

adequate, it will become part of the Maryland program.

#### *Written Comments*

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Appalachian Regional Coordinating Center will not necessarily be considered in the final rulemaking or included in the Administrative Record.

#### **IV. Procedural Determinations**

##### *Executive Order 12866*

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

##### *Executive Order 12988*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

##### *National Environmental Policy Act*

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

##### *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

#### *Regulatory Flexibility Act*

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

#### *Unfunded mandates*

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

#### **List of Subjects in 30 CFR Part 920**

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 26, 1998.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

[FR Doc. 98-8894 Filed 4-3-98; 8:45 am]

BILLING CODE 4310-05-M

#### **DEPARTMENT OF TRANSPORTATION**

##### **Coast Guard**

##### **33 CFR Part 20**

##### **46 CFR Part 5**

[USCG-98-3472]

RIN 2115-AF59

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

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard seeks to improve its adjudication process. This improvement would also affect certain actions involving merchant mariners. First, the proposed rule would consolidate all Coast Guard adjudicative procedures to include the following: the suspension and revocation (S&R) of merchant mariners' licenses, certificates of registry, and documents and the

procedures involving class II civil penalties. Second, the proposed rule would eliminate unnecessary procedures from S&R proceedings. The Coast Guard expects the proposed rule to facilitate the efficient use of administrative resources relating to Coast Guard adjudication. It would save time, effort, and money for all parties who are or may become involved in Coast Guard actions.

**DATES:** Comments must reach the Coast Guard on or before May 6, 1998.

**ADDRESSES:** You may mail comments to the Docket Management Facility, [USCG-98-3472], U.S. Department of Transportation (DOT), Room PL-401, 400 Seventh Street SW., Washington, DC 20590-0001, or deliver them to room PL-401, located on the Plaza Level of the Nassif Building at the same address between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

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, located on the Plaza Level of the Nassif Building at the above address between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also electronically access the public docket for this rulemaking on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information on the public docket, contact Carol Kelley, Coast Guard Dockets Team Leader or Paulette Twine, Chief, Documentary Services Division, U.S. Department of Transportation, telephone 202-366-9329; for information concerning the notice of proposed rulemaking (NPRM) provisions, contact George J. Jordan, Attorney-Advisor, Office of the Chief Administrative Law Judge, between 8:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. His telephone number is 202-267-0006.

#### **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-98-3472] 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 proposed 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 procedures, the Coast Guard will hold a public meeting at a time and place announced by a later notice in the **Federal Register**.

### Background and Purpose

The Coast Guard derives its authority to issue this proposed rule in part from 46 U.S.C. 7702. This law, amended by the *Oil Pollution Act of 1990* (Pub. L. 101-380), authorizes the Coast Guard, in certain situations, to temporarily suspend merchant mariners' credentials. The Coast Guard also derives its authority under 33 U.S.C. 1321(b)(6) to issue rules affecting class II proceedings.

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) 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). The rules of criminal procedure form the basis of the S&R rules. 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 proposes to consolidate both sets of rules in 33 CFR Part 20. It also seeks to remove those procedures that impede the efficient handling of cases. In addition, it would amend those rules which are not

consistent with relevant legal standards and practices.

Another relevant factor adds to the need for this proposed rule. The Coast Guard 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 in 60 cities throughout the United States, 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 class II civil penalty cases, S&R cases, and civil penalty and permit sanction cases for the National Oceanographic and Atmospheric Administration (NOAA). This proposed rule would assist in the processing of Coast Guard S&R cases at the ALJ Docketing Center. This rule would allow the ALJ Docketing Center to better administer the adjudication of Coast Guard actions.

In addition, this proposed rule would produce several other benefits. It would ensure that similar cases follow similar procedures. It would eliminate unnecessary hearings and the costs associated with these hearings, such as travel and court reporting costs. It seeks to employ the use of rules that are more familiar to civilian attorneys. It would also incorporate many recommendations of the former Administrative Conference of the United States and practices prevalent in the Department of Transportation and other agencies. This would promote uniformity and consistency in certain proceedings. Finally, this proposed rule would help to promote the settlement process in cases that are undisputed. This would further help to eliminate unnecessary hearings.

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

### Discussion of Proposed Rule

#### 1. Consolidated Rules of Procedure and Rules of Evidence

This proposed rule would consolidate all rules of procedure and evidence for administrative adjudication into 33 CFR

Part 20. The proposed rule would do so in the following ways—

- 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 requirements for S&R in the areas of procedure, for example, regarding the opening of cases; and
- Create certain special 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

The proposed rule would change the rules of procedure and evidence in administrative proceedings in the following ways:

- Complaints replace Notices of Hearings. Under the proposed rule, the investigating officer would 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. In addition, the complaint would 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 Twenty Days. Under the proposed 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 to schedule hearings. Under the proposed 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 proposed 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. Under the proposed rule, settlement agreements are encouraged. In addition the proposed rule establishes procedures for the process of settlement. Under present S&R practices, although settlement agreements have been encouraged, there is no consistent procedure involved in achieving them.

- **Administrative Law Judges to Issue Oral Decisions.** This rule proposes that ALJs issue oral decisions in simple cases, when the rights of the parties are not impaired and in order 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 Established.** This rule proposes that in certain prescribed circumstances, the ALJ may expedite a hearing. Under 46 U.S.C. 7702(d), a mariner whose license, certificate or document is temporarily suspended is entitled to an expedited hearing. However, a hearing is required within 30 days after the suspension. This proposed rule requires that an ALJ be immediately assigned to the case in order that the matter be resolved within the statutory period. Under the current S&R rules, there is no provision for this circumstance.

- **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 were 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 to those rules. Neither the APA nor the statutory authority for S&R cases prohibit appeal by an agency. All other Federal administrative agencies can appeal ALJ rulings, and the proposed rules in Part 20 provide for such an appeal.

### 3. *Changes in the Rules of Evidence*

This rule proposes to apply the Administrative Procedures Act (APA) rules of evidence as the standard for evidence brought in S&R cases. In current practice some ALJs apply the Federal Rules of Evidence. This proposed rule seeks to have one consistent standard, the APA standard, used in S&R cases.

### 4. *Special Rules of Evidence—Suspension and Revocation Cases*

This rule proposes to adopt additional rules of evidence in S&R cases. The Coast Guard recognizes a need for special rules of evidence created specifically for S&R cases. The proposed rule places these special rules in a separate subpart. Current Part 20 Rules do not allow for special rules of evidence to address the unique circumstances that may arise involving an S&R case.

### 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 proposed rule seeks to optimize the capabilities of the Docketing Center and improve case filing procedure in the following ways:

- **Central Location of Filed Documents.** This proposed 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 proposed 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 proposed rule would change the discovery rules in all administrative proceedings. The rules would be changed in the following ways:

- **Fifteen-Day Limit to Submit Final Exhibits and Witnesses.** The rules would be changed to require that parties submit final lists of witnesses and proposed exhibits 15 days or more before a hearing, unless otherwise allowed at the discretion of the ALJ. The current class II rules require parties to submit final exhibits 5 days or more before a hearing.

- **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 in a timely manner and with sufficient notice to the other party. Most ALJs have introduced requirements for discovery on their own, but these differ from judge to judge.

### Summary of Proposed Changes

33 CFR Part 20—Rules of Practice, Procedure, and Evidence for Coast Guard Administrative Proceedings

1. Revise the title of 33 CFR Part 20 to indicate that it applies to all formal adjudicative proceedings of the Coast Guard.

2. Revise the authority citation for part 20 to include the authority for S&R of merchant mariners' licenses, certificates of registry, and documents.

3. Where the term "administrative proceeding" appears throughout part 20, it would now refer to S&R cases and class II civil penalty cases.

4. In section 20.101, the reference to the statutory authority for S&R is now added.

5. In section 20.102, *Definitions*, S&R proceedings are defined and appropriate references to S&R cases are added in other definitions.

6. In section 20.302, *Filing of documents and other materials*, the address of the ALJ Docketing Center is added. This eliminates the requirement to file multiple copies of cases with the docket clerk.

7. In section 20.307, *Complaint*, changes to section would enable the Coast Guard to propose a sanction early in the complaint. Under current S&R procedures, the Coast Guard may not propose a sanction until the penalty phase.

8. Revise section 20.601(c)(2), *Discovery—General*, to eliminate the reference to 33 CFR 20.807.

9. Revise section 20.807, *Exhibits and Documents*, paragraph (b), to now require 15 days to submit final exhibits instead of 5 days. This would provide for the timely submittal of pertinent information by both parties, well before the hearing. It would preclude undue confusion and disruption by allowing both parties adequate time in which to review documents and exhibits.

10. Section 33 CFR 20.902, *Decision of Administrative Law Judge*, allows an ALJ to issue an oral decision instead of a written decision in appropriate cases.

11. Section 20.903, *Record of Proceedings*, changes the site for public examination of record to the ALJ Docketing Center.

12. Section 20.904, *Reopening*, already allows the reopening of a record for the taking of added evidence. The new procedures deal with the subsequent reversal of a conviction that served as the basis for a suspension or revocation and with the issuance under 46 U.S.C. 7702(c) of a new document in certain circumstances after revocation.

13. Section 20.1001, *Appeals—General*, changes the address to file notices and briefs to the ALJ Docketing Center.

14. Section 20.1103, *Availability of Decisions*, adds the ALJ Docketing Center as a public reading room. It also provides the Internet address for filing appeal decisions and the index of appeal decisions.

15. A new Subpart L, *Expedited Hearings*, provides procedures for an expedited hearing after the temporary suspension of a license, certificate, or document.

16. A new Subpart M, *Evidentiary rules for Suspension and Revocation Hearings*, added to Part 20, includes the sections of Part 5 that deal with

evidentiary matters which are specific to S&R cases.

17. Changes to 46 CFR Part 5 would remove similar rules now covered in part 33 CFR Part 20. In addition, some rules are now governed by the power of the ALJ to regulate the course of the hearing. For specific information, refer to the chart below:

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**PROPOSED CHANGES TO 46 CFR PART 5**

\* "Removed" as unnecessary. These items are now covered under the powers of the judge to regulate the course of the hearing.

Sections in Part 5	Title	Change	Equivalents in Part 20
<b>5.1-5.5</b>	Subpart A Authority and Purpose		
5.3	Purpose of regulations	Revised	None
<b>5.11-5.35</b>	Subpart B - Definitions		
5.11	Commandant	Revised	20.102(c)
5.13	Coast Guard District	Removed	
5.23	Charge	Removed	20.102, 20.307
5.25	Specification	Removed	20.102, 20.307
5.33	Violation of law or regulation	Revised	None
5.35	Conviction for a dangerous drug law violation, use of, or addition to the use of dangerous drugs.	Revised	None
<b>5.51-5.71</b>	Subpart C - Statements of Policy and Interpretation		
5.51	Construction of regulations	Retained / No Change	20.103
5.53	Initiating suspension and revocation proceedings	Removed	20.401
5.55	Time limitations	Revised	None
5.63	Standard of Proof	Removed	20.701
5.65	Commandants decisions on appeal and review	Removed / Covered by Part 20	20.1004, 20.1102
<b>5.101-5.105</b>	Subpart D - Investigations		
5.105	Course of action available	Revised	None
5.107	Preparation and service of Charges and specifications	Revised	
<b>5.301-309</b>	Subpart F - Subpoenas		
5.301	Issuance of subpoenas	Retained / No Change	20.608
5.305	Motions to quash	Retained	20.609
5.307	Enforcement of subpoena	Retained / No Change	20.608, 20.609
5.309	Proof of service	Retained	20.608
<b>5.401</b>	Subpart G - Witness Fees		
<b>5.501-</b>	Subpart H - Hearings		
5.501	Hearings--general	Revised	20.205; Subpart E; Subpart G
5.503	Record of the hearing	Removed / Covered by Part 20	20.903
5.505	Public access to hearing	Removed	None*
5.507	Disqualification of ALJ	Removed / Covered by Part 20	20.204
5.509	Opening the hearing	Removed / Unnecessary [See § 20.704]	None*
5.511	Continuance of a hearing	Removed / Covered by Part 20	20.309; 20.704
5.513	Appearances	Removed / Covered by Part 20	20.301
5.515	Failure of respondent to appear	Removed / Covered by Part 20	20.705; 20.314

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**PROPOSED CHANGES TO 46 CFR PART 5**

\* "Removed" as unnecessary. These items are now covered under the powers of the judge to regulate the course of the hearing.

Sections in Part 5	Title	Change	Equivalents in Part 20
5.517	Witnesses excluded from hearing room	Removed / Covered by Part 20	None*
5.519	Rights of respondent	Removed	None
5.523	Motions or objections	Removed / Covered by Part 20	20.309
5.525	Correction or amendment of charges	Removed / Covered by Part 20	20.305
5.527	Answer	Removed / Covered by Part 20	20.308
5.529	Opening statement by investigating officer	Removed	None*
5.531	Opening statement by or on behalf of respondent	Removed	None*
5.533	Presentation of case where there is an admission or no contest answer	Removed	20.308
5.535	Witnesses	Removed / Covered by Part 20	20.706; 20.707
5.537	Evidence	Removed / Covered by Part 20	Subpart H
5.539	Burden of proof	Removed / Covered by Part 20	20.701; 20.702
5.541	Official notice by Commandant and ALJ	Removed / Covered by Part 20	20.806
5.543	Certification of extracts from shipping articles, logbooks, etc.	Removed / Moved to Part 20	20.1303
5.545	Weight of entries from logbooks	Removed / Moved to Part 20	20.1305
5.547	Use of judgment of conviction	Removed / Moved to Part 20	20.1307
5.549	Admissibility of respondent's prior record	Removed / Moved to Part 20	20.1309
5.551	Admissions by respondent	Removed / Moved to Part 20	20.1311
5.553	Testimony by deposition	Removed / Covered by Part 20	20.605
5.555	Treatises	Removed	None*
5.557	Medical examination of respondent	Removed / Moved to Part 20	20.1313
5.559	Argument	Removed	None*
5.561	Submission of proposed findings	Removed / Covered by Part 20	20.710
5.563	Administrative Law Judge's findings and conclusions	Removed / Covered by Part 20	20.902
5.565	Submission of prior record	Removed / Moved to Part 20	20.1315
5.571	Delivery of decisions	Removed / Covered by Part 20	20.304; 20.902
5.573	Notification of right to appeal	Removed / Covered by Part 20	20.1001
5.577	Modification of ALJ's decision and order	Removed	20.904
5.601-607	Subpart I - Reopening of hearing	Removed / Covered by Part 20	20.904

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**PROPOSED CHANGES TO 46 CFR PART 5**

\* "Removed" as unnecessary. These items are now covered under the powers of the judge to regulate the course of the hearing.

Sections in Part 5	Title	Change	Equivalents in Part 20
5.701-5.711	<b>Subpart J - Appeals</b>		
5.701	Appeals in general	Revised / Adds reference to Part 20	20.1001
5.703	Procedures for appeal	Removed / Covered by Part 20	20.1003
5.705	Action on appeal	Removed / Covered by Part 20	20.1004
5.709	Appeal cases remanded for further proceedings	Removed	None
5.711	Commandant's decisions on appeal	Removed / Covered by Part 20	20.1004, 20.1102
5.901-5.905	<b>Subpart L - Issuance of new license, certificate of document after revocation</b>		
5.903	Application procedures	Retained / Parallel process in Part 20	20.904
5.905	Commandant's decisions on application	Retained / Parallel process in Part 20	20.904

## Regulatory Evaluation

This proposal 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. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) [44 FR 11040 (February 26, 1979)]. 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 indices and to improve case management. A part of that effort would be to rewrite 33 CFR Part 20, as here augmented, in plain English.

Executive Order 12988 [61 FR 4728 (February 5, 1996)], on Reform of Civil Justice, 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 adjudication 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 ALJ and staff 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 will 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 use the hearing date for a case that ends without a hearing to hear another 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 holds 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 or less, on the case; but the LA must still prepare the record for transfer to another ALJ and file it.) This claims almost as much time from respondents as from the Coast Guard. The adjudication procedures of this rule would drastically reduce the demands of the time required of all parties concerned.

## Small Entities

Under the Regulatory Flexibility Act [5 U.S.C. 601 *et seq.*], the Coast Guard considers whether this proposed rule, if adopted, would 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 proposed rule would 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 and adds only the requirement to reply by written answer, in most cases, rather than by oral response at hearing.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule, if adopted, would 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 would 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 would 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 proposed rule so that they can better evaluate its effects on them and participate in the rulemaking process. If this rule would affect your small business or organization, and if you have questions concerning its provisions or options for compliance, please contact Mr. George J. Jordan, Attorney Advisor, Office of the Chief Administrative Law Judge (G-CJ), Room 6302, 202-267-0006.

## Collection of Information

This proposed 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 would reduce the burden of paperwork on the public and private sectors in large and about equal measure.

## Unfunded Mandate

Under the Unfunded Mandates Reform Act (Pub. L. 104-4), the Coast Guard must consider whether this 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, cost-effective, or least burdensome alternative that achieves the objective of the rule.

No State, local, or tribal government entities would be affected by this

proposed rule. Therefore, this proposed rule would 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 has analyzed this proposal under the principles and criteria contained in Executive Order 12612 and has 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 proposal and concluded that, under paragraph 2.B.2.e(34) (b) and (c) of COMDTINST M16475.1B, this proposed 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.

### 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, rug 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 consisting of §§ 20.101 through 20.1103 to read as follows:

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

### Subpart A—General

Sec.

- 20.101 Scope.
- 20.102 Definitions.
- 20.103 Construction and waiver of rules.

### Subpart B—Administrative Law Judges

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**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 section 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 offers 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 result.

(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 result.

(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 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 by 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 otherwise ordered by the ALJ.

(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 either the qualifications to represent others or 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 may decline to accept the document, or other material, for filing, and return it unfiled. Alternatively, the Clerk may accept it, advise the person offering it of the defect, and require that person to correct the defect.

#### **§ 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 8-1/2 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 1-1/2 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, no filed document need be verified or accompanied by an affidavit. 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 first 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) Service of any document may be by mail or personal delivery. Service of any document other than the complaint and the answer may be by fax or other electronic means, at the discretion of the ALJ; but the Hearing Docket Clerk may limit the times and circumstances of service by fax or other electronic means.

(e) Unless the ALJ orders otherwise, each document filed in accordance with § 20.302 must be served upon each counsel or other representative or, if the party is not represented, upon the party herself or himself. Service upon counsel or representative constitutes service upon the person to be served.

(f) Service must be made at the address of the counsel or representative, or, if the party is not represented, at the last known address of the residence or principal place of business of the person to be served.

(g) If service is by personal delivery, it is complete when the document is handed to the person to be served, is delivered to the person's office during business hours, or, if the person to be served has no office, is delivered to the person's residence and deposited in a conspicuous place. If service is by mail, fax, or other electronic means, it is complete either upon deposit in the mail or with the electronic transmission.

(h) If a person refuses to accept delivery or fails to claim a properly addressed document sent under this subpart, the document is deemed 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) In the computation of any period of time prescribed in this part—

(1) The first day of the period is not included; and,

(2) When the period is 7 days or less, intermediate Saturdays, Sundays, and Federal holidays are not included either; but,

(3) Unless the last day of the period is a Saturday, Sunday, or Federal holiday, it is included.

(b) If service or filing is by domestic mail, the period for response would run an added 3 days.

(c) An ALJ, for cause shown, may—

(1) Upon request for extension made before the end of the original period or of the period as extended by a previous order, with or without motion or notice, order a period extended; or

(2) Upon motion made after the end of the original period or of the period as extended, permit the act to be done when the failure to do it before the end was excusable.

#### **§ 20.307 Complaints.**

(a) The complaint must set forth—

(1) The statute or rule allegedly violated;

(2) The pertinent facts involved; and

(3)(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.

(1) 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 paragraph, it denies that paragraph. If it does not specifically deny a particular allegation made in the complaint, it admits that allegation.

(2) If an answer generally denies the complaint, it constitutes a failure to file an answer.

(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) Its statutory or regulatory authority; and

(3) The facts constituting the grounds for the relief it seeks.

(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 and must include a proposed decision. 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 of the Commandant 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 party may move to dismiss the complaint, or 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 their 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 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) Each party or interested person shall promptly amend or supplement—

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

(2) The list of documents he or she intends to introduce into evidence; and

(3) Any information previously provided, if he or she knows that—

(i) It was incorrect or incomplete when provided; or,

(ii) Though correct when provided, it no longer is and that, in the circumstances, a failure to amend or supplement it amounts to a knowing concealment.

(b) The ALJ may impose a further duty to amend or supplement.

#### **§ 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) A party 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 reasons for the objection shall be stated instead of a response. A 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 considered sufficient when—

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

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

(3) The records from which such answers may be derived or ascertained are fully specified.

(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 which are requested to be produced.

(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 request 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 a witness to present 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 as were noted at the taking of the deposition and which would have been sustained if the witness were personally present and testifying, 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) Ordain 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) Any party affected by a protective order shall have an adequate opportunity, once learning the name of the witness and obtaining a narrative summary of expected testimony—or, if the witness comes from the Coast Guard, obtaining any prior statement—to prepare for cross-examination and for the presentation of the party's case.

#### § 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—that 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) An ALJ may 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. A party seeking a subpoena 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.

**§ 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 duty of going forward with evidence to rebut or meet the presumption; but

(b) Does not shift to that party the risk of non-persuasion, which remains throughout the hearing upon the party that bears it.

**§ 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 shall 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. 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.

(b) 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 on appeal unless he or she raised it before the ALJ.

(b) Whenever evidence is excluded, the party offering such evidence 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 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 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, after commencement of the proceeding and 15 days or more before the date fixed for the hearing, may, with or without supporting affidavits, 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. Any other party may, 10 days or less after service of the motion, 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, documents, 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 the assessment of a class II civil penalty or an order of suspension or revocation, as appropriate;

(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 actual 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 the periods for appeals specified in subpart J of this part, except that a motion to reopen the record tolls the running of whatever time remains in the period from the date of filing the motion until either the ALJ acts on the motion or the party filing it withdraws it.

(e)(1) The ALJ shall 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 move the reopening of the proceeding to modify the order of revocation to 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 motion to reopen the record waives any objection to the motion.

**Subpart J—Appeals****§ 20.1001 General.**

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 7.95; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.99.

**§ 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: Commandant (G-LMI); U.S. Coast Guard Headquarters; 2100 Second St., S.W.; Washington, D.C. 20593 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 for the appeal, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Commandant 60 days or less after service of the ALJ's decision. If a brief is not filed within this time, or within another time period authorized in writing by the Commandant, it will be considered not timely.

(b) Any party may file a reply brief with the Commandant 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. The Commandant will allow a reasonable time for the party to file any additional 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 prejudicial 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. The Commandant may take any of these four actions.

(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 proceeding.* (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 its issuance.

(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, this 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 indices 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](http://www.dot.gov) or the Coast Guard Home Page at [www.uscg.mil](http://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 7.93.

**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 proceedings, 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 proceedings, the respondent may move that the expedited 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.* At the pre-hearing conference, the parties shall:

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

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

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

(4) Discuss witnesses and exhibits. 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.* Each party may present oral argument at the close of the hearing. 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, for the filing of:

(1) Proposed findings of fact and conclusions of law and

(2) Post-hearing briefs, both under § 20.710.

(c) *ALJ's decision.* The ALJ may render his or her decision from the bench. Alternatively, he or she may issue a written decision. He or she shall render or 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—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)(1) Any entry in any logbook of a vessel is admissible into evidence as a record of a regularly conducted activity and, therefore, does not constitute hearsay.

(2) 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 incident described in 46 U.S.C. 7703 when an act or offense forming the basis of the charge in the proceeding is the same as in the court.

(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 incident described in 46 U.S.C. 7703, even when an act or offense forming the basis of the charge in the proceeding is the same as in the court. But the judgment is admissible in evidence and constitutes substantial evidence adverse to the respondent.

(c) An S & R proceeding is conclusive if it is based on a conviction by a Federal or State court for—

(1) The violation of a dangerous drug law;

(2) An offense that would prevent the issuance or renewal of the 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. 401, note].

(d) If the respondent participates in the scheme of a State for the expunging 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 finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7704, as having received a final conviction. The Coast Guard does not consider the conviction expunged without proof that the expunging 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 at least one charge was proved.

(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 33 CFR subpart 1.07.

(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.

**PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION**

2. The authority citation for 46 CFR Part 5 continues to read as follows:

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

**§ 5.1 [Removed]**

3. Remove § 5.1.

**§ 5.3 [Amended]**

4. In § 5.3 remove the words “and procedures.”

**§ 5.11 [Removed]**

5. Remove § 5.11.

**§ 5.13 [Removed]**

6. Remove § 5.13.

**§ 5.23 [Removed]**

7. Remove § 5.23.

**§ 5.25 [Removed]**

8. Remove § 5.25.

**§ 5.33 [Amended]**

9. 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 in any case of violation of law or violation of regulation shall”.

**§ 5.35 [Amended]**

10. 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]**

11. Remove § 5.53.

**§ 5.55 [Amended]**

12. 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]**

13. Remove § 5.63.

**§ 5.65 [Removed]**

13a. Remove § 5.65.

**§ 5.105 [Amended]**

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

15. Revise § 5.107 to read as follows:

**§ 5.107 Service of complaints.**

(a) When the investigating officer prefers charges, 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 suspension and revocation 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.

16. 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.

17. 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 Administrative Law Judge 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 Judge 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]**

18. Remove §§ 5.503 through 5.519.

**§§ 5.523 through 5.565 [Removed]**

19. Remove §§ 5.523 through 5.565.

**§§ 5.571 through 5.577 [Removed]**

20. Remove §§ 5.571 through 5.577.

**§§ 5.601 through 5.607 [Removed]**

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

22. Revise § 5.701 to read as follows:

**§ 5.701 Appeals in general.**

A party may appeal the decision of an Administrative Law Judge 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 Judge committed any abuses of discretion.

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

**§§ 5.703 through 5.705 [Removed]**

23. Remove §§ 5.703 through 5.705.

**§ 5.709 [Removed]**

24. Remove § 5.709.

**§ 5.711 [Removed]**

25. Remove § 5.711.

Dated: March 29, 1998.

**P.M. Blayney,**

*Chief Counsel.*

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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[DE-031-1011; FRL-5991-4]

**Approval and Promulgation of Air Quality Implementation Plans; Delaware—Minor New Source Review and federally Enforceable State Operating Permit Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing limited approval of a State Implementation Plan (SIP) revision submitted by the State of Delaware pursuant to requirements of the Clean Air Act (CAA). This SIP revision amends Delaware's minor New Source Review (NSR) permit program. It also creates a federally Enforceable State Operating Permits Program (FESOPP) which provides a mechanism for the terms and conditions of a permit issued pursuant to Regulation No. 2 to be made “federally enforceable” for purposes of limiting a source's potential to emit (PTE) a regulated air pollutant. EPA is proposing limited approval of changes to the minor NSR program, because while the SIP revision submitted by Delaware strengthens the SIP, it does not fully meet the current Federal requirements for public participation. EPA is proposing full approval of the FESOPP.

**DATES:** Comments must be received on or before May 6, 1998.