guard actions.

In addition, this rule will produce several other benefits. It will ensure that similar cases follow similar procedures. It will eliminate unnecessary hearings

and the costs associated with these hearings, such as travel and court-reporting costs. It will employ the use of rules more familiar to civilian attorneys. It will also incorporate many recommendations of the former Administrative Conference of the United States and many practices prevalent in the Department of Transportation and other agencies. This will promote uniformity and consistency in certain proceedings. Finally, this rule will help to promote settlement in cases that are undisputed. This will further help to eliminate unnecessary hearings.

This rule will promote and ensure consistent procedural guidelines in adjudication over mariners' certificates, documents, and licenses, class II civil penalties, and other proceedings before Coast Guard ALJs. It will also enable the Coast Guard to maintain regulations in keeping with modern rules of civil and criminal procedure, where applicable.

1. Consolidated Rules of Procedure and Rules of Evidence

This rule will consolidate all rules of procedure and evidence for administrative adjudication into 33 CFR Part 20. It will—

- Remove the rules of procedure and evidence for S&R cases from 46 CFR Part 5;
- Supersede those rules of procedure and evidence from 46 CFR Part 5 and provide equivalent rules in Part 20;
- Amend certain sections of Part 20 to accommodate specific procedural requirements for S&R, for example, regarding the opening of cases; and
- Move certain rules of evidence, relating only to S&R cases, into a new subpart in 33 Part 20.

2. Changes in the Rules of Procedure and the Rules of Evidence

This rule will change the rules of procedure and evidence in administrative proceedings in the following ways:

- Complaints replace Notices of Hearings. Under the rule, the investigating officer will file a complaint and propose the place for a hearing, as opposed to the current system in which the investigating officer files charges and serves them on the mariner, telling the mariner where and when to appear to answer the charges. The complaint will identify the order of suspension or revocation sought, or, in a class II case, the penalty sought.
- Complaint must be answered in writing and within 20 days. Under the rule, the mariner must answer the complaint in writing within 20 days. Under the current S&R rules, the mariner answers at a hearing.
- Administrative Law Judge will schedule hearings. Under the rule, the ALJ schedules the hearing after receiving the answer and considering the convenience of both parties. Under the current S&R rule, the investigating officer schedules the hearing in the Notice, and the ALJ schedules continuances, etc.
- The Coast Guard may seek a default judgment. Under the rule, if a mariner fails to answer or does not attend a hearing, the Coast Guard may seek a default judgment. Under the current S&R rules, a hearing in the absence of the mariner is required.
- New procedures for settlement agreements. The rule encourages settlement agreements. It also establishes procedures for settlement. Although present S&R practices encourage settlement agreements, there is no consistent procedure involved in achieving them.
- Administrative Law Judges may issue oral decisions. Under this rule ALJs will issue oral decisions in simple cases, when the rights of the parties are not impaired, to speed justice. The present S&R rule, 46 CFR 5.571, *Delivery of decision*, does not allow for such decisions, under any circumstance.
- Expedited hearings are established. This rule establishes procedure for processing cases whenever the Coast Guard temporarily suspends a mariner's license, certificate, or document before hearing.

OPA 90 gave the Coast Guard temporary suspension authority. There are no procedures for temporary suspension in the Part 5 rules. The Coast Guard and the presiding ALJ established ad hoc procedures in the few times in which the Coast Guard ordered temporary suspensions.

The responsive pleadings used in these rules generally are not appropriate in temporary suspension cases, because of the time delays involved. The ALJ must hold a hearing within 30 days of the temporary suspension. To meet this requirement, the ALJ must hold an immediate pre-hearing conference, receive an answer, and issue appropriate orders to meet the statutorily mandated deadlines.

- The Coast Guard will have the right of appeal in S&R cases. Under the current S&R rules, the Coast Guard reviews only cases in which the charges are found proved and the respondent files an appeal. The inability of the agency to seek review or appeal, in cases where the ALJ ruled against it, is unique among Federal administrative practices. Neither the Administrative Procedure Act (APA) nor the statutory authority for S&R cases prohibits appeal by an agency. The rules in Part 20 now provide for such an appeal.

3. Changes in the Rules of Evidence

This rule will apply the rules of evidence from the APA. In current practice some ALJs apply the Federal Rules of Evidence. This rule will have one consistent standard, the APA standard, used in S&R cases.

4. Special Rules of Evidence—Suspension and Revocation Cases

This rule retains special rules of evidence for S&R cases. It places these special rules in a separate subpart. The rule adds a subpart that contains evidentiary rules from Part 5.

The existing suspension and revocation rules contain special rules concerning the admission and use of judgments of conviction, log book entries, medical examinations, and admissions made by respondents. We are not changing these rules at this time. We moved them to a separate subpart (subpart M) in Part 20.

5. Changes in Case Filing

With the opening of the ALJ Docketing Center in Baltimore, Maryland, efficient and effective case management in administrative proceedings is now in effect. The rule will optimize the capabilities of the Docketing Center and improve case-filing procedures by creating a central location for filing documents. This rule changes the place and method of filing for all administrative proceedings. Parties may now file all pleadings, motions, decisions, and other appropriate documents with the ALJ Docketing Center in Baltimore, Maryland. The current S&R rules require parties to file documents in the Coast Guard District where the case originated. The current rules in 33 CFR Part 20 also require parties to file multiple copies of documents. This rule requires parties to submit only a single signed copy of a specified form instead of the previously required formatted documents.

6. Changes in the Rules of Discovery

This rule changes the discovery rules in all administrative proceedings, in the following ways:

- Fifteen-Day Limit on Submittal of Final Exhibits and Witnesses. Parties must now submit final lists of witnesses and proposed exhibits at least 15 days before a hearing, unless otherwise allowed at the discretion of the ALJ. The current class II rules allow parties to submit final exhibits as few as 5 days

before a hearing; they encourage the disfavored ''trial by ambush''.

• Consistent Discovery Procedures Established. Under the current S&R rules, there are no formal discovery procedures. This can create problems when copies of exhibits and witnesses are not presented with sufficient notice to the other party. Most ALJs have introduced requirements for discovery on their own, but these differ from judge to judge.

Discussion of Comments and Changes

The Coast Guard received seven letters commenting on the notice of proposed rulemaking (NPRM). The following paragraphs contain a discussion of comments received and an explanation of changes, if any, to the proposed regulations. The comments discussed are in the following three categories—

(A) General comments;

(B) Comments that refer to issues discussed in the preamble, but not discussed in specific sections of the rule; and

(C) Comments that concern specific sections of the rule.

(A) General Comments

Rulemaking Process. Comment: One comment concerns the rulemaking process and suggests making this rule a collaborative effort among the Coast Guard, trade unions, mariners, and their counsel. The comment also suggests that workshops be held in order that the rulemaking receive adequate input from its audience. Finally, the comment suggests that we publish successive drafts of the rule.

Response: This rule is an ongoing project. We will publish a Supplemental Notice of Proposed Rulemaking (SNPRM) re-writing these procedural rules in plain language. We request comments from the public on how to improve these rules. We may hold public meetings with industry to develop the rules in plain language. We use the process set out in the Administrative Procedures Act (APA), 5 U.S.C. 553. However, the suggestion that we publish successive drafts of proposed rules is not in keeping with the APA.

We are issuing the rule as an interim rule with further opportunity for comment. Later, we will issue an SNPRM in a ''plain language'' version.

The Docketing Center. Comment: One comment states that the Docketing Center should not be allowed to dictate major procedural changes to the rule without comment from the public.

Response: The Docketing Center does not dictate procedural changes to rules. The Docketing Center is a place for the public to read and file documents in administrative proceedings. We will publish changes to these rules in accordance with the APA.

Potential of Additional Penalties for Mariners. Comment: One comment expresses concern about the potential for mariners to be subject to both S&R proceedings and civil penalty proceedings. The comment states that the proposed rule does not address this concern.

Response: An individual who holds a license, certificate, or document may also be subject to civil penalty proceedings. This rule neither increases nor decreases the possibility that this will occur. Our policy has generally been to bring one type of action or the other. Usually, the owner is subject to civil penalty proceedings, while the operator is subject to S&R proceedings.

The Use of Marine Casualty Investigations as Evidence. Comment: One comment concerns barring use of reports of marine casualty investigations as evidence in S&R proceedings. In addition, the comment suggests that the ALJ's decision not be based solely or substantially on the findings of a marine casualty investigation. The comment cites 46 U.S.C. 6308 for this opinion.

Response: We disagree with this comment. Section 6308 specifically allows the use of reports of marine casualty investigations as evidence in administrative proceedings initiated by the United States, such as S&R proceedings or administrative penalty proceedings. (Admissions made by respondents during these investigations remain inadmissible.)

Comment: One comment suggests that we provide more ALJs to adjudicate these matters. The comment also suggests that we provide this service by an offset of users' fees from Regional Examination Centers, since the S&R program is essential to ensuring competency.

Response: Funds for more ALJs would have to come from either or both of two sources: appropriated funds and users' fees. Appropriated funds are not an offer for the foreseeable future. Users' fees under 14 U.S.C. 664, 31 U.S.C. 9701, and 46 U.S.C. 2110 appeared available until late last year. Then, however, by Section 207 of the ''Coast Guard Authorization Act of 1998'' [Pub. L. 105–383], Congress added to § 2110 a subsection (R) that forbids, until 1 October 2001 at the earliest, the collecting of any users' fees not already being collected. So users' fees are not an offer for the immediate future, either.

(B) Issues Discussed in the Preamble

ALJ may Issue Oral Decisions. Comment: One comment states concern for the protection of the mariner's right to due process, when the ALJ issues an oral decision. The commenter suggests that we provide the mariner with a free transcribed copy of the opinion.

Response: The language in § 20.902(d) states that ''. . . if the ALJ renders the initial decision orally, and if a party asks for a copy, the hearing-docket clerk shall furnish a copy excerpted from the transcript of the record.''

Notice Requirement. Comment: One comment states concern about the notice requirement that will apply to mariners. It requests that we draft the rule to give the mariner a maximum of certainty and fairness. The comment states that the rule should require personal service of process or at least service by certified mail, with return receipt requested.

Response: A number of the comments specifically mention the notice requirement of the rule. We address this issue fully in the sections regarding notice (§§ 20.304, 20.308, and 20.310) in the section titled *Specific Sections in 33 CFR Part 20.*

Rule Based on Inconsistent Standards. Comment: One comment suggests that the Commandant and the Coast Guard express inconsistent standards as the basis for the S&R rules. The comment cites the Coast Guard as stating that the rules of criminal procedure are the basis for the S&R proceedings. The comment cites the Commandant as stating the license proceedings are remedial and not punitive in nature (Commandant's Decision 2316 (McNAUGHTON)).

Response: An S&R proceeding is not a criminal proceeding, it is an administrative proceeding (46 CFR 5.5). That is why one of our primary purposes in this rulemaking is to remove criminal-style or military-justice-style processes from this remedial S&R proceeding. The present rules of part 5 include processes that are similar to an arraignment; the effect of an answer is similar to a ''not guilty'' plea requiring the government to prove each element of the offense. This interim rule replaces those with civil-style responsive pleadings, which use a written answer instead of a hearing and which allow a respondent to admit some allegations while denying others.

General Comments—Part 5. Special Rules of Evidence. Comment: A comment states concern that ''special rules of evidence'' will be more complicated than the current rules. The writer suggests that we require the ALJ

to comply with the Federal Rules of Evidence (FRE).

Response: The ''special rules of evidence'' proposed for subpart M of part 20 are not new. They have been in use for nearly 50 years, and we do not wish to change them at this time. We moved them from part 5 to part 20. We will consider changes to simplify them in the later, plain-language version. We invite your comments on the rule. The APA's intent is that administrative proceedings be simpler than court proceedings. For this reason, we adopt the APA standard, and not the FRE, for our rules on evidence.

The Right to Remain Silent. Comment: One comment states concern about the removal of the respondent's right to remain silent (§ 5.519). The comment states that the right should be recognized.

Response: The right to remain silent pertains to criminal proceedings. Because these proceedings are civil-style hearings, the right no longer applies. However, the Fifth Amendment right against self-incrimination applies to these proceedings, and the respondent may assert this right. Also, admissions by the respondent made in the course of marine casualty investigations are inadmissible.

The Table Printed in the NPRM. Comment: One comment states concern with § 5.101(b). The comment states that the table printed in the NPRM does not address whether § 5.101(b) will be deleted.

Response: Section 5.101 remains unchanged. The table provided in the NPRM erroneously omitted this section.

Concern Over Changes in Part 5. Comment: Several comments state the belief that we are going to remove certain sections of part 5 (e.g., §§ 5.19, 5.65(a), 5.201–5.205).

Response: We printed a table with the NPRM. The table sets out all changes to part 5, except that, as just noted, it omitted § 5.101. Otherwise, if we changed or removed any section, we published it in the NPRM (63 FR 16735). The NPRM as printed clearly indicates where part 5 will remain unchanged by the statement, referring to the respective section, ''Retained, no change.'' This interim rule contains no table. However, if you downloaded the NPRM as a TXT file, you may have found that the table was omitted.

(C) Specific Sections in 33 CFR Part 20

Section 20.103 Construction and waiver of rules. Comment: One comment suggests the use of the phrase ''economical determination'' instead of the phrase, ''inexpensive result'' in paragraphs (a) and (b).

Response: We agree that the term ''inexpensive result'' may be misleading. The purpose of this section is to ensure that we can quickly and fairly resolve administrative adjudication, without undue cost to participants. We replaced the term ''inexpensive result'' with ''inexpensive determination'' similar to Rule 1 of the Federal Rules of Civil Procedure (FRCP).

Section 20.301 Representation. Comment: The comment states that we should include in the rule a provision that will prevent parties from placing an undue burden on the government, where a party fails to obtain counsel before the hearing. The comment states that the rule would place an undue burden on the government and on counsel by allowing the respondent a continuance when he has failed to obtain counsel. The comment states that the rule should provide that, when a party cannot show good cause for the failure to obtain counsel, the party will automatically waive his or her right to counsel.

Response: We have removed the requirement that an ALJ advise a respondent of a right to counsel at the beginning of a hearing. The elimination of arraignment-style proceedings should eliminate most instances of last-minute requests for counsel. If an ALJ believes that a respondent had a reasonable opportunity to obtain counsel and failed to do so, then the ALJ can deny the respondent's request for a continuance.

Section 20.302 Filing of Documents and Other materials. Comment: One comment expresses concern about allowing the docket clerk to refuse documents. It cites subsection (f) of the FRCP, which prohibits a court clerk from refusing defective documents. The comment urges that this rule allow all documents to be filed with the clerk and not leave to his or her discretion which documents may be filed.

Response: Paragraph (f) of this section gives the clerk an option to decline material and return it without filing it or to accept it and require the correction of defects. We recognize the potential impact of this paragraph and have amended the interim rule to state that the docketing staff will accept all filed documents and to permit the docketing clerk to notify a filer of a defective document and to require correction. If the defect was improper service on another party, it may extend response periods for those parties.

Section 20.303 Form and Content of Filed Documents. Comment: One comment urges that we establish a specific typeface for the text of the document, without the use of bold, italic, or script typeface, to enhance legibility. The comment also urges that the rule specify who is to issue or establish forms acceptable for use in these proceedings. It should also indicate the process for issuing or establishing them.

Response: We establish specific guidelines for format in the rules. We do not believe that we need to adopt more restrictive guidelines. We will issue any necessary forms under our current procedures.

Section 20.304 Service of Documents. Comment: One comment urges that the rule comply with accepted State and federal practice, where a person serving a complaint or other document certifies, under oath or affirmation, how the document was served. Usually, a party to a proceeding may not serve another party with documents. The party's counsel or representative may.

Response: We added tables to paragraphs (d), (e), (f), and (g). The tables indicate that we require the government to serve any complaint by either (1) certified mail, return receipt requested; (2) personal delivery; or (3) express courier service, that has return-receipt capability. A person of suitable age and discretion residing at the individual's residence must accept service.

Comment: One comment also proposes that paragraph (h) remain as it is in the current rule because the re-wording is awkward. The comment suggests that, if the Coast Guard serves mariners by certified mail to the most current address listed with the Coast Guard Regional Examination Center, then that service should be considered proper.

Response: The Coast Guard maintains a database containing addresses of mariners, in keeping with 46 U.S.C. 7319. The database is not necessarily current, since mariners are not bound to notify the Coast Guard when they move. Requiring them to do so is beyond the scope of this rulemaking.

Section 20.305 Amendment or Supplementation of Filed Documents. Comment: One comment urges that we revise this section of the rule because, now, a respondent can file any amendment to an answer in order to trigger a continuance.

Response: We do not agree that we should revise this section to deter a party from filing amendments. That would increase the complexity of the process. The intent of this section is to have parties notify each other as soon as they become aware of significant changes. This section and 33 CFR 20.303(c) ensure that parties may not wait until the last minute to do so.

Comment: A comment suggests that we require each party to file proof of service of notice on the other, to avoid delay of the proceedings.

Response: §§ 20.304(g) and 20.306(b) state the rules on the proper methods of service of process. The rules establish how you are to serve documents on a party after you have filed the documents with the court. If we require return receipt or similar proof, then we will be establishing a more complex process. We do not want to require return receipt, because it would entail delays.

Section 20.306 Computation of Time. Comment: One comment recommends that we eliminate § 20.306(a)(2), which contains the procedure for computing time periods of 7 days or less. The comment states that this subparagraph is unnecessary because the rules do not mandate response in less than 7 days.

Response: We disagree. Judges may order motions or replies in under 7 days.

Section 20.307 Complaints. Comment: One comment prefers the language in part 5 because the language clearly identifies charges and specifications.

Response: Again, we believe that the terms ''charges'' and ''specifications,'' borrowed from criminal law, are not appropriate for a civil adjudication. However, considering the varying jurisdictional requirements for S&R proceedings, we have amended this section and will use the terms ''type of case'' instead of ''charge'', and ''allegation'' instead of ''specification.''

Section 20.308 Answers. Comment: One comment states a concern that the respondent will need an attorney's assistance to complete an answer in response to a complaint, at a cost in time and money.

Response: We do not agree that the respondent will have to use an attorney to respond to a complaint. Under this rule, the complaint describes the acts or omissions of the person that constitute the basis for the proceedings. We have determined that this is the information needed to give a respondent ''meaningful notice'' of the charges so that the respondent can prepare a defense.

Responses help both parties in the hearing process. When the government presents specific allegations in a complaint, and when the respondent makes specific responses in an answer, this helps the ALJ to review all the pertinent information in a case. Specific responses help the ALJ to eliminate uncontested issues and to focus in on contested issues. (In 5 U.S.C. 554(b), the APA states, ''* * * agencies may by rule require responsive pleading.'')

A respondent must address each numbered paragraph in the complaint. If a respondent disagrees with any allegations in a paragraph, he or she may simply deny the entire paragraph.

Also, the respondent may answer the complaint brought against him by filling out a form. In many cases, the respondent can fill out the form by listing the number of the paragraph that he or she will deny or by checking a box. This does not require the assistance of an attorney. In general, we do not intend that the rules require the respondent's answer to be expressed in the same degree of detail as required for civil litigation, unless the type of case requires it. The respondent may use the form where (1) the allegations brought against him or her do not require a detailed reply and (2) the respondent can adequately reply to them by using the form.

Section 20.310 Default by Respondent. Comment: Several comments also oppose the default provisions of 33 CFR 20.310, specifically the use of regular mail to complete service on the mariner. The comments state that, through irregular mail delivery, a mariner could be held in default because he did not receive service. This could happen because mariners are often away on long voyages. The comments state that the rule works to substantially interfere with the mariner's due process: the right to be notified of any charges brought against him or her involving suspension, revocation, or other act against his or her license. The comments state that current 46 CFR 5.515, requiring a hearing *in absentia,* is preferable to the new rule.

Response: We are changing the language to clearly establish that any complaint must be sent to the respondent's last known address and that the Coast Guard must produce a receipt of service before an ALJ can enter a default judgement against the respondent. We are also revising § 20.310(b) to read, ''Each motion must include a proposed decision and proof of service * * *''.

Comment: Another comment states that the proposed rule—by allowing the ALJ to issue a decision against a licensee if a licensee fails to appear for the hearing, regardless of the strength of the Coast Guard's case—abrogates the licensee's due process. Previously the Coast Guard had to prove the case.

Response: We disagree. The costs of hearings *in absentia* are significant. The APA gives a party the opportunity to be heard. If a party fails to use that opportunity, the agency should not have to bear the cost of a meaningless hearing.

Section 20.401 Initiation of Proceedings. Comment: One comment prefers the current text of 46 CFR 5.53, which specifies the commencement of a proceeding as the time charges are served. The comment interprets the proposed text of 33 CFR 20.401 to mean that the proceeding begins when the Coast Guard files its complaint with the Hearing Docket Clerk and serves a copy of it on the respondent. The comment states that the time of service may differ from the time of the filing of the complaint.

Response: We disagree. The 20-day response period does not start with the Docketing Center. It starts when the government serves the complaint on the respondent. This is a public proceeding; the filing with the Docketing Center opens the case and permits a docket to be established.

Section 20.501 Conferences. Comment: Comments on this section state several concerns. One comment asks who is responsible for any monetary reimbursement for travel and time?

Response: The ALJ schedules hearings and pre-hearing conferences at his or her discretion. Parties must pay their own expenses.

Comment: One comment would like to know how, if at all, a party may appeal from an ALJ's picking a location, date, and time of a conference that conflicts with already scheduled agenda?

Response: We did not establish any way for an interlocutory appeal in these rules. If an ALJ abuses his or her discretion so as to deny a party due process, he or she creates a ground for appeal under Subpart J.

Comment: It is difficult to have settlement discussions with the ALJ present because these often divulge admissions of guilt.

Response: The ALJ does not have to attend settlement discussions. Under the APA, the ALJ may request the appointment of a separate ALJ to conduct them, if the parties wish.

Sections 20.502 Settlements. Comment: One writer would like to know whether an ALJ can reject a proposed settlement, even if agreed to by the parties?

Response: Under § 20.502(b) any motion for proposed settlement must include the reasons why the ALJ should accept it. The ALJ will review such a settlement for the following information:

(1) Did the appropriate parties sign the agreement?

(2) Does the complaint allege sufficient facts?

(3) Does the government have jurisdiction over the respondent?

(4) Does the law permit the order? (For example, on convictions in dangerous-drug cases, the statute mandates revocation of mariners' licenses. The parties may not agree to rehabilitation in these cases.)

(5) Is the settlement fair under the circumstances?

(6) Is the settlement clear?

If the ALJ rejects the proposed settlement, the ALJ must state the reason(s) in writing and will return the motion to the parties.

Section 20.601 General. Comment: One comment states that the ALJ should not be allowed to receive written discovery.

Response: We disagree in part. Under § 20.601 the ALJ receives lists of witnesses and exhibits and copies of exhibits that the party intends to introduce. All exhibits filed under § 20.601 become part of the administrative record, whether or not formally introduced or admitted. The ALJ is responsible for maintaining the administrative record and needs copies of all potential exhibits. The ALJ receives no other written discovery before the hearing.

Section 20.604 Request for Production of Documents or Things for Inspection for Other Purposes. Comment: One comment states that ''[t]his part states that any party wanting to obtain evidence has to do so through the ALJ. . . . Why change the process in place now, the IO (investigating officer) can subpoena evidence as needed; not having to work with the ALJ.''

Response: Our rule does not change current practices. 46 CFR 5.301(b) grants the investigating officer broad subpoena authority.

Section 20.608 Subpoenas. Comment: One comment urges that ''[t]his section does not state whether the IO may issue a subpoena. Recommend amending [this section] to state that the IO can issue subpoenas, in [the same way] as an ALJ.''

Response: We believe that 46 CFR Parts 4 and 5 adequately describe the authority of investigating officers to issue subpoenas. However, in the interim rule we add a paragraph (d) to § 20.608 stating that investigating officers can also issue subpoenas in S&R cases.

Section 20.701 Standard of Proof. Comment: Two comments state that the interim rule establishes ''preponderance of the evidence'' as the standard of proof. One comment urges that the standard of proof contained in 46 CFR 5.63, which is a higher standard and is preferable to the standard proposed, become the standard.

Response: The interim rule does not establish a new standard of proof; it restates the standard for administrative proceedings. The Supreme Court interprets the language in 46 CFR 5.63 to mean preponderance of the evidence. The Court, in *Steadman* v. *Securities and Exchange Commission,* 450 U.S. 91, 101 S. Ct. 999, 67 L.Ed.2d 69 (1981), determined that in administrative hearings the burden of proof required for purposes of due process is ''preponderance of the evidence.'' Coast Guard appeal decisions have followed that Supreme Court decision for several years. In Commandant Decision on Appeal 2468 (LEWIN), the Coast Guard interpreted 46 CFR 5.63 to mean preponderance of the evidence. See also Appeal Decisions 2477 (TOMBARI) and 2485 (YATES). Accordingly, we made no changes to this section.

Section 20.703 Presumptions. Comment: One comment states that the ''presumption of negligence'' has presented problems in maritime law because of different views as to how it should operate. We should explain it or abolish it.

Response: § 20.703 merely restates Federal Rule of Evidence (FRE) 301 on presumptions. It is not a presumption ''of'' negligence or anything else. This interim rule does not change the administrative practice or judicial precedent concerning presumptions in S&R cases. There are many cases that establish the law in this area. They remain unaffected by this rulemaking.

Section 20.706 Witnesses. Comment: One writer opposes subsection (b), which allows the ALJ to strike all or part of a witness's testimony if the witness fails or refuses to answer any question the ALJ thinks is proper to ask of the respondent at the hearing.

Response: We disagree. The ALJ must control the proceedings and establish the administrative record. We based this section on Model Adjudication Rule 328. Other administrative agencies have similar procedural rules. See, e.g., 29 CFR 40.252(c). The rule states a well-established principle of administrative law and evidence in general.

Section 20.707 Telephonic Testimony. Comment: One comment suggests that this section state that any testimony by telephone has to be approved by the ALJ. He asked who is responsible for costs of travel and lodging of a witness if the ALJ will permit a witness to testify only in person. In his opinion, this section gives the ALJ authority to disrupt evidence.

Response: We disagree. We have not changed the rules nor the policies for telephonic testimony. The ALJ determines whether the testimony can be given by telephone. Under 33 CFR 20.710 and 46 CFR 5.553(f), parties must move (request) to use telephonic testimony and each party must pay any costs associated with having the testimony taken.

Section 20.710 Proposed findings, closing arguments, and briefs Comment: One comment recommends amending this section to let the ALJ keep the hearing open for proposed findings only on motion by a party involved in the hearing. The comment stated that several investigating officers have had experiences in which an ALJ required each party to file findings of facts, when neither party has so moved; this is an administrative burden on both parties.

Response: The APA permits parties to file proposed findings of fact and conclusions of law [5 U.S.C. 557(c)]. The ALJ sets a schedule for submission or allows the parties to waive submission. No ALJ may require parties to file proposed findings or conclusions, but the parties may file them. Section 20.710 does not permit an ALJ to require filing of proposed findings or conclusions. An ALJ might require parties to file briefs on a particular issue, but that is very rare.

Section 20.902 Decision of the ALJ. Comment: One comment recommends establishing a time within which an ALJ must issue a decision, to ensure that the respondent gets one within a reasonable time.

Response: We believe that establishing a time period within which an ALJ must issue a decision by regulation would serve no useful purpose. The guidelines for the ALJs' workflow call for issuance of a decision in a simple case within 30 days. Complex cases entailing research and the requirement to review a complex record and develop an administrative record often need more than 30 days.

Section 20.904 Reopening. Comment: One comment notes that an ALJ already may reopen and modify an order of revocation. The comment recommends that this paragraph also remove the 3-year limit and eliminate the current procedures for administrative clemency. The comment further recommends adding a paragraph providing that ''a mariner, who has voluntarily surrendered his or her document, [rather than undergo] S&R proceedings, and who later wishes to reapply for that document, will be subject to the same administrative procedures as though an ALJ had issued an order of revocation in the matter.''

Response: We believe that this comment has merit. We will review the whole program of administrative clemency and may consider its procedures in a future rulemaking.

Section 20.1001 General (Appeals). Comment: Several comments oppose allowing the Coast Guard the right to appeal an ALJ's decision. One comment would like the right of appeal restricted to the respondent because it feels that the Coast Guard will have had a chance to prove its case during the hearing, at the ALJ level.

Response: The APA recognizes the agencies' right of appeal [5 U.S.C. 557(b)]. The Coast Guard is the only agency that does not use such a right. The Coast Guard does not believe that its exercise of this right will impair the rights of respondents.

The ALJ is the finder of facts, and his or her findings will not be overturned lightly. Under existing case law, the Commandant will overturn such findings or determinations of credibility by ALJs only if they are clearly erroneous.

If the agency seeks an appeal, then there must be grounds for appeal. The agency, like a respondent, may seek appeal only on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

If an ALJ errs in finding against the Coast Guard, there should be review to ensure consistency. Any detriment to a respondent is offset by improved consistency in the administrative process.

We believe that the Equal Access to Justice Act is a sufficient deterrent to an agency's abuse of its right of appeal. Accordingly, the Coast Guard will retain its right in these rules.

Section 20.1103 Availability of decisions. Comment: One comment recommends that the Docketing Center make all S&R Decisions and Orders, not just Commandant Decisions of Appeal, available for review. This would greatly assist in preparing for upcoming cases.

Response: At present, ALJs' decisions are available for inspection and copying at Coast Guard Headquarters and at the public reading room in the district where they were issued (49 CFR Part 7). Under recent amendment to the Freedom of Information Act (FOIA), (H.R. 3802, Pub. L. 104–231, Electronic Freedom of Information Act Amendments of 1996 (approved October 2, 1996, 110 Stat. 3048), agencies must publish these decisions on-line. The Coast Guard has published precedent-setting Appeals Decisions on-line. We will publish ALJ decisions also. The Coast Guard is working on making them available on the Internet under FOIA. We will amend § 20.1103 when they are available.

Section 20.1309 Admissibility of respondent's criminal records with the Coast Guard before entry of findings and conclusions. Comment: The proposed section would permit the use of these records for the purpose of impeaching the credibility of the evidence offered by the respondent. Current 46 CFR 5.549(b) permits their use for ''the limited purpose of impeaching * * *''. One commenter prefers the language in current § 5.549.

Response: § 20.1309 restates the current rule in 46 CFR 5.549(b). We revised the section to remove unnecessary language. We do not believe that we need to make further changes at this time.

Section 20.1313 Medical examination of respondent. Comment: One comment objects to the last sentence of the section, which states that, ''[I]f the respondent fails or refuses to undergo any such examination, the failure or refusal receives due weight and may be sufficient for the ALJ to infer that the results would have been adverse to the respondent.''

Response: This section restates the law in S&R proceedings more clearly than the current language [46 CFR 5.557] states it. There is no substantive change to this section.

Section 20.1315 Submission of prior records and evidence in aggravation or mitigation. Comment: One comment prefers the language of 46 CFR 5.565(a), which specifically states when a prior record may be disclosed. The proposed section, the comment asserts, does not clearly state whether this requirement remains the same.

Response: This section's predecessor (46 CFR 5.565(a)) contained a general prohibition of disclosure of prior records before the ALJ makes his findings (made on the facts of the case). We believe that we should not totally prohibit the disclosure of prior records. Judgments of convictions are now the basis for three different types of cases contemplated by 46 U.S.C. 7703 and 7704. Much of what constitutes prior record is in the public record. We made no changes to this section.

Comment: Another comment states that we do not clearly define the term ''conviction.'' The writer recommends that we use the definition of conviction in 46 CFR Part 10.

Response: We believe that § 20.1307 establishes a definition of the term ''conviction'' that both is adequate and is consistent with the definition in 46 CFR 10.103.

Regulatory Evaluation

This interim rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. This rule is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) [44 FR 11040 (February 26, l979)]. The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Benefits: The Coast Guard assumes savings to all parties by simplifying administrative proceedings that help to expedite cases. The Coast Guard's use of Administrative Law Judges (ALJs) is undergoing major change. In the first phase of this process, the Coast Guard established a Docketing Center in Baltimore. It provides administrative law services for all pertinent cases. In the second phase, the Docketing Center would expand its services to permit on-line access to decisions and indexes and to improve case management. A part of that effort would be to rewrite 33 CFR Part 20 in plain English.

Executive Order 12988 [61 FR 4728 (February 5, 1996)], on Civil Justice Reform, also established ''Principles to Promote Just and Efficient Administrative Adjudications.'' It recommends that agencies use case management techniques as a tool for improving their administrative proceedings. It also recommends that they review their adjudicative procedures and develop specific ones to—

- Reduce delay in decision-making;
- Facilitate self-representation where appropriate;
- Expand non-lawyer counseling and representation where appropriate;
- Invest maximal discretion in fact-finding officers;
- Encourage appropriate settlement of claims as early as possible; and
- Develop effective and simple methods, including the use of electronic technology, to educate the public about their policies and procedures.

The primary reason for this entire effort is to achieve and sustain effective case management. First, a central docket permits more efficient assignment of

ALJs to contested cases. Second, enhanced office automation (workflow) permits the routine handling of dockets and files by a small staff. Third, a central database permits active supervision of cases.

At present, Notices of Hearings hinder an ALJ's schedule in S&R cases because current rules require notice but do not also require responses from mariners. The result is that ALJs (and the Coast Guard) must prepare for hearings as if all mariners would dispute the charges. Almost half of these cases conclude without ever going to hearings, through settlement agreements or withdrawal by the prosecution. However, it is not currently possible to reassign the unused or vacated hearing date for such a case.

With responsive pleading, ALJs are able to identify which cases would be amenable to disposal by motion and which would need hearings. In cases of class II civil penalties, ALJs are able to schedule hearings only if necessary. Almost half of these cases, through settlement agreements or motions, likewise conclude without ever going to hearings. (Unlike S&R cases, these cases have had a negligible effect on ALJs' schedules.)

Each ALJ depends upon a single Legal Assistant (LA). Each case docketed usually takes three days of an LA's time for docketing; scheduling; arranging for court reporters, hearing rooms, and the ALJ's travel; preparing reports; maintaining the docket record and closing the file; preparing the hearing report; and arranging for final disposition of the case record.

This demand on time applies in every case filed, whether contested or not. (For example: The Coast Guard files a case, and the respondent seeks a change of venue unopposed by the agency. The ALJ would not spend more than an hour on the case; but the LA must still prepare the record for transfer to another ALJ and file it.) This costs respondents time as it does the Coast Guard. The procedures of this interim rule would drastically reduce the demands of the time required of all parties concerned.

The Coast Guard estimates that the annual costs attributable to the interim rule will total $36,000. This figure includes costs associated with preparing witness and exhibit lists for contested cases, as well as costs associated with cases appealed by the Coast Guard.

The 10-year present value of the costs, discounted at 7 percent and expressed in 1998 dollars, will total $252,849.

This interim rule will benefit the regulated public as well as the taxpaying public. Both publics will benefit from the uniform application of procedural rules to the administrative proceedings. Rather than operating under a judge-specific collection of procedural rules, the adjudicative actions of the Coast Guard will come into line with the APA.

The monetary benefits of this rule are the cost savings which will total $279,000 annually. The 10-year present value of the cost savings, discounted at 7 percent and expressed in 1998 dollars, will total $1,959,579.

New costs attributable to the rule should reach a discounted total of $252,849 for the 10-year period. Therefore, the 10-year benefit-cost ratio is 7.7 to 1.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this interim rule will have a significant economic impact on a substantial number of small entities. These include independently owned and operated small businesses that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard expects that this rule will have a minimal direct impact on small entities. Holders of licenses, certificates, and documents are not small entities, though they may work for small entities. This rule simplifies many adjudicatory procedures; it adds only the requirement to reply by written answer, in most cases, rather than by oral response at hearing, and this may prove less, not more, onerous.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. If, however, you think that your business or organization qualifies as a small entity and that this rule will have a significant economic impact on your business or organization, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and in what way and to what degree this rule will economically affect it.

Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), the Coast Guard wants to assist small entities in understanding this interim rule so that they can better evaluate its effects on them and participate in the rulemaking. If this rule will affect your small business or organization, and if you have questions concerning its provisions or options for compliance, please call Mr. George J. Jordan, Attorney Advisor, Office of the Chief Administrative Law Judge (G–CJ), Room 6302, 202–267–0006.

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about enforcement by Federal agencies. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small businesses. If you wish to comment on the enforcement by the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This interim rule does not call for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Between simplified, expedited adjudicatory procedures and greater use of electronic devices, this rule will reduce the burden of paperwork on the public and private sectors in large and about equal measure.

Unfunded Mandates

Under the Unfunded Mandates Reform Act (Pub. L. 104–4), the Coast Guard must consider whether this interim rule will result in an annual expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation). The Act also requires (in Section 205) that the Coast Guard identify and consider a reasonable number of regulatory alternatives, and from those alternatives, select the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule.

No State, local, or tribal governments will be affected by this rule. Therefore, this rule will not result in annual or aggregate costs of $100 million or more either to State, local, or tribal governments or to the private sector.

Federalism

The Coast Guard analyzed this interim rule under the principles and criteria contained in Executive Order 12612 and determined that this rule does not have sufficient implications for federalism to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this interim rule and concluded that, under figure 2–1, paragraphs (34)(b) and (c) of COMDTINST M16475.1C, this rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination''

is available in the docket for inspection or copying where indicated under **ADDRESSES.**

Other Executive Orders on the Regulatory Process

In addition to the statutes and Executive Orders already addressed in this preamble, the Coast Guard considered the following executive orders in developing this rule and reached the following conclusions:

E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. This rule will not effect a taking of private property or otherwise have taking implications under this Order.

E.O. 12875, Enhancing the Intergovernmental Partnership. This rule will not impose, on any State, local, or tribal government, a mandate that is not required by statute and that is not funded by the Federal government.

E.O. 12988, Civil Justice Reform. This rule meets applicable standards in sections 3(a) and 3(b)(2) of this Order to minimize litigation, eliminate ambiguity, and reduce burden.

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to safety disproportionately affecting children.

List of Subjects

33 CFR Part 20

Administrative Law Judges, Administrative practice and procedure, Appeals, Discovery, Evidence, Hearings.

46 CFR Part 5

Administrative practice and procedure, Alcohol abuse, Drug abuse, Investigations, Licensing, Mariners, Seamen, Penalties.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 20 and 46 CFR Part 5 as follows:

1. Revise 33 CFR Part 20 to read as follows:

PART 20—RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

Subpart A—General

Sec.

Subpart B—Administrative Law Judges

Subpart C—Pleadings and Motions

Subpart D—Proceedings

Subpart E—Conferences and Settlements

Subpart F—Discovery

Subpart G—Hearings

Subpart H—Evidence

Subpart I—Decisions

Subpart J—Appeals

Subpart K—Finality, Petitions for Hearing, and Availability of Orders

Subpart L—Expedited Hearings

Subpart M—Supplementary Evidentiary Rules for Suspension and Revocation Hearings

Authority: 33 U.S.C. 1321; 42 U.S.C. 9609; 46 U.S.C. 7701, 7702; 49 CFR 1.46.

Subpart A—General

§ 20.101 Scope.

Except as otherwise noted, the rules of practice, procedure, and evidence in this part apply to the following subjects of administrative proceedings before the United States Coast Guard:

(a) Class II civil penalties assessed under subsection 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(6)).

(b) Class II civil penalties assessed under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9609(b)).

(c) Suspensions and revocations conducted under 46 U.S.C. Chapter 77.

§ 20.102 Definitions.

Administrative Law Judge or ALJ means any person designated by the Commandant under paragraph 556(b)(3)

of the Administrative Procedure Act (APA) (5 U.S.C. 556(b)(3)) to conduct hearings arising under 33 U.S.C. 1321(b); 42 U.S.C. 9609(b); or 46 U.S.C. Chapter 77.

Chief Administrative Law Judge or Chief ALJ means the Administrative Law Judge appointed as the Chief Administrative Law Judge of the Coast Guard by the Commandant.

Class II Civil penalty proceeding means a trial-type proceeding for the assessment of a civil penalty that affords an opportunity for an oral, fact-finding hearing before an ALJ.

Coast Guard Representative means an official of the Coast Guard designated to prosecute an administrative proceeding.

Commandant means the Commandant of the Coast Guard. It includes the Vice-Commandant of the Coast Guard acting on behalf of the Commandant in any matter.

Complaint means a document issued by a Coast Guard representative alleging a violation for which a penalty may be administratively assessed under 33 U.S.C. 1321(b) or 42 U.S.C. 9609(b), or a merchant mariner's license, certificate of registry, or document suspended or revoked under 46 U.S.C. 7703 or 7704.

Hearing Docket Clerk means an employee of the Office of the Chief ALJ who is responsible for receiving documents, determining their completeness and legibility, and distributing them to ALJs and others, as required by this part.

Interested person means a person who, as allowed in § 20.404, files written comments on a proposed assessment of a class II civil penalty or files written notice of intent to present evidence in any such hearing held on the proposed assessment.

Mail means first-class, certified, or registered matter sent by the Postal Service, or matter sent by an express-courier service.

Motion means a request for an order or ruling from an ALJ.

Party means a respondent or the Coast Guard.

Person means an individual, a partnership, a corporation, an association, a public or private organization, or a governmental agency.

Personal delivery means delivery by hand or in person, or through use of a contract service or an express-courier service. It does not include use of governmental interoffice mail.

Pleading means a complaint, an answer, and any amendment to such document permitted under this part.

Respondent means a person charged with a violation in a complaint issued under this part.

Suspension and revocation proceeding or *S&R proceeding* means a trial-type proceeding for the suspension or revocation of a merchant mariner's license, certificate of registry, or document issued by the Coast Guard that affords an opportunity for an oral, fact-finding hearing before an ALJ.

§ 20.103 Construction and waiver of rules.

(a) Each person with a duty to construe the rules in this part in an administrative proceeding shall construe them so as to secure a just, speedy, and inexpensive determination.

(b) Except to the extent that a waiver would be contrary to law, the Commandant, the Chief ALJ, or a presiding ALJ may, after notice, waive any of the rules in this part either to prevent undue hardship or manifest injustice or to secure a just, speedy, and inexpensive determination.

(c) Absent a specific provision in this part, the Federal Rules of Civil Procedure control.

Subpart B—Administrative Law Judges

§ 20.201 Assignment.

An ALJ, assigned by the Chief ALJ after receipt of the complaint, shall preside over each administrative proceeding under this part.

§ 20.202 Powers.

The ALJ shall have all powers necessary to the conduct of fair, fast, and impartial hearings, including the powers to—

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law;

(c) Rule on motions;

(d) Order discovery as provided for in this part;

(e) Hold hearings or settlement conferences;

(f) Regulate the course of hearings;

(g) Call and question witnesses;

(h) Issue decisions;

(i) Exclude any person from a hearing or conference for disrespect, or disorderly or rebellious conduct; and

(j) Institute policy authorized by the Chief ALJ.

§ 20.203 Unavailability.

(a) If an ALJ cannot perform the duties described in § 20.202 or otherwise becomes unavailable, the Chief ALJ shall designate a successor.

(b) If a hearing has commenced and the assigned ALJ cannot proceed with it, a successor ALJ may. The successor ALJ may, at the request of a party, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 20.204 Withdrawal or disqualification.

(a) An ALJ may disqualify herself or himself at any time.

(b) Until the filing of the ALJ's decision, either party may move that the ALJ disqualify herself or himself for personal bias or other valid cause. The party shall file with the ALJ, promptly upon discovery of the facts or other reasons allegedly constituting cause, an affidavit setting forth in detail the reasons.

(1) The ALJ shall rule upon the motion, stating the grounds for the ruling. If the ALJ concludes that the motion is timely and meritorious, she or he shall disqualify herself or himself and withdraw from the proceeding. If the ALJ does not disqualify herself or himself and withdraw from the proceeding, the ALJ shall carry on with the proceeding, or, if a hearing has concluded, issue a decision.

(2) If an ALJ denies a motion to disqualify herself or himself, the moving party may, according to the procedures in subpart J of this part, appeal to the Commandant once the hearing has concluded. When that party does appeal, the ALJ shall forward the motion, the affidavit, and supporting evidence to the Commandant along with the ruling.

§ 20.205 Ex parte communications.

Ex parte communications are governed by subsection 557(d) of the Administrative Procedure Act (5 U.S.C. 557(d)).

§ 20.206 Separation of functions.

(a) No ALJ may be responsible to, or supervised or directed by, an officer, employee, or agent who investigates for or represents the Coast Guard.

(b) No officer, employee, or agent of the Coast Guard who investigates for or represents the Coast Guard in connection with any administrative proceeding may, in that proceeding or one factually related, participate or advise in the decision of the ALJ or of the Commandant in an appeal, except as a witness or counsel in the proceeding or the appeal.

Subpart C—Pleadings and Motions

§ 20.301 Representation.

(a) A party may appear—

(1) Without counsel;

(2) With an attorney; or

(3) With other duly authorized representative.

(b) Any attorney, or any other duly authorized representative, shall file a

notice of appearance. The notice must indicate—

(1) The name of the case, including docket number if assigned;

(2) The person on whose behalf the appearance is made; and

(3) The person's and the representative's mailing addresses and telephone numbers.

(c) Any attorney or other duly authorized representative shall also file a notice, including the items listed in paragraph (a) of this section, for any withdrawal of appearance.

(d) Any attorney shall be a member in good standing of the bar of the highest court of a State, the District of Columbia, or any territory or commonwealth of the United States. A personal representation of membership is sufficient proof, unless the ALJ orders more evidence.

(e) Any person who would act as a duly authorized representative and who is not an attorney shall file a statement setting forth the basis of his or her authority to so act. The ALJ may deny appearance as representative to any person who, the ALJ finds, lacks the requisite character, integrity, or proper personal conduct.

§ 20.302 Filing of documents and other materials.

(a) The proper address at which to file all documents and other materials relating to an administrative proceeding is: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022.

(b) The telephone number is: 410–962–5100.

(c) The fax number is: 410–962–1746.

(d) The appropriate party shall file with the Hearing Docket Clerk an executed original of each document (including any exhibit and supporting affidavit).

(e) A party may file by mail or personal delivery. The ALJ or the Hearing Docket Clerk may permit other methods, such as fax or other electronic means.

(f) When the Hearing Docket Clerk determines that a document, or other material, offered for filing does not comply with requirements of this part, the Clerk will accept it, and may advise the person offering it of the defect, and require that person to correct the defect. If the defect is failure to serve copies on other parties, the parties' response period begins when properly served.

§ 20.303 Form and content of filed documents.

(a) Each filed document must clearly—

(1) State the title of the case;

(2) State the docket number of the case, if one has been assigned;

(3) Designate the type of filing (for instance: petition, notice, or motion to dismiss);

(4) Identify the filing party by name and capacity acted in; and

(5) State the address, telephone number, and any fax number of the filing party and, if that party is represented, the name, address, telephone number, and any fax number of the representative.

(b) Each filed document must—

(1) Measure 8½ by 11 inches, except that a table, chart, or other attachment may be larger if folded to the size of the filed document to which it is physically attached;

(2) Be printed on just one side of the page and be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(3) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(4) Have a left margin of at least 1½ inches and other margins of at least 1 inch; and

(5) Be bound on the left side, if bound.

(c) Each filed document must be in English or, if in another language, accompanied by a certified translation. The original of each filed document must be signed by the filing party or her or his representative. Unless the rules in this part or the ALJ requires it to be verified or accompanied by an affidavit, no filed document need be. The signature constitutes a certification by the signer that she or he has read the document; that, to the best of her or his knowledge, information, and belief, the statements made in it are true; and that she or he does not intend it to cause delay.

(d) Complaints, answers, and simple motions may employ forms approved for use in proceedings of the Coast Guard instead of the format set out in this section.

§ 20.304 Service of documents.

(a) The ALJ shall serve upon each party to the proceeding a copy of each document issued by the ALJ in it. The ALJ shall serve upon each interested person, as determined under § 20.404, a copy of the notice of hearing. Unless this part provides otherwise, the ALJ shall upon request furnish to each such interested person a copy of each document filed with the Hearing Docket Clerk or issued by the ALJ.

(b) Unless the ALJ orders otherwise, each person filing a document with the Hearing Docket Clerk shall serve upon each party a copy of it.

(c) If a party filing a document must serve a copy of it upon each party, each copy must bear a certificate of service, signed by or on behalf of the filing party, stating that she or he has so served it. The certificate shall be in substantially the following form:

I hereby certify that I have served the foregoing document[s] upon the following parties (or their designated representatives) to this proceeding at the addresses indicated by [specify the method]:

(1) [name, address of party]

(2) [name, address of party]

Done at _____, this _____ day of _____, 19____ or 20____.

[Signature]

For

[Capacity].

(d) This table describes how to serve filed documents.

TABLE 20.304(D).—HOW TO SERVE FILED DOCUMENTS

Type of filed document	Acceptable methods of service
(1) Complaint	certified mail, return receipt requested.
(2) Default Motion	(i) Personal delivery. (ii) Express-courier service that has receipt capability.
(3) Answer	(i) Mail. (ii) Personal delivery. (iii) Express-courier service. (iv) Fax.

TABLE 20.304(D).—HOW TO SERVE FILED DOCUMENTS—Continued

Type of filed document	Acceptable methods of service
(4) Any other filed document	(i) Mail. (ii) Personal delivery. (iii) Express-courier service. (iv) Fax. (v) Other electronic means(at the discretion of the ALJ).

(e)(i) Unless the ALJ orders otherwise, if a party files a document under § 20.302, the party must serve a copy to the person indicated in this table.

TABLE 20.304(E).—WHO RECEIVES COPIES OF FILED DOCUMENTS

If a party—	Then the serving party must serve—
Is represented	The counsel or other representative.
Is not represented	The party.

(2) Service upon counsel or representative constitutes service upon the person to be served.

(f) The serving party must send service copies to the address indicated in this table.

TABLE 20.304(F).—WHERE TO SEND SERVICE COPIES

If the party—	Then the serving party must send the copies to—
Is represented	The address of the counsel or representative.
Is not represented	The last known address of the residence or principal place of business of the person to be served.

(g) This table describes when service of a filed document is complete.

TABLE 20.304(G).—WHEN SERVICE IS COMPLETE

If method of service used is—	Then service is complete when the document is—
(1) Personal delivery (Complaint or Default Motion).	(i) Handed to the person to be served. (ii) Delivered to the person's office during business hours. (iii) Delivered to the person's residence and service made to a person of suitable age and discretion residing at the individual's residence.
(2) Personal delivery (all other filed documents)	(i) Handed to the person to be served. (ii) Delivered to the person's office during business hours. (iii) Delivered to the person's residence and deposited in a conspicuous place.
(3) Certified Mail or express-courier (Complaint or Default Motion).	(i) Delivered to the person's residence and signed for by a person of suitable age and discretion residing at the individual's residence. (ii) Delivered to the person's office during business hours and signed for by a person of suitable age and discretion.
(4) Mail or express-courier service (all other filed documents).	(i) Mailed (postmarked). (ii) Deposited with express-courier service.
(5) Fax or other electronic means	Transmitted.

(h) If a person refuses to accept delivery of any document or fails to claim a properly addressed document other than a complaint sent under this subpart, the Coast Guard considers the document served anyway. Service is valid at the date and the time of mailing, of deposit with a contract service or express-courier service, or of refusal to accept delivery.

§ 20.305 Amendment or supplementation of filed documents.

(a) Each party or interested person shall amend or supplement a previously filed pleading or other document if she or he learns of a material change that may affect the outcome of the administrative proceeding. However, no amendment or supplement may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues.

(b) The ALJ may allow other amendments or supplements to previously filed pleadings or other documents.

(c) Each party or interested person shall notify the Hearing Docket Clerk, the ALJ, and every other party or interested person, or her or his representative, of any change of address.

§ 20.306 Computation of time.

(a) We compute time periods as follows:

(1) We do not include the first day of the period.

(2) If the last day of the period is a Saturday, Sunday, or Federal holiday, we extend the period to the next business day.

(3) If the period is 7 days or less, we do not include Saturdays, Sundays, or Federal holidays.

(b) If you were served a document (by domestic mail) that requires or permits a response, you may add 3 days to any period for response.

(c) If you need additional time to file a response, follow the rules in these tables.

(1) You may request an extension—

TABLE 20.306(C)(1).—HOW TO REQUEST AN EXTENSION

If the response period—	By—
Has not expired	Telephone, letter, or motion.
Has expired	Only by motion describing why the failure to file was excusable.

(2) You file your request as follows:

TABLE 20.306(C)(2).—WHERE TO FILE AN EXTENSION REQUEST

If—	Then you file your request with the—
An ALJ has not been assigned	Hearing Docket Clerk.
An ALJ has been assigned	ALJ.
Your case is on appeal	Hearing Docket Clerk.

§ 20.307 Complaints.

(a) The complaint must set forth—

(1) The type of case;

(2) The statute or rule allegedly violated;

(3) The pertinent facts alleged; and

(4)(i) The amount of the class II civil penalty sought; or

(ii) The order of suspension or revocation proposed.

(b) The Coast Guard shall propose a place of hearing when filing the complaint.

(c) The complaint must conform to the requirements of this subpart for filing and service.

§ 20.308 Answers.

(a) The respondent shall file a written answer to the complaint 20 days or less after service of the complaint. The answer must conform to the requirements of this subpart for filing and service.

(b) The person filing the answer shall, in the answer, either agree to the place of hearing proposed in the complaint or propose an alternative.

(c) Each answer must state whether the respondent intends to contest any of the allegations set forth in the complaint. It must include any affirmative defenses that the respondent intends to assert at the hearing. The answer must admit or deny each numbered paragraph of the complaint. If it states that the respondent lacks sufficient knowledge or information to admit or deny a particular numbered paragraph, it denies that paragraph. If it does not specifically deny a particular numbered paragraph, it admits that paragraph.

(d) A respondent's failure without good cause to file an answer admits each allegation made in the complaint.

§ 20.309 Motions.

(a) A person may apply for an order or ruling not specifically provided for in this subpart, but shall apply for it by motion. Each written motion must comply with the requirements of this subpart for form, filing, and service. Each motion must state clearly and concisely—

(1) Its purpose, and the relief sought;

(2) Any statutory or regulatory authority; and

(3) The facts constituting the grounds for the relief sought.

(b) A proposed order may accompany a motion.

(c) Each motion must be in writing; except that one made at a hearing will be sufficient if stated orally upon the record, unless the ALJ directs that it be reduced to writing.

(d) Except as otherwise required by this part, a party shall file any response to a written motion 10 days or less after service of the motion. When a party makes a motion at a hearing, an oral response to the motion made at the hearing is timely.

(e) Unless the ALJ orders otherwise, the filing of a motion does not stay a proceeding.

(f) The ALJ will rule on the record either orally or in writing. She or he may summarily deny any dilatory, repetitive, or frivolous motion.

§ 20.310 Default by respondent.

(a) The ALJ may find a respondent in default upon failure to file a timely answer to the complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown.

(b) Each motion for default must conform to the rules of form, service, and filing of this subpart. Each motion must include a proposed decision and proof of service under section 20.304(d). The respondent alleged to be in default shall file a reply to the motion 20 days or less after service of the motion.

(c) Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of her or his right to a hearing on those facts.

(d) Upon finding a respondent in default, the ALJ shall issue a decision against her or him.

(e) For good cause shown, the ALJ may set aside a finding of default.

§ 20.311 Withdrawal or dismissal.

(a) An administrative proceeding may end in withdrawal without any act by an ALJ in any of the following ways:

(1) By the filing of a stipulation by all parties who have appeared in the proceeding.

(2) By the filing of a notice of withdrawal by the Coast Guard representative at any time before the respondent has served a responsive pleading.

(3) With respect to a complaint filed under section 311(b)(6) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(6)) or section 109(d) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9609(b)), by the filing of—

(i) A notice of withdrawal by the Coast Guard representative at any time after the respondent has served a responsive pleading, but before the issuance of an order assessing or denying a class II civil penalty, together with

(ii) A certification by the representative that the filing of the notice is due to a request by the Attorney General—in accordance with subsection 10(d) of Executive Order 12777 (56 FR 54757; 3 CFR, 1991 Comp., p. 351)—that the Coast Guard

refrain from conducting an administrative proceeding.

(b) Unless the stipulation or notice of withdrawal states otherwise, a withdrawal under paragraph (a) of this section is without prejudice.

(c) Except as provided in paragraph (a) of this section, no administrative proceeding may end in withdrawal unless approved by an ALJ upon such terms as she or he deems proper.

(d) Any respondent may move to dismiss a complaint, the government may move to dismiss a petition, or any party may lodge a request for relief, for failure of another party to—

(1) Comply with the requirements of this part or with any order of the ALJ;

(2) Show a right to relief based upon the facts or law; or

(3) Prosecute the proceeding.

(e) A dismissal resides within the discretion of the ALJ.

Subpart D—Proceedings

§ 20.401 Initiation of administrative proceedings.

An administrative proceeding commences when the Coast Guard representative files the complaint with the Hearing Docket Clerk and serves a copy of it on the respondent.

§ 20.402 Public notice.

Upon the filing of a complaint under 33 U.S.C. 1321(b) (6), the Coast Guard provides public notice of a class II civil penalty proceeding. The notice appears in the **Federal Register**.

§ 20.403 Consolidation and severance.

(a) A presiding ALJ may for good cause, with the approval of the Chief ALJ and with all parties given notice and opportunity to object, consolidate any matters at issue in two or more administrative proceedings docketed under this part. (Good cause includes the proceedings' possessing common parties, questions of fact, and issues of law and presenting the likelihood that consolidation would expedite the proceedings and serve the interests of justice.) The ALJ may not consolidate any matters if consolidation would prejudice any rights available under this part or impair the right of any party to place any matters at issue.

(b) Unless directed otherwise by the Chief ALJ, a presiding ALJ may, either in response to a motion or on his or her own motion, for good cause, sever any administrative proceeding with respect to some or all parties, claims, and issues.

§ 20.404 Interested persons.

(a) Any person not a party to a class II civil penalty proceeding under 33 U.S.C. 1321(b)(6) who wishes to be an interested person in the proceeding shall, 30 days or less after publication in the **Federal Register** of the public notice required by § 20.402, file with the Hearing Docket Clerk either—

(1) Written comments on the proceeding; or

(2) Written notice of intent to present evidence at any hearing in the proceeding.

(b) The presiding ALJ may, for good cause, accept late comments or late notice of intent to present evidence.

(c) Each interested person shall receive notice of any hearing due in the proceeding and of the decision in the proceeding. He or she may have a reasonable opportunity to be heard and to present evidence in any hearing.

(d) The opportunity secured by paragraph (c) of this section does not extend to—

(1) The issuance of subpoenas for witnesses;

(2) The cross-examination of witnesses; or

(3) Appearance at any settlement conference.

Subpart E—Conferences and Settlements

§ 20.501 Conferences.

(a) Any party may by motion request a conference.

(b) The ALJ may direct the parties to attend one or more conferences before or during a hearing.

(c) The ALJ may invite interested persons to attend a conference, other than a settlement conference, as the ALJ deems appropriate.

(d) The ALJ shall give reasonable notice of the time and place of any conference to the parties, and to interested persons if invited. A conference may occur in person, by telephone, or by other appropriate means.

(e) Each party, and any interested person invited, shall be fully prepared for a useful discussion of all issues properly before the conference, both procedural and substantive, and be authorized to commit themselves or those they represent respecting those issues.

(f) Unless the ALJ excuses a party, the failure of a party to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in it and to any consequent orders or rulings.

(g) The ALJ may direct that any of the following be addressed or furnished before, during, or after the conference:

(1) Methods of service and filing.

(2) Motions for consolidation or severance of parties or issues.

(3) Motions for discovery.

(4) Identification, simplification, and clarification of the issues.

(5) Requests for amendment of the pleadings.

(6) Stipulations and admissions of fact and of the content and authenticity of documents.

(7) The desirability of limiting and grouping witnesses, so as to avoid duplication.

(8) Requests for official notice and particular matters to be resolved by reliance upon the substantive standards, rules, and other policies of the Coast Guard.

(9) Offers of settlement.

(10) Proposed date, time, and place of the hearing.

(11) Other matters that may aid in the disposition of the proceeding.

(h) No one may stenographically report or otherwise record a conference unless the ALJ allows.

(i) During a conference, the ALJ may dispose of any procedural matters on which he or she is authorized to rule.

(j) Actions taken at a conference may be memorialized in—

(1) A stenographic report if authorized by the ALJ;

(2) A written transcript from a magnetic tape or the equivalent if authorized by the ALJ; or

(3) A statement by the ALJ on the record at the hearing summarizing them.

§ 20.502 Settlements.

(a) The parties may submit a proposed settlement to the ALJ.

(b) The proposed settlement must be in the form of a proposed decision, accompanied by a motion for its entry. The decision must recite the reasons that make it acceptable, and it must be signed by the parties or their representatives.

(c) The proposed decision must contain—

(1) An admission of all jurisdictional facts;

(2) An express waiver of—

(i) Any further procedural steps before the ALJ; and

(ii) All rights to seek judicial review, or otherwise challenge or contest the validity, of the decision;

(3) A statement that the decision will have the same force and effect as would a decision made after a hearing; and

(4) A statement that the decision resolves all matters needing to be adjudicated.

Subpart F—Discovery

§ 20.601 General.

(a) Unless the ALJ orders otherwise, each party—and each interested person

who has filed written notice of intent to present evidence at any hearing in the proceeding under § 20.404—shall make available to the ALJ and to every other party and interested person—

(1) The name of each expert and other witness the party intends to call, together with a brief narrative summary of the expected testimony; and

(2) A copy, marked as an exhibit, of each document the party intends to introduce into evidence or use in the presentation of its case.

(b) During a pre-hearing conference ordered under § 20.501, the ALJ may direct that the parties exchange witness lists and exhibits either at once or by correspondence.

(c) The ALJ may establish a schedule for discovery and shall serve a copy of any such schedule on each party.

(1) The schedule may include dates by which the parties shall both exchange witness lists and exhibits and file any requests for discovery and objections to such requests.

(2) Unless the ALJ orders otherwise, the parties shall exchange witness lists and exhibits 15 days or more before hearing.

(d) Further discovery may occur only by order, and then only when the ALJ determines that—

(1) It will not unreasonably delay the proceeding;

(2) The information sought is not otherwise obtainable;

(3) The information sought has significant probative value;

(4) The information sought is neither cumulative nor repetitious; and

(5) The method or scope of the discovery is not unduly burdensome and is the least burdensome method available.

(e) A motion for discovery must set forth—

(1) The circumstances warranting the discovery;

(2) The nature of the information sought; and

(3) The proposed method and scope of discovery and the time and place where the discovery would occur.

(f) If the ALJ determines that he or she should grant the motion, he or she shall issue an order for the discovery, together with the terms on which it will occur.

§ 20.602 Amendatory or supplementary responses.

(a) Any party or interested person shall amend or supplement information previously provided upon learning that the information—

(1) Was incorrect or incomplete when provided; or,

(2) Though correct or complete when provided, no longer is.

(b) The party or interested person shall amend or supplement that information by following the procedures in § 20.305.

§ 20.603 Interrogatories.

(a) Any party requesting interrogatories shall so move to the ALJ. The motion must include—

(1) A statement of the purpose and scope of the interrogatories; and

(2) The proposed interrogatories.

(b) The ALJ shall review the proposed interrogatories, and may enter an order either—

(1) Approving the service of some or all of the proposed interrogatories; or

(2) Denying the motion.

(c) The party requesting interrogatories shall serve on the party named in the interrogatories the approved written interrogatories.

(d) Each interrogatory must be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the party named shall state the reasons for the objection instead of a response. This party, the party's attorney, or the party's representative shall sign the party's responses to interrogatories.

(e) Responses or objections must be filed within 30 days after the service of the interrogatories.

(f) A response to an interrogatory is sufficient when—

(1) The responder lists the records from which such answers may be derived or ascertained; and

(2) The burden of ascertaining the information in a response to an interrogatory is substantially the same for all parties involved in the action; and

(3) The information may be obtained from an examination, audit, or inspection of records, or from a compilation, abstract, or summary based on such records.

(g) The party serving the interrogatory shall be afforded reasonable opportunity to examine, audit, or inspect the resource and to make copies, compilations, abstracts, or summaries. The specification must include sufficient detail to permit the interrogating party to locate and identify the individual records from which the answer may be ascertained.

§ 20.604 Requests for production of documents or things, for inspection or other purposes.

(a) Any party seeking production of documents or things for inspection or other purposes shall so move to the ALJ. The motion must state with particularity—

(1) The purpose and scope of the request; and

(2) The documents and materials sought.

(b) The ALJ shall review the motion and enter an order approving or denying it in whole or in part.

(c) A party shall serve on the party in possession, custody, or control of the documents the order to produce or to permit inspection and copying of documents.

(d) A party may, after approval of an appropriate motion by the ALJ, inspect and copy, test, or sample any tangible things that contain, or may lead to, relevant information, and that are in the possession, custody, or control of the party upon whom the request is served.

(e) A party may, after approval of an appropriate motion by the ALJ, serve on another party a request to permit entry upon designated property in the possession or control of the other party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or area. A request to permit entry upon property must set forth with reasonable particularity the feature to be inspected and must specify a reasonable time, place, and manner for making the inspection and performing the related acts.

(f) The party upon whom the request is served shall respond within 30 days after the service of the request. Inspection and related activities will be permitted as requested, unless there are objections, in which case the reason for each objection must be stated.

§ 20.605 Depositions.

(a) The ALJ may order a deposition only upon a showing of good cause and upon a finding that—

(1) The information sought is not obtainable more readily by alternative methods; or

(2) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation at the hearing.

(b) Testimony may be taken by deposition upon approval of the ALJ of a motion made by any party.

(1) The motion must state—

(i) The purpose and scope of the deposition;

(ii) The time and place it is to be taken;

(iii) The name and address of the person before whom the deposition is to be taken;

(iv) The name and address of each witness from whom a deposition is to be taken;

(v) The documents and materials which the witness is to produce; and

(vi) Whether it is intended that the deposition be used at a hearing instead of live testimony.

(2) The motion must state if the deposition is to be by oral examination, by written interrogatories, or a combination of the two. The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(c) Upon a showing of good cause the ALJ may enter, and serve upon the parties, an order to obtain the testimony of the witness.

(d) If the deposition of a public or private corporation, partnership, association, or governmental agency is ordered, the organization named must designate one or more officers, directors, or agents to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. Subject to the provisions of 49 CFR part 9 with respect to Coast Guard witnesses, the designated persons shall testify as to matters reasonably known to them.

(e) Each witness deposed shall be placed under oath or affirmation, and the other parties shall have the right to cross-examine.

(f) The witness being deposed may have counsel or another representative present during the deposition.

(g) Except as provided in paragraph (n) of this section, depositions shall be stenographically recorded and transcribed at the expense of the party requesting the deposition. Unless waived by the deponent, the transcription must be read by or read to the deponent, subscribed by the deponent, and certified by the person before whom the deposition was taken.

(h) Subject to objections to the questions and responses that were noted at the taking of the deposition and that would have been sustained if the witness had been personally present and testifying at a hearing, a deposition may be offered into evidence by the party taking it against any party who was present or represented at the taking of the deposition or who had notice of the deposition.

(i) The party requesting the deposition shall make appropriate arrangements for necessary facilities and personnel.

(j) During the taking of a deposition, a party or the witness may request suspension of the deposition on the grounds of bad faith in the conduct of the examination, oppression of the witness or party, or improper questioning or conduct. Upon request for suspension, the deposition will be adjourned. The objecting party or witness must immediately move the ALJ for a ruling on the objection(s). The ALJ may then limit the scope or manner of the taking of the deposition.

(k) When a deposition is taken in a foreign country, it may be taken before a person having power to administer oaths in that location, or before a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or before such other person or officer as may be agreed upon by the parties by written stipulation filed with the ALJ.

(l) Objection to taking a deposition because of the disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins, or as soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(m) A deposition may be taken by telephone conference call upon such terms, conditions, and arrangements as are prescribed in the order of the ALJ.

(n) The testimony at a deposition hearing may be recorded on videotape, upon such terms, conditions and arrangements as are prescribed in the order of the ALJ, at the expense of the party requesting the recording. The video recording may be in conjunction with an oral examination by telephone conference held pursuant to paragraph (m) of this section. After the deposition has been taken, and copies of the video recording are provided to parties requesting them, the person recording the deposition shall immediately place the videotape in a sealed envelope or a sealed videotape container, attaching to it a statement identifying the proceeding and the deponent and certifying as to the authenticity of the video recording, and return the videotape by accountable means to the ALJ. The deposition becomes a part of the record of the proceedings in the same manner as a transcribed deposition. The videotape, if admitted into evidence, will be played during the hearing and transcribed into the record by the reporter.

§ 20.606 Protective orders.

(a) In considering a motion for an order of discovery—or a motion, by a party or other person from whom discovery is sought, to reconsider or amend an order of discovery—the ALJ may enter any order that justice requires, to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. This order may—

(1) Confine discovery to specific terms and conditions, such as a particular time and place;

(2) Confine discovery to a method other than that selected by the party seeking it;

(3) Preclude inquiry into certain matters;

(4) Direct that discovery occur with no one present except persons designated by the ALJ;

(5) Preclude the disclosure of a trade secret or other proprietary information, or allow its disclosure only in a designated way or only to designated persons; or

(6) Require that the person from whom discovery is sought file specific documents or information under seal for opening at the direction of the ALJ.

(b) When a person from whom discovery is sought seeks a protective order, the ALJ may let him or her make all or part of the showing of good cause *in camera.* The ALJ shall record any proceedings *in camera.* If he or she enters a protective order, he or she shall seal any proceedings so recorded. These shall be releasable only as required by law.

(c) Upon motion by a person from whom discovery is sought, the ALJ may—

(1) Restrict or defer disclosure by a party either of the name of a witness or, if the witness comes from the Coast Guard, of any prior statement of the witness; and

(2) Prescribe other appropriate measures to protect a witness.

(d) The ALJ will give any party an adequate opportunity to prepare for cross-examination or other presentation concerning witnesses and statement subject to protective orders.

§ 20.607 Sanctions for failure to comply.

If a party fails to provide or permit discovery, the ALJ may take such action as is just. This may include the following:

(a) Infer that the testimony, document, or other evidence would have been adverse to the party.

(b) Order that, for the purposes of the proceeding, designated facts are established.

(c) Order that the party not introduce into evidence—or otherwise rely upon, in support of any claim or defense—the evidence that was withheld.

(d) Order that the party not introduce into evidence, or otherwise use in the hearing, information obtained in discovery.

(e) Allow the use of secondary evidence to show what the evidence withheld would have shown.

§ 20.608 Subpoenas.

(a) Any party may request the ALJ to issue a subpoena for the attendance of

a person, the giving of testimony, or the production of books, papers, documents, or any other relevant evidence during discovery or for any hearing. Any party seeking a subpoena from the ALJ shall request its issuance by motion.

(b) An ALJ may, for good cause shown, apply to the United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence.

(c) A person serving a subpoena shall prepare a written statement setting forth either the date, time, and manner of service or the reason for failure of service. He or she shall swear to or affirm the statement, attach it to a copy of the subpoena, and return it to the ALJ who issued the subpoena.

(d) Coast Guard investigating officers have separate subpoena power in S&R proceedings under 46 CFR 5.301.

§ 20.609 Motions to quash or modify.

(a) A person to whom a subpoena is directed may, by motion with notice to the party requesting the subpoena, ask the ALJ to quash or modify the subpoena.

(b) Except when made at a hearing, the motion must be filed:

(1) 10 days or less after service of a subpoena compelling the appearance and testimony of a witness or the production of evidence or

(2) At or before the time specified in the subpoena for compliance, whichever is earlier.

(c) If the subpoena is served at a hearing, the person to whom it is directed may, in person at the hearing or in writing within a reasonable time fixed by the ALJ, ask the ALJ to quash or modify it.

(d) The ALJ may quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue.

Subpart G—Hearings

§ 20.701 Standard of proof.

The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence.

§ 20.702 Burden of proof.

(a) Except for an affirmative defense, or as provided by paragraph (b) of this section, the Coast Guard bears the burden of proof.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order bears the burden of proof.

§ 20.703 Presumptions.

In each administrative hearing, a presumption—

(a) Imposes on the party against whom it lies the burden of going forward with evidence to rebut or meet the presumption; but

(b) Does not shift the burden of proof in the sense of the risk of non-persuasion.

§ 20.704 Scheduling and notice of hearings.

(a) With due regard for the convenience of the parties, and of their representatives or witnesses, the ALJ shall, as early as possible, fix the date, time, and place for the hearing and notify all parties and interested persons.

(b) The ALJ may grant a request for a change in the date, time, or place of a hearing.

(c) At any time after commencement of a proceeding, any party may move to expedite the proceeding. A party moving to expedite shall—

(1) Explain in the motion the circumstances justifying the motion to expedite; and

(2) Incorporate in the motion affidavits supporting any representations of fact.

(d) After timely receipt of the motion and any responses, the ALJ may expedite pleadings, pre-hearing conferences, and the hearing, as appropriate.

§ 20.705 Failure to appear.

The ALJ may enter a default under § 20.310 against a respondent threatening to fail, or having failed, to appear at a hearing unless,—

(a) Before the time for the hearing, the respondent shows good cause why neither the respondent nor his or her representative can appear; or,

(b) 30 days or less after an order to show good cause, the respondent shows good cause for his or her failure to appear.

§ 20.706 Witnesses.

(a) Each witness shall testify under oath or affirmation.

(b) If a witness fails or refuses to answer any question the ALJ finds proper, the failure or refusal constitutes grounds for the ALJ to strike all or part of the testimony given by the witness or to take any other measure he or she deems appropriate.

§ 20.707 Telephonic testimony.

(a) The ALJ may order the taking of the testimony of a witness by telephonic conference call. A person presenting evidence may by motion ask for the taking of testimony by this means. The arrangement of the call must let each participant listen to and speak to each other within the hearing of the ALJ, who will ensure the full identification of each so the reporter can create a proper record.

(b) The ALJ may issue a subpoena directing a witness to testify by telephonic conference call. The subpoena in any such instance issues under the procedures in § 20.608.

§ 20.708 Witnesses' fees.

(a) Each witness summoned in an administrative proceeding shall receive the same fees and mileage as a witness in a District Court of the United States.

(b) The party or interested person who calls a witness is responsible for all fees and mileage due under paragraph (a) of this section.

§ 20.709 Closing of the record.

(a) When the ALJ closes the hearing, he or she shall also close the record of the proceeding, as described in § 20.903, unless he or she directs otherwise. Even after the ALJ closes it, he or she may reopen it.

(b) The ALJ may correct the transcript of the hearing by appropriate order.

§ 20.710 Proposed findings, closing arguments, and briefs.

(a) Before the ALJ closes the hearing, he or she may hear oral argument so far as he or she deems appropriate.

(b) Before the ALJ decides the case, and upon terms he or she finds reasonable, any party may file a brief, proposed findings of fact and conclusions of law, or both. Any party may waive this right. If all parties waive it, then the ALJ may issue an oral order at the close of the hearing.

(c) Any oral argument, brief, or proposed findings of fact and conclusions of law form part of the record of the proceeding, as described in § 20.903.

Subpart H—Evidence

§ 20.801 General.

Any party may present his or her case or defense by oral, documentary, or demonstrative evidence; submit rebuttal evidence; and conduct any cross-examination that may be necessary for a full and true disclosure of the facts.

§ 20.802 Admissibility of evidence.

(a) The ALJ may admit any relevant oral, documentary, or demonstrative evidence, unless privileged. Relevant evidence is evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence.

(b) The ALJ may exclude evidence if its probative value is substantially outweighed by the danger of prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

§ 20.803 Hearsay evidence.

Hearsay evidence is admissible in proceedings governed by this part. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

§ 20.804 Objections and offers of proof.

(a) Any party objecting to the admission or exclusion of evidence shall concisely state the grounds. A ruling on every objection must appear in the record. No party may raise an objection to the admission or exclusion of evidence on appeal unless he or she raised it before the ALJ.

(b) Whenever evidence is objected to, the party offering it may make an offer of proof, which must appear in the record.

§ 20.805 Proprietary information.

(a) The ALJ may limit introduction of evidence or issue such protective or other orders as in his or her judgment are consistent with the object of preventing undue disclosure of proprietary matters, including, among others, ones of a commercial nature.

(b) When the ALJ determines that information in a document containing proprietary matters should be made available to another party, the ALJ may direct the party possessing the document to prepare a non-proprietary summary or extract of it. The summary or extract may be admitted as evidence in the record.

(c) If the ALJ determines that a non-proprietary summary or extract is inadequate and that proprietary matters must form part of the record to avert prejudice to a party, the ALJ may so advise the parties and arrange access to the evidence for a party or representative.

§ 20.806 Official notice.

The ALJ may take official notice of such matters as could courts, or of other facts within the specialized knowledge of the Coast Guard as an expert body. When all or part of a decision rests on the official notice of a material fact not appearing in the evidence in the record, the decision must state as much; and any party, upon timely request, shall receive an opportunity to rebut the fact.

§ 20.807 Exhibits and documents.

(a) Each exhibit must be numbered and marked for identification by the party offering it. The original of each exhibit so marked, whether or not offered or admitted into evidence, must be filed and retained in the record of the proceeding, unless the ALJ permits the substitution of a copy. The party introducing each exhibit so marked shall supply a copy of the exhibit to the ALJ and to every party to the proceeding.

(b) Unless the ALJ directs otherwise, each party who would offer an exhibit upon direct examination shall make it available to every other party for inspection 15 days or more before the hearing. The ALJ will deem admitted the authenticity of each exhibit submitted before the hearing unless a party either files written objection and serves it on all parties or shows good cause for failure to do both.

(c) In class II civil penalty proceedings under 33 U.S.C. 1321(b)(6), each exhibit introduced by an interested person must be marked, and filed and retained in the record of the proceeding, unless the ALJ permits the substitution of a copy. The interested person shall supply a copy of the exhibit to the ALJ and to every party to the proceeding. The requirements of paragraph (b) of this section apply to any interested person who would offer an exhibit upon direct examination.

§ 20.808 Written testimony.

The ALJ may enter into the record the written testimony of a witness. The witness shall be, or have been, available for oral cross-examination. The statement must be sworn to, or affirmed, under penalty of perjury.

§ 20.809 Stipulations.

Any party or interested person may stipulate, in writing, at any stage of the proceeding, or orally at the hearing, to any pertinent fact or other matter fairly susceptible of stipulation. A stipulation binds all parties to it.

Subpart I—Decisions

§ 20.901 Summary decisions.

(a) Any party may move for a summary decision in all or any part of the proceeding on the grounds that there is no genuine issue of material fact and that the party is entitled to a decision as a matter of law. The party must file the motion no later than 15 days before the date fixed for the hearing and may include supporting affidavits with the motion. Any other party, 10 days or less after service of a motion for summary decision, may serve opposing affidavits or countermove for summary decision. The ALJ may set the matter for argument and call for the submission of briefs.

(b) The ALJ may grant the motion if the filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noted show that there is no genuine issue of material fact and that a party is entitled to a summary decision as a matter of law.

(c) Each affidavit must set forth such matters as would be admissible in evidence and must show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Once a party has moved for summary decision and supported his or her motion as provided in this section, no party opposing the motion may rest upon the mere allegations or denials of facts contained in his or her own pleadings. The response to the motion, by affidavit or as otherwise provided in this section, must provide a specific basis to show that there is a genuine issue of material fact for the hearing.

(d) If it appears from the affidavit of a party opposing the motion that this party cannot, for reasons stated, present by affidavit matters essential to justify his or her opposition, the ALJ may deny the motion for summary decision, may order a continuance to enable the obtaining of information, or may make such other order as is just.

(e) No denial of all or any part of a motion for summary decision is subject to interlocutory appeal.

§ 20.902 Decisions of the ALJ.

(a) After closing the record of the proceeding, the ALJ shall prepare a decision containing—

(1) A finding on each material issue of fact and conclusion of law, and the basis for each finding;

(2) The disposition of the case, including any appropriate order;

(3) The date upon which the decision will become effective;

(4) A statement of further right to appeal; and,

(5) If no hearing was held, a statement of the right of any interested person to petition the Commandant to set aside the decision.

(b) The decision of the ALJ must rest upon a consideration of the whole record of the proceedings.

(c) The ALJ may, upon motion of any party or in his or her own discretion, render the initial decision from the bench (orally) at the close of the hearing and prepare and serve a written order on the parties or their authorized representatives. In rendering his or her decision from the bench, the ALJ shall state the issues in the case and make clear, on the record, his or her findings of fact and conclusions of law.

(d) If the ALJ renders the initial decision orally, and if a party asks for a copy, the Hearing Docket Clerk shall furnish a copy excerpted from the transcript of the record. The date of the decision is the date of the oral rendering of the decision by the ALJ.

§ 20.903 Records of proceedings.

(a) The transcript of testimony at the hearing, all exhibits received into evidence, any items marked as exhibits and not received into evidence, all motions, all applications, all requests, and all rulings constitute the official record of a proceeding. This record also includes any motions or other matters regarding the disqualification of the ALJ.

(b) Any person may examine the record of a proceeding at the U. S. Coast Guard Administrative Law Judge Docketing Center; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022. Any person may obtain a copy of part or all of the record after payment of reasonable costs for duplicating it in accordance with 49 CFR part 7.

§ 20.904 Reopening.

(a) To the extent permitted by law, the ALJ may, for good cause shown in accordance with paragraph (c) of this section, reopen the record of a proceeding to take added evidence.

(b) Any party may move to reopen the record of a proceeding 30 days or less after the closing of the record.

(1) Each motion to reopen the record must clearly set forth the facts that the movant would try to prove and the grounds for reopening the record.

(2) Any party who does not respond to any motion to reopen the record waives any objection to the motion.

(c) The ALJ may reopen the record of a proceeding if he or she believes that any change in fact or law, or that the public interest, warrants reopening it.

(d) The filing of a motion to reopen the record of a proceeding does not affect any period for appeals specified in subpart J of this part, except that the filing of such a motion tolls the running of whatever time remains in the period for appeals until either the ALJ acts on the motion or the party filing it withdraws it.

(e)(1) At any time, a party may file a petition to reopen with the Docketing Center for the ALJ to rescind any order suspending or revoking a merchant mariner's license, certificate of registry, or document if—

(i) The order rests on a conviction—

(A) For violation of a dangerous-drug law;

(B) Of an offense that would prevent the issuance or renewal of the license, certificate, or document; or

(C) Of an offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401, note); and

(ii) The respondent submits a specific order of court to the effect that the conviction has been unconditionally set aside for all purposes.

(2) The ALJ, however, may not rescind his or her order on account of any law that provides for a subsequent conditional setting-aside, modification, or expunging of the order of court, by way of granting clemency or other relief after the conviction has become final, without regard to whether punishment was imposed.

(f) Three years or less after an S&R proceeding has resulted in revocation of a license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center.

(1) Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea.

(2) Any party who does not respond to any petition to reopen the record waives any objection to the motion.

Subpart J—Appeals

§ 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,—

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201–4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the—

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless—

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether

the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

Subpart K—Finality, Petitions for Hearing, and Availability of Orders

§ 20.1101 Finality.

(a) *Civil penalty proceedings.*

(1) Unless appealed pursuant to subpart J of this part, an ALJ's decision becomes an order assessing or denying a class II civil penalty 30 days after the date of its issuance.

(2) If the Commandant issues a decision under Subpart J of this part, the decision constitutes an order of the Commandant assessing or denying a class II civil penalty on the date of issuance of the Commandant's decisions.

(b) *S&R Proceedings. (1) Unless appealed pursuant to subpart J of this part, an ALJ's decision becomes final action of the Coast Guard 30 days after the date of its issuance.*

(2) If the Commandant issues a decision under Subpart J of this part, the decision constitutes final action of the Coast Guard on the date of its issuance.

§ 20.1102 Petitions to set aside decisions and provide hearings for civil penalty proceedings.

(a) If no hearing takes place on a complaint for a class II civil penalty, any interested person may file a petition, 30 days or less after the issuance of an order assessing or denying a civil penalty, asking the Commandant to set aside the order and to provide a hearing.

(b) If the Commandant decides that evidence presented by an interested person in support of a petition under paragraph (a) of this section is material and that the ALJ did not consider the evidence in the issuance of the decision, the Commandant shall set aside the decision and direct that a hearing take place in accordance with the requirements of this part.

(c) If the Commandant denies a hearing sought under this section, he or she shall provide to the interested person, and publish in the **Federal Register**, notice of and the reasons for the denial.

§ 20.1103 Availability of decisions.

(a)(1) Copies and indexes of decisions on appeal are available for inspection and copying at—

(i) The document inspection facility at the office of any Coast Guard District, Activity, or Marine Safety Office;

(ii) The public reading room at Coast Guard Headquarters; and

(iii) The public reading room of the Coast Guard ALJ Docketing Center; Baltimore, Maryland.

(2) Appellate decisions in S&R proceedings, and both appellate and ALJs' decisions on class II civil penalties, are available on the Department of Transportation Home Page at www.dot.gov or the Coast Guard Home Page at www.uscg.mil.

(b) Any person wanting a copy of a decision may place a request with the Hearing Docket Clerk. The Clerk will bill the person on the terms prescribed in 49 CFR 7.43.

Subpart L—Expedited Hearings

§ 20.1201 Application.

(a) This subpart applies whenever the Coast Guard suspends a merchant mariner's license, certificate of registry, or document without a hearing under 46 U.S.C. 7702(d).

(b) The Coast Guard may, for 45 days or less, suspend and seize a license, certificate, or document if, when acting under the authority of the license, certificate, or document,—

(1) A mariner performs a safety-sensitive function on a vessel; and

(2) There is probable cause to believe that he or she—

(i) Has performed the safety-sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;

(ii) Has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document; or,

(iii) Three years or less before the start of an S&R proceeding, has been convicted of an offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401, note).

§ 20.1202 Filing of pleadings.

(a) *Complaint.* If the Coast Guard has temporarily suspended a merchant mariner's license, certificate of registry, or document, it shall immediately file a complaint under § 20.307. The complaint must contain both a copy of a notice of temporary suspension and an affidavit stating the authority and reason for temporary suspension.

(b) *Answer.* In a case under this subpart—

(1) § 20.308 does not govern answers, and

(2) The respondent shall therefore enter his or her answer at the pre-hearing conference.

§ 20.1203 Commencement of expedited hearings.

Upon receipt of a complaint with a copy of the notice of temporary suspension and the affidavit supporting the complaint, the Chief ALJ will immediately assign an ALJ and designate the case for expedited hearing.

§ 20.1205 Motion for return of temporarily suspended license, certificate of registry, or document.

(a) *Procedure.* At any time during the expedited hearing, the respondent may move that his or her license, certificate of registry, or document be returned on the grounds that the agency lacked probable cause for temporary suspension. The motion must be in writing and explain why the agency lacked probable cause.

(b) *Ruling.* If the ALJ grants the motion, the ALJ may issue such orders as are necessary for the return of the suspended license, certificate, or document and for the matter to continue in an orderly way under standard procedure.

§ 20.1206 Discontinuance of expedited hearings.

(a) *Procedure.* At any time during the expedited hearing, the respondent may move that the hearing discontinue and that the matter continue under standard procedure. A motion to discontinue must be in writing and explain why the case is inappropriate for expedited hearing.

(b) *Ruling.* If the ALJ grants the motion to discontinue, the ALJ may issue such orders as are necessary for the matter to continue in an orderly way under standard procedure.

§ 20.1207 Pre-hearing conferences.

(a) *When held.* As early as practicable, the ALJ shall order and conduct a pre-hearing conference. He or she may order the holding of the conference in person, or by telephonic or electronic means.

(b) *Answer.* The respondent shall enter his or her answer at the pre-hearing conference. If the answer is an admission, the ALJ shall either issue an appropriate order or schedule a hearing on the order.

(c) *Content.* (1) At the pre-hearing conference, the parties shall:

(i) Identify and simplify the issues in dispute and prepare an agreed statement of issues, facts, and defenses.

(ii) Establish a simplified procedure appropriate to the matter.

(iii) Fix a time and place for the hearing 30 days or less after the temporary suspension.

(iv) Discuss witnesses and exhibits.

(2) The ALJ shall issue an order directing the exchange of witness lists and documents.

(d) *Order.* Before the close of the pre-hearing conference, the ALJ shall issue an order setting forth any agreements reached by the parties. The order must specify the issues for the parties to address at the hearing.

(e) *Procedures not to cause delay.* Neither any filing of pleadings or motions, nor any conduct of discovery, may interfere with—

(1) The holding of the hearing 30 days or less after the temporary suspension or

(2) The closing of the record early enough for the issuance of an initial decision 45 days or less after the temporary suspension.

(f) *Times.* The ALJ may shorten the time for any act required or permitted under this subpart to enable him or her to issue an initial decision 45 days or less after the temporary suspension.

§ 20.1208 Expedited hearings.

(a) *Procedures.* As soon as practicable after the close of the pre-hearing conference, the ALJ shall hold a hearing, under subpart G of this part, on any issue that remains in dispute.

(b) *Oral and written argument.* (1) Each party may present oral argument at the close of the hearing or present—

(i) Proposed findings of fact and conclusions of law; and

(ii) Post-hearing briefs, under § 20.710.

(2) The ALJ shall issue a schedule, such as will enable him or her to consider the findings and briefs without delaying the issuance of the decision.

(c) *ALJ's decision.* The ALJ may issue his or her decision as an oral decision from the bench. Alternatively, he or she may issue a written decision. He or she shall issue the decision 45 days or less after the temporary suspension.

§ 20.1209 Appeals of ALJs' decisions.

Any party may appeal the ALJ's decision as provided in subpart J.

Subpart M—Supplementary Evidentiary Rules for Suspension and Revocation Hearings

§ 20.1301 Purpose.

This subpart contains evidentiary rules that apply only in certain circumstances in S&R proceedings. They supplement, not supplant, the evidentiary rules in subpart H.

§ 20.1303 Authentication and certification of extracts from shipping articles, logbooks, and the like.

(a) The investigating officer, the Coast Guard representative, any other commissioned officer of the Coast Guard, or any official custodian of extracts from shipping articles, logbooks, or records in the custody of the Coast Guard may authenticate and certify the extracts.

(b) Authentication and certification must include a statement that the person acting has seen the original, compared the copy with it, and found the copy to be a true one. This person shall sign his or her name and identify himself or herself by rank or title and by duty station.

§ 20.1305 Admissibility and weight of entries from logbooks.

(a) Any entry in any official logbook of a vessel concerning an offense enumerated in 46 U.S.C. 11501, made in substantial compliance with the procedural requirements of 46 U.S.C. 11502, is admissible in evidence and constitutes *prima facie* evidence of the facts recited.

(b) Any entry in any such logbook made in substantial compliance with the procedural requirements of 46 U.S.C. 11502 may receive added weight from the ALJ.

§ 20.1307 Use of judgments of conviction.

(a) A judgment of conviction by a Federal court is conclusive in any S&R proceeding under this part concerning any act or offense described in 46 U.S.C. 7703 or 7704 when the act or offense is the same as in the Federal conviction.

(b) Except as provided in paragraph (c) of this section, no judgment of conviction by a State court is conclusive in any S&R proceeding under this part concerning any act or offense described in 46 U.S.C. 7703 or 7704, even when an act or offense forming the basis of the charge in the proceeding is the same as in the State conviction. But the judgment is admissible in evidence and constitutes substantial evidence adverse to the respondent.

(c) A judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if an S&R proceeding alleges conviction for—

(1) A violation of a dangerous-drug law;

(2) An offense that would prevent the issuance or renewal of a merchant mariner's license, certificate of registry, or document; or

(3) An offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C.S. 401, note).

(d) If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads *guilty* or *no contest* or, by order of the trial court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error.

(e) No respondent may challenge the jurisdiction of a Federal or State court in any proceeding under 46 U.S.C. 7703 or 7704.

§ 20.1309 Admissibility of respondents' criminal records and records with the Coast Guard before entry of findings and conclusions.

(a) The prior disciplinary record of the respondent is admissible when offered by him or her.

(b) The prior disciplinary record of the respondent is admissible when offered by the Coast Guard representative to impeach the credibility of evidence offered by the respondent.

(c) The use of a judgment of conviction is permissible on the terms prescribed by § 20.1307.

§ 20.1311 Admissions by respondent.

No person may testify regarding admissions made by the respondent during an investigation under 46 CFR part 4, except to impeach the credibility of evidence offered by the respondent.

§ 20.1313 Medical examination of respondents.

In any proceeding in which the physical or mental condition of the respondent is relevant, the ALJ may order him or her to undergo a medical examination. Any examination ordered by the ALJ is conducted, at Federal expense, by a physician designated by the ALJ. If the respondent fails or refuses to undergo any such examination, the failure or refusal receives due weight and may be sufficient for the ALJ to infer that the results would have been adverse to the respondent.

§ 20.1315 Submission of prior records and evidence in aggravation or mitigation.

(a) The prior disciplinary record of the respondent comprises the following items less than 10 years old:

(1) Any written warning issued by the Coast Guard and not contested by the respondent.

(2) Final agency action by the Coast Guard on any S&R proceeding in which a sanction or consent order was entered.

(3) Any agreement for voluntary surrender entered into by the respondent.

(4) Any final judgment of conviction in Federal or State courts.

(5) Final agency action by the Coast Guard resulting in the imposition against the respondent of any civil penalty or warning in a proceeding administered by the Coast Guard under this title.

(6) Any official commendatory information concerning the respondent of which the Coast Guard representative is aware. The Coast Guard representative may offer evidence and argument in aggravation of any charge proved. The respondent may offer evidence of, and argument on, prior maritime service, including both the record introduced by the Coast Guard representative and any commendatory evidence.

(b) The respondent may offer evidence and argument in mitigation of any charge proved.

(c) The Coast Guard representative may offer evidence and argument in rebuttal of any evidence and argument offered by the respondent in mitigation.

46 CFR PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION

2. The authority citation for Part 5 continues to read as follows:

Authority: 46 U.S.C. 2103, 7101, 7301, 7701; 49 CFR 1.46.

Subpart A—Purpose—[Amended]

3. Revise subpart A heading to read as set forth above.

§ 5.1 [Removed]

4. Remove § 5.1.

§ 5.3 [Amended]

5. In § 5.3 remove the words ''and procedures.''

§ 5.11 [Removed]

6. Remove § 5.11.

§ 5.13 [Removed]

7. Remove § 5.13.

§ 5.23 [Removed]

8. Remove § 5.23.

§ 5.25 [Removed]

9. Remove § 5.25.

§ 5.33 [Amended]

10. In § 5.33, remove the words ''the charge shall be violation of law or violation of regulation. The specification shall'', and add, in their place, the words ''the complaint must''.

§ 5.35 [Amended]

11. In § 5.35, remove the words ''the charge will be'' from the first sentence and add, in their place, the words ''the complaint will allege''; and in the first and second sentences remove the words ''circumstances. The specification'' and add, in their place, the words ''circumstances and''.

§ 5.53 [Removed]

12. Remove § 5.53.

§ 5.55 [Amended]

13. In the section heading for § 5.55, remove the words ''charges and specifications'' and add, in their place, the words ''a complaint''; and in paragraph (a) remove the words ''various charges and specifications'' and add, in their place, the words ''a complaint''.

§ 5.63 [Removed]

14. Remove § 5.63.

§ 5.105 [Amended]

15. In § 5.105(a), remove the words ''Prefer charges'', and add, in their place, ''Issue complaint''.

16. Revise § 5.107 to read as follows:

§ 5.107 Service of complaints.

(a) When the investigating officer determines that an S&R proceeding is appropriate, he or she shall prepare and serve a complaint in accordance with 33 CFR part 20.

(b) When the investigating officer serves the complaint, he or she shall also advise the respondent—

(1) Of the nature of S&R proceedings and their possible results;

(2) Of the right to be represented at the hearing by another person, who may, but need not, be a lawyer;

(3) Of the right to obtain witnesses, records, and other evidence by subpoena; and

(4) That failure or refusal to answer the complaint or to appear at the time, date, and place specified for the hearing may result in a finding of default, which will constitute an admission of the facts alleged in the complaint and the waiver of his or her right to a hearing.

17. Revise § 5.305 to read as follows:

§ 5.305 Quashing a subpoena.

Any person subpoenaed to appear to produce evidence at a hearing may request that the subpoena be quashed or modified using the procedures in 33 CFR 20.609.

18. Revise § 5.501 to read as follows:

§ 5.501 General.

A hearing concerning the suspension or revocation of a merchant mariner's license, certificate of registry, or document is a formal adjudication under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*). It is presided over by, and conducted under the exclusive control of, an ALJ in accordance with applicable requirements in the APA, the rules in this part, and the rules of administrative practice at 33 CFR part 20. The ALJ shall regulate and conduct the hearing so as to bring out all the relevant and material facts and to ensure a fair and impartial hearing.

§§ 5.503 through 5.519 [Removed]

19. Remove §§ 5.503 through 5.519.

§§ 5.523 through 5.565 [Removed]

20. Remove §§ 5.523 through 5.565.

21. Revise § 5.567(a) to read as follows:

§ 5.567 Order.

(a) The Administrative Law Judge enters an order which recites the disposition of the case. When the finding is *not proved*, the Administrative Law Judge issues an order *dismissing* the proceeding with or without prejudice to refile. When the finding is *proved*, the Administrative Law Judge may order an *admonition*, *suspension* with or without probation, or *revocation*.

* * * * *

§§ 5.571 through 5.577 [Removed]

22. Remove §§ 5.571 through 5.577.

§§ 5.601 through 5.607 [Removed]

23. Remove and reserve subpart I, consisting of §§ 5.601 through 5.607.

24. Revise § 5.701 to read as follows:

§ 5.701 Appeals in general.

A party may appeal the decision of an ALJ under the procedures in subpart J of 33 CFR part 20. A party may appeal only the following issues:

(a) Whether each finding of fact rests on substantial evidence.

(b) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(c) Whether the ALJ committed any abuses of discretion.

(d) The ALJ's denial of a motion for his or her disqualification.

§§ 5.703 through 5.705 [Removed]

25. Remove §§ 5.703 through 5.705.

§ 5.709 [Removed]

26. Remove § 5.709.

§ 5.711 [Removed]

27. Remove § 5.711.

Dated: May 17, 1999.

J.E. Shkor,

Chief Counsel.

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