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

THE COAST GUARD "INJUSTICE" HANDBOOK

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EXECUTIVE SUMMARY

The National Mariners Association (NMA) is the voice for approximately 126,000 American "limited-tonnage" merchant mariners that have earned Coast Guard credentials and serve aboard tugboats, towboats, small passenger vessels, offshore supply vessels, charter boats and assorted "workboats."

The Coast Guard has regulated American merchant mariners since 1942, first as a wartime necessity, but since 1946 as part of a regulatory and law enforcement agency under the Administrative Procedures Act. The Coast Guard's "***Marine Safety***" mission includes investigations, vessel inspection, credentialing[1] and disciplining[2] merchant mariners. *[[1]e.g., licensing. [2]i.e., suspension and revocation proceedings.]*

Our "limited-tonnage" mariners are "transportation workers" who serve on "boats" rather than "ships" although some of these boats may exceed 200-feet in length. From 1967 until 2003, the Coast Guard was part of the U.S. Department of Transportation. In 2003, the Coast Guard moved into the newly created Department of Homeland Security and placed its greatest emphasis on security issues while allowing its traditional "Marine Safety" mission to degenerate to the point where the Coast Guard no longer shows much interest in our mariners' health, welfare, or safety[1] while cushioning their own jobs.[1] *[[1]Refer to our Report #R-205.]*

Our merchant mariners always have been ***civilians*** while the Coast Guard increasingly identifies itself as a branch of the ***military***. Ever since Congress passed the Posse Comitatus Act in 1876, the military has not been allowed to regulate civilian affairs. Nevertheless, Congress granted "the Secretary (of Homeland Security) "…general superintendence over the merchant marine of the United States and of merchant marine personnel[1]…" The relationship has deteriorated as a result of poor leadership and the Coast Guard's lack of knowledge and understanding as well as its persistent mistreatment of our merchant mariners. *[[1]46 U.S. Code §2103]*

In recent years, the relationship between the Coast Guard and our mariners turned sour. The Coast Guard neglected its role in domestic vessel inspection even before the events of 9/11.[1] Government reports clearly show the Coast Guard also neglected its role in "***investigations***" since 1994.[2] The perception of "injustice" pervaded the Coast Guard's **Administrative Law** program long before the House of Representatives conducted a hearing on front page news of abuses reported in the Baltimore Sun in June 2007.[3] Shortcomings in mariner "Credentialing" (e.g., licensing) seriously impacted our mariners, the backbone of the industry's workforce.[4] Our Association followed these issues and reported on them in a series of over 208 reports. *[[1]Refer to our Report #R-401-E. [2]Refer to our Report #R-429-A, #R-429-B & #R-429-M. [3]Refer to our Report #R-429-K. [4]) Refer to our Reports #R-429-D & #R-429-D, Rev. 1. An index and access to for viewing these reports appears at the end of this report.]*

This particular report focuses on only one portion of the Coast Guard's Marine Safety Mission. The House of Representatives, Committee on Transportation and Infrastructure under Chairman James Oberstar and its Subcommittee on Coast Guard and Maritime Transportation under Chairman Elijah Cummings in the 111th Congress focused their attention on the Marine Safety issues for the past three years. Many of their legislative "proposals" bore fruit in the Coast Guard Authorization Act of 2010.

Unfortunately proposed changes to the Coast Guard's Administrative Law system to correct problems exposed in a Congressional hearing on July 31, 2007 were never enacted by either the 110th or 111th Congress.

While the Coast Guard, in response to intense criticism, did make a number of changes in the Administrative Law system, other important changes need to be made to faults within the system that are unfair to our mariners. Our Association points out the faults in a number of cases we review within this report. Until these changes are completed, our Association cannot recommend a career path for merchant mariners in the towing sector of the marine industry and possibly other sectors.[1] *[[1]Refer to NMA Report #R- 276-D, Rev. 3.]*

Our Association fully supported the efforts of Congressmen Oberstar and Cummings to put the Marine Safety mission back on track and to restore a greater measure of civilian control to the U.S. Merchant Marine. We appreciated the opportunity they extended us to offer testimony on Marine Safety issues on three separate occasions.

Coast Guard procedures to punish mariners for violations of laws and regulations are supposed to be "***remedial***" in nature. This is a cruel joke for our mariners and attorneys that occasionally represent them as related in this report and in Congressional testimony on July 31, 2007. This report will show, the Coast Guard stretched "remedial" far beyond the breaking point and used it to destroy the lives and careers of our mariners. This report tells the story in considerable detail and numerous references cite connections to many of the other shortcomings within the Coast Guard's Marine Safety mission.

FOREWORD

Sometimes we ordinary people get into serious trouble when we venture on the water. If heavy seas swamp our boat, if we suffer a mechanical failure or a fire, then we devoutly pray for the Coast Guard to intervene. They do, and that evening they make the news. The whole nation watches and cheers as brave Coast Guardsmen descend from helicopters to rescue those in danger.

I have long admired, at a distance, the wonderful people of the Coast Guard who risk their lives to save others. These folk could have chosen to be grocers or accountants. Instead they chose to help others, placing their own lives on the line. They go willingly into harm's way. They live by their motto, *Semper Paratus*, Latin for "Always Ready."

The only time I saw the Coast Guard in action was while returning to the U.S. after World War II. Our ship stopped just off the Farallon Islands and a Coast Guard pilot boat approached. A man transferred to our ship and we continued our way under the San Francisco Bay bridge and up the bay to our dock.

That was about all I knew of the United States Coast Guard until one evening in early 1999 when Captain Greg

The cover said, "Transcript of Proceedings, United States of America, United States Coast Guard vs. License Number 852819, Gregory L. Periman." *[Refer to Chapter 5, below]*

I looked up at Greg. "Dad, they took my license. They said I failed a pee test. They accused me of using marijuana, but I didn't. I really didn't."

That old proverb about fighting city hall came to mind and I said, "Just forget it, Greg. Do something else."

He replied, "Dad, I want my license back. And, whatever I do I don't want this decision hanging over me."

I was totally unqualified to help him. I knew very little about the law and even less about the Coast Guard, but at his urging I opened the book and began reading. (If Richard's book had existed at that time it would have saved us a large amount of money, as well as many headaches and sleepless nights.)

Here was a strange world. Everything was arrayed against us, as in a nightmare. The officers of the Coast Guard justice system had all the advantages. They knew all the rules, had all the resources and experience. The judge was in the pay of the Coast Guard. The prospect was grim.

The urine test was done by LabOne, Inc., of Lenexa, Kansas. The Coast Guard's primary witness was LabOne's Vice-president for Toxicology, Alan Earl Davis. Mr. Davis testified that he had been the Armed Forces chief pathologist. When I read this I looked up at Greg's mother and yelled, *"We've got them! This clown is lying!"* No Armed Forces chief pathologist is ever going to step down to take a job supervising urine testing. Greg got on the phone and wrote some letters. We soon learned that Davis's claim was baloney. He was not a pathologist, not a doctor, not even a college graduate! I don't know how the Coast Guard could even think of using a witness whose qualifications they had not verified. Even the Honorable Peter A. Fitzpatrick, Administrative Law Judge for the United States Coast Guard, a lawyer and probably the best-educated person in the courtroom, swallowed Davis's preposterous claims without voicing any suspicion. *"Mr. Davis is the director of that laboratory, with pretty darned good qualifications, in my view."* There is the odor of misfeasance here!

Could this have been something more sinister than carelessness? Did they know Davis's claims were lies and still deliberately use him, assuming that the unfortunate mariner under attack would not catch on to Davis's lies? This would be criminal! I'm angry for the other mariners, truckers and pilots who received a positive test result and lost their jobs while this incompetent fool was directing the drug testing at LabOne.

Our investigation led to more funny stuff. Greg learned that the "certifying scientist" supervised by Davis, did such shoddy work in Greg's case and others, that she was fired. The Medical Review Officer, Dr. Ashokkumar Patel, lost his copy of Greg's paperwork and tried to substitute. Richard Block deals with all this in chapter 6 of this book.

Many aspects of the handling of Greg's case disturbed me. The first was the sneering, careless attitude of the investigating and prosecuting officers. It seemed that their interest in the mariner's rights was about equal to their interest in a wad of gum stuck to the sole of their highly polished shoe.

Another disturbing aspect of the case was the utter intransigence of the Coast Guard officers involved. As things went from bad to worse for their case the lords of the Coast Guard remained just as unreasonable and implacable as ever. They even attempted to intimidate us. Greg was not allowed discovery. The judge would not issue subpoenas for the witnesses Greg wished to call. I concluded that the aberrant behavior of the Coast Guard personnel was the result of a command from on high to win, whatever the cost.

The Coast Guard case against Greg fell apart because of its own defects. Our attorneys sued LabOne and other entities. They settled.

Other mariners have not been so fortunate. Richard reveals appalling accounts of men who have lost their jobs, reputations, homes, businesses, their licenses, their entire savings, everything except their integrity, because Coast Guard prosecution morphed into persecution.

Even so, my admiration for Coast Guard people who do the fieldwork, who get wet, cold and tired during rescue operations, is undiminished. But those in the United States Coast Guard department of justice need to have their job descriptions and limits carefully redefined.

Richard offers counsel on two levels. At one level he suggests how mariners can influence their legislators. In the long run this may be the more promising approach if mariners can find it in their hearts to pull together.

Then he recommends ways the individual mariner can prepare himself now, and protect himself in the almost certain future conflict with the Coast Guard. To those who accept Richard's warnings and suggestions, this book will be worth its weight in gold.

Richard helped Greg in many crucial ways, just as he has helped others. His counsel enabled us to prevail against the full weight of the Coast Guard system of justice. Now Richard has assembled the results of his experience in a form that is handy to use. Anyone subject to Coast Guard jurisdiction should read this book, not once or twice, but three or four times with hi-liter in hand. When the Coast Guard comes down, those who have digested this information will be prepared.

Val Periman, B.A., MT (ASCP).
Summers, AR

Page revised May 2011

FOREWORD
Coast Guard Administrative Law Procedures: Are They Remedial or Punitive?

[By V.J. Gianelloni III, Chief Engineer of Steam, Motor, Gas Turbine powered vessels, B.S., U.S. Merchant Marine Academy '64, J.D. Loyola School of Law, 71. Commander, USCGR (ret.). Member, Board of Directors, National Mariners Association.]

Most citizens regard the United States Coast Guard as a good-guy, "white-hat" outfit as in "the good guys wear the white hats who selflessly come to the rescue of those in distress. That reputation is well deserved in many of its eleven Congressionally assigned "missions" including search and rescue, environmental protection, aids to navigation, ice operations

Included in these "missions" is ***Marine Safety*** that administers and enforces all laws and regulations governing the equipment, operations and personnel in the U.S. Merchant Marine (i.e., commercial shipping) as well as recreational boating.

Putting aside the question of why most U.S.-owned commercial shipping is not registered under the U.S. flag but rather under Panamanian, Liberian, or other "flags of convenience," Congress has given the Secretary of the Department of Homeland Security (DHS) "general superintendence over the merchant marine of the United States and of merchant marine personnel…"[1] *[[1]46 U.S. Code §2103.]*

The Federal function of Marine Safety began with the licensing of engineers and the inspection of boilers of steam vessels as a result of major casualties. One of particular note involved the SS Sultana, an overloaded Mississippi River paddlewheel steamboat destroyed in an explosion on April 27, 1865 while returning former union prisoners of war from the Andersonville, GA, Confederate prison camp. This resulted in the greatest maritime disaster in U.S. history. An estimated 1,800 of the 2,400 passengers were killed when three of the ship's four boilers exploded about eight miles north of Memphis. About 500 survivors, many with horrible burns, were transported to hospitals in Memphis but up to 300 of them died later from burns or exposure.

The Marine Safety mission was placed under the Collector of Customs and then placed in the Department of Commerce and moved under the Treasury Department in 1942 as a temporary wartime measure where it stayed until the creation of the Transportation Department in 1967. On March 1, 2003 the Coast Guard was moved into the Department of Homeland Security.

Our Association as well as segments of the maritime industry and portions of the Coast Guard officer corps believe the marine safety mission "took a real hit" with the transfer of the Coast Guard to DHS in 2003.[1] *[[1]Refer to NMA Report #R-401-E, Marine Safety: Where the Coast Guard Went Wrong. Reprint of a 2007 report by VADM James C. Card (USCG, Ret'd).]*

White Hats but Dirty Underwear

We now get to see the Coast Guard's dirty underwear that virtually nobody outside of maritime personnel circles knows about. It is the Coast Guard's Suspension and Revocation (S&R) proceedings that are quasi-legal proceedings under "Administrative Law" that are the regulations, policies, and procedures that allow the Coast Guard to suspend or revoke a mariner's credentials.

To work legally aboard any U.S.-flag oceangoing vessel as well as other classes of vessels, you must hold valid credentials (e.g., licenses or z-cards) issued by the Coast Guard. If you are charged by the Coast Guard with misconduct, negligence, incompetence, violation of law or regulation, or conviction of a dangerous drug law violation, use of or addiction to dangerous drugs, Administrative Law S&R proceedings are held. A finding of "charges proved" can result in the revocation of your credentials or a suspension for varying lengths of time. The Coast Guard furnishes an Administrative Law Judge (ALJ) who is required to be a licensed attorney.

The Coast Guard claims that its Administrative Law hearings are remedial in nature and are not punitive.. Unfortunately, the procedure as administered under the Marine Safety mission has developed a "***gotcha, and we'll make you pay no matter what***" attitude, atmosphere, and reputation. It has become so bad that those who have the audacity to attempt to go through the "appeals process" very often cannot believe that they have been through a process that is constitutionally permissible for these reasons:

- If the Coast Guard's ALJ a legally trained and licensed attorney, makes a finding of "charges ***not*** proved" the Coast Guard can appeal that finding to the Vice Commandant of the Coast Guard. Most Vice Commandants are not and most likely will never be attorneys. At least the Judge Advocate General of the Coast Guard would, I hope, have a better idea of the difference between remedial and punitive measures and understand the legal concepts of double jeopardy, due process, as well as cruel and unusual punishment even in a "remedial" procedure.
- There is no time requirement for a decision submitted to the Vice Commandant on appeal. Nevertheless, our Association determined in several cases that a number of years elapsed before the Vice Commandant reached a decision on appeal. A mariner must file a "Notice of Appeal" with the ALJ Docketing Center in Baltimore and then perfect that appeal within very short periods of time[1] after the ALJ issues his/her decision. If the Appeal is denied, the mariner may give notice and Appeal to the National Transportation Safety Board, an independent governmental agency within very short periods of time.[2] All these appeals have been built into the system "exhaust the mariner's remedies" to enable a mariner to appeal to the Federal Courts which tend to have a broader knowledge of the Constitution and federal law which may be lacking in the Vice Commandant. *[[1]33 CFR §20.1001 – notice within 30 days and appeal brief within 60 days.. [2]49 CFR §825.5 – notice within 10 days; appeal brief within 20 days.]*
- It has become normal procedure for the Vice Commandant to remand (i.e., return) the case back to the ALJ to re-hear it if the Vice Commandant does not concur with the ALJ – who, you recall, is an attorney.

- There is apparently no standard procedure to cover the situation when a charged mariner will have his credentials removed from his personal possession. Sometimes this is done by an Investigating Officer, but often by the ALJ at the hearing. Sometimes the credentials are returned to the mariner at the end of the hearing. Often it is not returned after the hearing.
- Often, an ALJ's finding on the charges is not rendered at the end of the hearing. An ALJ often will call upon a mariner and the Coast Guard Investigating Officer to submit a written brief dealing with some point at issue during the hearing. Whether this occurs or not, written findings of fact and citations given from the "Commandant's Decisions on Appeal" (CDOA) and other legal sources are required to complete the record and provide the ALJ's "Decision and Order."

Mariners Have Families and Financial Obligations

Even if the mariner's credentials are not taken from him, most persons in this situation will not be able to maintain their employment and support themselves and family members throughout the long ordeal that was built into the system.. The National Mariners Association presents records of cases that have dragged on for up to twelve years that have bankrupted mariners even if they did not, and most mariners cannot afford to hire an attorney to defend them from the prospect of what we believe is ***unconstitutional cruel and unusual punishment in what is supposed to be a "remedial" proceeding*** imposed by a branch of the military upon civilian mariners.

ADDENDUM

Our Association has urged its mariners to protect their Coast Guard credentials with "license insurance."[(1)] This insurance is only available to officers and not ratings. The basic policy available commercially provides for legal representation before the Coast Guard in Administrative Law actions and would have been available in most of the cases we bring to your attention. It is money well invested in your credential and your career. *[[(1)]Refer to NMA Report #R-342, Rev.5.*

The administrative law system does not provide for a "public defender" and it probably never will. As you read each case, put yourself in the place of each mariner. It could happen to you.

When the Coast Guard comes after you for any reason, you are in trouble. You are in trouble if you do not know the law and have an attorney to represent you from the first moment you open your mouth. You have the right to consult an attorney – but this is the wrong time to try to hire one! When an Investigating Officer puts together his case, he/she intends to win it – sometimes at any cost. The Coast Guard has attorneys on call, and so should you.

The National Mariners Association is working to improve the situation facing our mariners, but you must do your part and take the first steps to defend yourself.

CHAPTER 1 – INTRODUCTION TO "INJUSTICE" COAST GUARD STYLE

Justice or Injustice

Websters' Dictionary defines ***justice*** as (**1**) the quality of being just or fair, and (**2**) the administration of law; the act of determining rights and assigning rewards or punishments.

We titled an earlier edition of this report The Coast Guard "Justice" Handbook although our mariners could not recognize much in the report that was fair or just in the ***Suspension and Revocation (S&R) process*** concocted and administered by the Coast Guard. Consequently, this revised report replaces the word "Justice" with "Injustice" in its title. The term "injustice" denotes the practice of being unjust or unfair that more accurately reflects this report's internal contents.

About Our Association

The **National Mariners Association** was founded in 1999 by the AFL-CIO and four national maritime unions as the Gulf Coast Mariners Association. On June 30, 2003 our Association severed its ties with the past and became independent. We grew from a regional to a national group to an organization that spoke on behalf of "lower-level" or "limited-tonnage" merchant mariners. On Jan. 1, 2008, our Board of Directors changed our name to accentuate our Association's national rather than regional outlook on addressing the concerns and protecting the professional interests of commercial mariners that hold U.S. Coast Guard credentials. We are a "membership" association and, as such, intend to reflect the views and speak on behalf of health, welfare, safety, and working conditions of all limited-tonnage credentialed mariners who serve on commercial vessels of less than 1,600 gross register tons.

One of our major projects during our 12-year history has been to identify issues that affect our population of approximately 126,000 credentialed merchant mariners who work on inland, near-coastal, and ocean waters, as well as the "western rivers," other rivers and the Great Lakes. Along with those who must obtain Coast Guard credentials to work on the water, are other job titles including deckhands, mechanics, unlicensed engineers, cooks and other casual laborers who often work alongside us and who become interested in advancing in the maritime industry to become credentialed ordinary seamen (OS), able seamen (AB), tankermen, engineers, mates, and masters.

In the sixth revision of a report we sent to Congress in April 2011[1], we listed ***25 major issues*** important to our mariners that we asked our lawmakers to address. In these 25 issues, we did ***not*** include the issue that this report targets. We did not believe we had to do this because the House of Representatives Committee on Transportation and Infrastructure in the 110th Congress ***already*** looked into the matter after it had turned into a national scandal that trapped many of our mariners in its web. *[[1]Report #R-350, Rev. 6.* ***Editorial note:*** *All NMA reports are numbered and indexed on our website. We include a copy of "Index R" in this report.]*

On July 31, 2007, several members of our Board of Directors attended a hearing at the Rayburn House Office Building in Washington presided over by Congressman Elijah Cummings of Maryland. We heard testimony from a number of distinguished individuals about a scandal that surfaced in June 2007 on the front page of the Baltimore Sun and rocked the Coast Guard's administrative law system to its foundations. The shock reverberated to mariners throughout the country.

The House Transportation and Infrastructure Committee oversees the operations of the U.S. Coast Guard and its 41,000 service members, 7,000 civilian employees, and ten billion dollar appropriation. Serious charges of inappropriate conduct were lodged against the administrative law system, a system that directly affects all of the nation's 210,000 credentialed mariners of which our mariners represent a majority of the population.[1] *[[1]Refer to NMA Report #R-353, Rev. 2.]*

Several months after the hearing concluded, the House ***proposed significant changes*** to the existing system. Although the vote on the floor of the House was 395 to 7, the proposed changes to the Coast Guard's ALJ system were never considered by the U.S. Senate and died with the 110th Congress.

We remain concerned that the underlying issues were not resolved, and the 111th Congress did ***not*** address them. Our recommendations for necessary changes appear in the closing chapter of this report.

In this report, we explain different facets of this problem and how this issue has the potential to affect every working mariner. We trust that experienced lawyers will work with members of Congress to repair the system so that our merchant mariners can be confident that its widespread abuses by Coast Guard personnel no longer will destroy careers and the quality of life of our working mariners.

Disappointments in the Administrative Law System

Most mariners are not lawyers and, in their training, are never introduced to the Coast Guard's Administrative law system. Most training courses our mariners attend never even mention it. Most vessels are not required to carry copies of the Code of Federal Regulations in Titles 33, 46 and 49 where the pertinent regulations are located.

Here are just a few basic items a mariner should understand if summoned before a Coast Guard investigating officer or an Administrative Law Judge (ALJ):

- Mariners tend to rely heavily on their general knowledge of the U.S. Constitution and especially the Bill of Rights. Since an Administrative Law Judge is not allowed to rule on constitutional questions, it is unwise for a mariner to base his defense on constitutional issues.
- Since Suspension and Revocation (S&R) cases are not criminal cases, an ALJ cannot put a mariner in jail. Since S&R cases are not civil cases, an ALJ cannot fine you. However, an ALJ can suspend or revoke a mariner's credential that can deprive a mariner of his livelihood potentially costing thousands of dollars in lost wages.
- The Coast Guard has greater resources and more experience than any mariner. Their system is tailored to fit their needs, not the needs of our mariners.
- The burden of proof is on the Coast Guard to prove the allegation they make in their "complaint" by a "preponderance of the evidence." – a very low standard of

proof. In other words, the Coast Guard only must establish that their allegations are more likely true than not, or are more likely to have occurred than not.

- The Coast Guard's "complaint" isn't proof of anything. However, count on the investigating officer being fully prepared to provide sufficient "proof" of the allegations that will satisfy the judge.
- The Coast Guard's allegations are made against you and your credential and not your employer. If your employer is to blame, the Coast Guard may or may not go after your employer with a "civil penalty." This is their choice and not yours! The Coast Guard often maintains a close working relationship with many employers – a relationship they may be unwilling to upset.
- You need not testify if you don't want to, and if you do not testify, that fact is not supposed to be used against you.
- Hearsay is admissible in ALJ proceedings.
- In theory, you can subpoena witnesses in your defense although many mariners experienced problems doing this.
- Once you are trapped in the Coast Guard's administrative law system and if the system treats you unfairly, do not expect any better treatment by filing an appeal to the Commandant, or the National Transportation Safety Board or with a Federal district court. You will read in this report that a number of our mariners tried this route to no avail.
- An ALJ, although on the Coast Guard's payroll, is supposed to be impartial and treat both sides of a case equally and fairly. Sadly, this has not always happened.

This report deals with failures in the Coast Guard's ***Marine Safety Directorate's*** "Investigations" Division (CG-5451) and how its investigators and ALJs apply a well-established administrative law system to suspension and revocation of mariners' credentials. In making this report, we will ***not*** target the entire Coast Guard. – only a very small segment that we have seen step beyond reasonable bounds and create the "appearance of impropriety."

We can substantiate these shortcomings by citing a number of government reports rather than relying on our collective imagination. Nevertheless, as Editor of this report, I point out to our readers that I am ***not*** a lawyer nor do I dispense legal advice. I hesitate to offer opinions as to who may or may not be a "good" judge or attorney since I am not a member of the legal profession.

U.S. Representatives and Senators were elected to carry out the will of the people, 305 million of them, including our 126,000 limited tonnage merchant mariners.

Our Association turns to those members of Congress and members of the legal profession to protect our mariners from the quicksand of the issues covered in this report. We urge them to dig further to root out the corruption we encountered in the existing administrative law system and find a meaningful solution to those problems. Our Association does not believe that mariners are best served by continuing the existing system without a major overhaul. We support a number of recommendations for change in later chapters.

About This Report

This report is an "assembled product" collected from bits and pieces taken from our Association's Newsletters, numbered research reports, and accident files. These bits and pieces are freely available on our website at ***www.nationalmariners.org.*** Our website endured "crashes" but "hard copies" of our reports survived while our webmaster, Captain J. David Miller, rebuilt the site. If you have a problem and believe one of our reports cited herein would helpful, just call us and we will e-mail it to you!

Administrative Law Judges

The Coast Guard hires its Administrative Law Judges (ALJ) and stations them throughout the United States to enforce its regulations governing the conduct of credentialed merchant mariners. Other government agencies such as the National Oceanic and Atmospheric Administration (NOAA) also share the use of the Coast Guard's ALJs on occasion**.**

NOAA Experience With Coast Guard ALJs

NOAA, an agency of the U.S. Department of Justice uses Coast Guard Administrative Law Judges in prosecuting cases involving fisheries. The laws and regulations regulating our fisheries are extremely complex. Our Association does not represent commercial fishermen and does not have the expertise to advise fishermen on these issues.

It is worth noting, however, that the fishermen have not been satisfied with their treatment under the ALJ system. In the spring of 2011, between 5,000 and 10,000 commercial fishermen descended on Washington, D.C. to protest the way they were treated.

U.S. Commerce Secretary Gary Locke announced that $649,527 in fisheries enforcement penalties will be returned to 11 individuals or businesses after an independent review of their cases concluded the NOAA enforcement program had, in some instances, "overstepped the bounds of propriety and fairness." In his decision memo Secretary Locke acted on 30 cases reviewed by the Special Master, Judge Charles Swartwood III, accepting all of his recommendations that the law allows and taking additional actions in several cases. Secretary Locke appointed Judge Swartwood to conduct the independent review of cases identified by the Department of Commerce's Inspector General as problematic

Judge Swartwood's reported upon the fishing industry's perception of the ALJ system.:

Judge Swartwood's Comments on the Coast Guard ALJ Program – (Excerpt pgs. 235-236)

"It is a common belief among fishermen on the East Coast that there is ***little or no chance of success before a Coast Guard ALJ and that NOAA and the Coast Guard ALJs work hand-in-hand***. ***This same sentiment was expressed to me, probably more graphically, by every lawyer, fisherman and fish dealer I interviewed who has had experience in appealing a case to a Coast Guard ALJ***. With few exceptions, every Coast Guard ALJ decision I reviewed during this investigation, upheld NOAA on the issue of liability and the originally assessed penalty. In one case, the Coast Guard ALJ increased the assessed penalty, in another, the ALJ decreased the penalty, and in most cases, the ALJ affirmed NOAA's assessed penalties. In one case, a ***Coast Guard ALJ totally ignored a United States District Court's Order*** on remand and re-instated an assessed penalty which the District Judge had vacated because it was excessive.

"It is clear from my several month investigation that a vast majority of fishermen, fishing businesses and the

lawyers that represent them have ***no confidence that any sort of justice would prevail by appealing a case to a Coast Guard ALJ***. This perception is not lessened by the fact that both parties can appeal the ALJ decision to the NOAA Administrator. ***There is little or no confidence in the NOAA Administrator's neutrality on such an appeal.*** I have not reviewed every Coast Guard ALJ decision and cannot opine on whether the perception of futility on appeal to a Coast Guard ALJ by people in the fishing industry and their lawyers is correct but I can state with certainty that the perception is universal and ***NOAA Enforcement Attorneys have a decided advantage in negotiating settlements*** because of this perception. I suggest a comprehensive review as to whether the Coast Guard ALJs should continue as the presiding officers on appeal in NOAA cases or whether there is an alternative forum where those involved in a de novo appeal of a NOAA enforcement case have confidence that they will get an impartial hearing."

s/ Hon. Charles B. Swartwood, III (ret)

Significant Differences in Enforcement

NOAA uses its "Special Agents" and "Enforcement Attorneys" while the Coast Guard uses "Investigating Officers" and enlisted personnel with a military background who have little if any background in the industry they regulate.

With NOAA enforcement there was a wide "money trail" to follow and also penalties such as permit suspension and loss of "days at sea" (DAS) that can affect a fisherman's ability to make a living or even put him out of business. In this way, the Coast Guard and NOAA system were comparable. With these factors, there existed enough well-publicized and blatant abuses to cause the fishing community along the east coast to rise in anger and frustration to march on Washington.

The "Special Master," retired Judge Charles B. Swartwood III assigned by the Secretary of Commerce showed great wisdom and got to the root of the problem by examining the problems fishermen faced in great detail. Our Association placed his full report on our website as NMA Report #R-459. Unfortunately, the Department of Homeland Security no similar action has been undertaken by the Secretary never demanded the requisite steps to protect our merchant mariners from continuing Coast Guard abuses of the ALJ system.

Remedial vs. Punitive

The stated goal of the administrative law system is "***remedial***" in that it seeks to find a remedy for mariners who are negligent, incompetent, or through their misconduct violate the federal laws and regulations the Coast Guard enforces. ***In each case cited in this report, some action by a mariner attracted the attention of a Coast Guard investigator.***. Investigators may be officers, warrant officers, or enlisted personnel that receive varying degrees of training in investigative skills. Some are well trained, but, unfortunately, others are not! We never claimed in this report that the mariners in this report are "perfect" people. However, in most cases we do not find the punishment or "remedy" applied is commensurate with the offense.

Use of Settlement Agreements

We warn our mariners to consider very carefully any "***settlement agreements***" that a Coast Guard investigating officer proposes. ***A settlement agreement is an irrevocable admission of guilt***. Read the charges against you very carefully; admit to nothing if you do not believe you are guilty of the charges.

The alternative to signing a settlement agreement is that the investigating officer will bring your case before an Administrative Law Judge (ALJ) in a formal proceeding that often leads to the suspension or revocation (S&R) of your credential for some specified period of time that also may include a lengthy period of probation. There can be other penalties such as requiring you to undertake additional formal training at your expense that are designed to remedy some problem that your violation exhibited. But remember that these administrative penalties are ***not*** direct monetary penalties involving fines. Indirectly, however, both suspension and revocation can involve loss of wages.

Unequal Treatment

Vessel operating companies (e.g., your employer) and persons that do *not* hold Coast Guard credentials (e.g., like recreational boaters and "port captains") are treated differently within a system of "civil penalties" that do seek a monetary penalty to "deter" future violations. However, aside from telling our mariners that their employers are treated "differently" – as most mariners already either know or suspect – we will ***not*** deal with these civil penalties in this report – only with the threat to suspend or revoke or otherwise place a black mark on the record against your credentials in the form of a "Letter of Warning" (LOW) you may be forced to explain to the National Maritime Center's satisfaction when you renew or upgrade your credential. Don't think that the Coast Guard will hesitate to punish you for the same offense twice!

The Coast Guard often goes after a mariner's credential for vague ***charges*** like Misconduct,[1] Negligence,[2] Incompetence,[3] and Violation of Law or Regulation[4] and ***specifications*** that further define or clarify the exact nature of the violation.

A mariner, who believe he "didn't do anything wrong" often is at a loss when confronted by a Coast Guard investigating officer with formal charges. When the mariner learns the nature of the complaint from the investigating officer, he usually is vulnerable if he takes any sort of immediate action like shooting off his mouth, admitting guilt, signing a "settlement agreement," and willingly accepting whatever penalty is offered. However, no such confrontation should require an instant decision or even any conversation that touches on the subject. We urge mariners to back off and take time to consider the problem and then ***seek advice from a maritime attorney***. Anything less is an admission of guilt. *[(1)46 CFR §5.27. (2)46 CFR §5.29. (3)46 CFR §5.31. (4)46 CFR §5.33.]*

Each "settlement agreement" the Coast Guard obtains from a mariner must be sent off and signed by an Administrative Law Judge (ALJ) who, will review it, accept your guilty plea, and approve the penalty unless the report submitted by the Coast Guard is seriously out of line. If you decide not to sign a settlement agreement, the investigating officer will bring your case before an ALJ in a formal hearing. While this process does involve considerably more

work for the investigating officer, be sure to tell the ALJ if the investigating officer threatens you with extended penalties if you cause him/her this extra work.

Keep in mind that ***there is no "public defender" available at an ALJ hearing*** and that hiring a lawyer to defend you will be expensive – possibly to the tune of $5,000 for a single appearance. This is an absolute waste of money if you are guilty of the charge. From our experience, most (but not all) mariners who just want the opportunity to tell their side of the story to the judge without hiring a lawyer will find themselves ***totally unprepared and woefully disappointed*** when the formal proceedings take place in the courtroom.

The other side of the story is that the Coast Guard does not want to "restrict commerce" by pushing many boat companies, especially larger corporations, because these companies generally have enough cold, hard cash to hire the best legal talent available to protect their interests. Add to that the fact that boat owners often belong to powerful trade associations that have strong political connections. Many companies contribute money to the Coast Guard Foundation, schmooze with Coast Guard bigwigs at Industry Day, advisory committee meetings, or at change of command ceremonies that are of little interest to and seldom attended by working mariners. Unless it involves an open and shut case, corporate attorneys are well equipped to give the Coast Guard a real run for their money. Most mariners are at a disadvantage because they do not have that clout.

Your hearing before an ALJ is all about your actions and your credential. You, ***not*** your employer, will be the focus of these proceedings. It is your problem and ***not*** your employer's problem. Your employer does not have a credential that the Coast Guard can suspend or revoke!

Employers are treated differently by Coast Guard authorities in an entirely different system that relies on "civil penalties" aimed at the corporate checkbook. If your "boss" or a company official led you to violate a rule, regulation, or law, the Coast Guard will point the finger of blame at you for committing the violation – not your employer.

Coast Guard Officials as Public Servants

Although Coast Guard officials are public servants, stepping on the wrong toes can end your career in a heartbeat. Remember that the Coast Guard is in "partnership" with (e.g., in bed with) the major trade associations that gather their member companies under their own protective umbrella. Most mariners, especially those that do not belong to a major labor union, have no similar umbrella to shield them from being "dumped on."

On the other hand, a Coast Guard investigator can step on your toes with impunity and score a victory in his or her "win" column. The "***win" column*** is reflected in the investigator's own performance rating that is a key to his or her promotion and retention in the Coast Guard. Your signed "settlement agreement" is a "win" just as is your conviction before an ALJ. However, a "settlement agreement" is much easier work for an investigating officer than preparing a case to be tried before an ALJ. Easier work equals more "wins" as preparing a case for a trial before an ALJ is very time consuming.

Investigative Shortcomings

Several government reports reveal its entire investigative process in an unfavorable and unprofessional light.(1) Because the Coast Guard has jurisdiction over all U.S. commercial merchant mariner credentials, it is unquestionably empowered to take action in its role of superintending the U.S. Merchant Marine. You may quickly find how very small and insignificant a part of the merchant service you are. One Coast Guard officer who previously served with the Coast Guard's Personnel Actions Branch in Washington, D.C. said, "As the specifics of every accident differ, so does each investigation at the respective Marine Safety Office. It's up to each individual investigating officer to conduct the investigation as he sees fit." That philosophy gives a lot of flexibility to Coast Guard investigators – and they use it to their advantage. *[(1)Refer to NMA Report #429-A, Rev. 1; #R-429-B; Rev. 1; #R-429-M]*

Why Must the Coast Guard Win at Any Cost?

The "cost" of opposing the Coast Guard must be borne by ***any individual mariner*** who is unfortunate enough to have a problem that attracts the Coast Guard's attention. Such unwanted attention can lead to punishment through suspending or revoking your credential, or issuing a "letter of warning," or assigning you to attend remedial training at your expense. A "no holds barred" prosecution can end many mariners' careers in the merchant marine. This includes ***strong-arm tactics some investigating officers use to ensure a settlement agreement instead of a formal hearing***. The Coast Guard appears to have an unwritten policy to "win at any cost." The Baltimore Sun in 2007 wrote of this in June 2007.

"There is no telling how long this unwritten policy has been in effect and how long it was carried out in the past by the Coast Guard investigating officers and compliant judges. However, the current Chief ALJ Joseph Ingolia has been on the bench for over two decades. Several years ago, former ALJ Jeffie J. Massey proved unwilling to play his game and courageously came forward and exposed some of his shady practices and other major players."

Regrettably, corruption at this level apparently is endemic in the Coast Guard and was in place even before Chief ALJ Ingolia came to office. Former Chief ALJ Chatterton was allowed to "retire" after former ALJ Rosemary Denson reportedly blew the whistle on his travel fund abuses. Judge Denson spoke with me at length and provided documentation of that incident in 1996. Abuses were ignored, and Judge Denson was driven from the bench by the "old boy" network. Her story was ignored for years by the Coast Guard although thousands of mariners and marine executives read the editorials about it in The Waterways Journal. These stories are as outstanding as the red stripes on the hulls of Coast Guard cutters. While officials at Coast Guard Headquarters often underestimate our mariners, we recognize the Coast Guard's skill and its role of controlling the media in deflect scandal and bury the truth.

The Coast Guard maintains its aura of respectability because of outstanding work performed by many of its officers and enlisted men in areas like search and rescue, drug interdiction, and environmental protection that are far removed from the Marine Safety Directorate.(1)

Administrative law, as practiced against our mariners is a dark side of the Coast Guard hidden from the public view for far too long and involves a hidden gender issue as both of the ALJs persecuted by the Coast Guard were women! *[(1)Refer to our Report #R-401-E.]*

"Power Tends to Corrupt; Absolute Power Corrupts Absolutely"

Granting the Coast Guard's administrative law system absolute power over the lives of our mariners led to absolute corruption within the system. However, our Association can only pose pertinent questions, make recommendations, and wait for answers and encourage changes that may never come:

If even ***some*** of the facts alleged in the cases in this report that managed to reach beyond Coast Guard jurisdiction to the Federal courts are true, it means that Coast Guard management has fouled its nest with corruption for years. Many proceedings may be tainted and should be reviewed, reinvestigated, and possibly thrown out. This could also extend to "settlement agreements" wrung from indigent mariners who could not afford a maritime attorney to protect their credential and ultimately their means of making a living. If the Coast Guard continues to resist making meaningful changes, we will look to Congress to bring about the necessary changes. Above all, each mariner must remain vigilant and "***blow the whistle***" on the types of abuses found in this report.

What Mariners Can Expect if Summoned before An Administrative Law Judge

[Departing from her prepared written testimony at the Congressional hearing on July 31, 2007, former Administrative Law Judge Jeffie J. Massey placed herself in the shoes of an average "limited-tonnage" merchant mariner who had just received a summons to appear before an ALJ. As a mariner who attended many administrative hearings and spoke at length with mariners and attorneys involved in these "remedial" proceedings, I noted that Judge. Massey painted an accurate picture.]

"Mr. Chairman, Mr. LaTourette and members of the committee, thank you for the opportunity to contribute information to your investigation.

"For a moment, let me ask you to imagine that you are a mariner living in southern Mississippi. You are a high school graduate and you have worked as a crewman on a vessel that takes supplies to oil rigs in the Gulf of Mexico. You have been employed by various companies in the last 10 years, but you have never done any other type of work, and you have no training to do any other type of work.

"It is 1:00 p.m. in the afternoon and you are sitting in the upstairs hall of a regional Coast Guard facility, the same facility where the investigating officer you met with six months ago has his office. It was then that he served you with a copy of a "complaint" that alleged you had been intoxicated on board the vessel you last worked on, and while intoxicated, you assaulted another crewmember. When your vessel docked after this incident, the company's regional employee relation's specialist informed you that you were being fired because of the allegations, and they had to report the alleged incident to the U.S. Coast Guard.

"When you met with the Investigating Officer (I.O), he took your mariner's credentials from you. You have been out of work for six months. **Although the investigating officer explained to you that you had the right to an attorney to represent you at a hearing, you cannot afford an attorney.**

"You feel if you just tell your side of the story, any reasonable person will know that the charges are not true. You believe that the Coast Guard will have several crewmembers present to testify because you know the Coast Guard took statements from them. They all know what really happened.

"When you received a witness list from the Coast Guard just two weeks before your hearing, you see that the names of all the crewmembers they interviewed are not on there. You don't understand that this means that the Coast Guard does not intend to call these men as witnesses.

"There are all sorts of uniformed Coast Guard employees milling about. After about 15 minutes, a man comes up the stairs, accompanied by the Investigating Officer you met with and two other uniformed U.S. Coast Guard employees. They are laughing and talking and pay no attention to you. They all go into a room down the hall, a room you are summoned into in a few minutes. To your surprise, sitting on the bench is the man who was just laughing and talking with the Coast Guard employees. None of the crewmembers that you know witnessed the incident are present. The only people there are your former employer's regional employee specialist and the crewmember you had the fight with.

"The hearing is over in less than 30 minutes. The crewmember that you had the fight with testifies that you were intoxicated and that you attacked him for no reason. The employee specialist testifies that he received a report of the incident, took you off the boat because that was company policy and informed you that you were fired.

"You testify that you were not intoxicated, that the other crewmember had been drinking and he attacked you. You were only defending yourself. You also testify that this crewmember had it in for you because a former girlfriend of his had started dating you.

"You know but do not say that this guy is also a cousin of someone who is an executive in the company you worked for. You don't mention this because you don't know it is important and no one asks you. You tell the judge that there were other witnesses to the incident, but he tells you that if you didn't get them to the hearing, then he wasn't going to hear their testimony today because today was your hearing date and your only chance to present your evidence. Before you really understand what is happening to you, the judge says your license is suspended for six months.

"I hope that this scenario does not sound incredible or unlikely to the committee members because, based on my experience at the Coast Guard, this scenario is representative of past hearings, the type of hearings that have gone on for years at the Coast Guard.

"I also hope that the committee members understand that I am here today only because I believe the suspension and revocation hearing process at the Coast Guard is in violation of its own regulations and of all the basic tenets of due process. Despite the personal attacks and disrespectful environment I was subjected to while at the Coast Guard, my appearance here today has nothing to do with me personally. What has been happening to the mariners who have been

forced to face Suspension and Revocation proceedings without the protections guaranteed by law is the only thing that matters. I welcome the questions of the committee members."

Our Best Advice to Our Mariners: Insure Your Credential and Protect Your Career

Our Association's prolonged experience with administrative law proceedings demonstrated to us beyond a reasonable doubt that ***all*** mariners are at serious risk whenever they attempt to defend their interests at a Coast Guard hearing carried out before an investigating officer or an Administrative Law Judge (ALJ) without ***first*** securing adequate legal representation.

Our Association, in updating this report warns our mariners that you have not only your credentials at stake but also your career in the marine industry and much more. We watched the Coast Guard's administrative law program under Chief ALJ Joseph Ingolia run amuck, and out of control for many years. With only the slightest provocation, a single investigating officer can cut off a mariner's income, seriously stress, damage, or destroy his family relationships, wipe out his savings, cause him to lose his home, his possessions, and his reputation. It happened to the mariners in this report, and it leaves all mariners vulnerable!

We urge our mariners to take the abuses mentioned in this report seriously and understand that the punishments inflicted on other mariners can be yours if you make the slightest misstep and attract the Coast Guard's attention. While we never claimed that our mariners were perfect people, many punishments doled out by Coast Guard officials have been excessive and unwarranted. Reading the Special Master's report of the Coast Guard ALJs' work with commercial fishermen as well as cases working fishermen brought to our attention reinforced this belief. ***The Coast Guard's attitude is supported up and down their military chain of command*** and appears to be driven by a gung-ho, "win at any cost" mentality and a willingness to use questionable any tactics to do so.

Never Surrender Your Rights Without Consulting a Lawyer!

If you have an accident or find yourself "in trouble" with the Coast Guard, there are actions an investigating officer may propose that often ***appear*** less threatening than bringing your case before an Administrative Law Judge. However, appearances can be deceptive.

"**Settlement Agreements**." A Coast Guard investigating officer may offer you a "settlement agreement" where you admit your wrongdoing and accept some sort of punishment. You should be very wary of offering to surrender any "rights" that you, as a mariner, may have by agreeing to accept any "settlement" offer the Coast Guard may make ***without first obtaining legal advice***. The Coast Guard investigating officer may offer a quick deal that just calls for your signature.

In light of the cases presented in this report, ***our best advice to any licensed officer is to purchase license defense insurance***.[(1)] Insurance is available only to ***officers*** with licenses (e.g., officer "credentials") and is not available to ratings such as able seaman, tankerman, oiler, etc. Unfortunately, most limited-tonnage officers do not accept this advice that we have put forth from the time our Association was founded. It is the only meaningful advice we can offer until our government changes this badly flawed system – if it ever does. *[(1)Refer to NMA Report #R-204-C. The cost is generally around $200 per year.]*

Our website also provides ***any mariner*** with access to our list of maritime attorneys to contact if an emergency arises on the job that affects you or your credential. You can count on them to provide you with basic, solid advice but, as with any professional, remember that time is money.

Unfortunately, emergencies can arise at any time of the day or night. Having an "admiralty attorney" you know and can contact is a real plus if you are involved in a serious accident or incident. Keep in mind that the garden variety of "administrative law" that enforces Coast Guard regulations is very specialized and is ***not*** an area that most attorneys choose to get bogged down in. Even a relatively simple case requiring one or more court appearances before an ALJ can cost up to $5,000 or more in legal fees. We know of several cases that dragged on for several years with attorney fees in the hundreds of thousand dollars. Yet, Coast Guard officials have been willing to waste an ungodly amount of taxpayer money persecuting mariners for the smallest offense…just because the system allows them to do so. Read of these true stories in this report!

Advance Planning. Free advice is only as good as its source. Our Association cannot give our mariners "legal advice" although we can provide encouragement and direction. Our best advice is that you really need to contact an admiralty attorney that ***already*** has a stake in your case, no matter where that case may lead. Most of our mariners are not wealthy enough to have a lawyer "on retainer." Nevertheless, a little advance planning can put you in the driver's seat in case you are involved in an accident or incident of any kind involving your job afloat or your credential. If you undertake proper advance planning, you can tell a Coast Guard investigating officer with the utmost confidence: "I will not discuss this matter until I first speak with ***my lawyer***" – and know that you already have a lawyer to speak with! Whether it takes an hour or a day, ***wait until you speak with your lawyer before discussing anything or signing any document***. Both admiralty law and administrative law (e.g., dealing with the Coast Guard bureaucracy) are specialties in the legal field and demand expertise that differs from divorce, bankruptcy, real estate, and other legal matters. ***Secure the services of a qualified maritime attorney 24 hours a day by purchasing license defense insurance***.

Until there is a basic sea change in the marine industry, you should consider securing license insurance as your personal responsibility. Consider license defense insurance as one of the hidden costs of holding a license.

Without a license defense insurance policy, licensed officers may face serious personal financial risks following accidents, incidents, or if any of number of laws or regulations are violated. ***It is incorrect to assume that you, as a licensed officer, will be protected under the umbrella of your employer's insurance policies***. These policies cover your employer's business interests and ***may not*** cover you personally or protect your license in event of an accident.[(1)] *[(1)Refer to NMA Report #R-399 as an example.]*

Prepare to Defend Your Coast Guard Credentials

Most mariners agree that the Coast Guard aggressively investigates marine accidents and incidents. Worrisome investigations followed by license suspensions and revocations are often the outcome regardless where a mariner operates. The credentials you earn from the Coast Guard are an ***easy target*** for Coast Guard investigators especially in high profile cases where the public demands that the Coast Guard take action against a mariner. Suspension and revocation (S&R) proceedings are painful and humiliating. Most of our mariners never heard of the term "administrative law" or "S&R Proceedings" in any training course they have ever taken. However, once a mariner goes through the process, he will learn a lesson never to be forgotten.

Congress and members of the public pressured the Coast Guard to act after a number of highly publicized incidents involving our limited-tonnage mariners. Horrific accidents like these motivate investigators to come down hard on those responsible. These incidents included:

- The Amtrak Sunset Limited bridge allision and derailment at Bayou Canot, AL, killing 45 people.[1] *[[1] Refer to NMA Report #R-293-A, Rev. 3.]*
- Grounding tank barges in Massachusetts, Rhode Island, and Puerto Rico that polluted hundreds of miles of coastline including public beaches[2] *[[2]Refer to NMA Report #R-429-D.]*
- Demolition of the Queen Isabella Causeway Bridge in south Texas; and the Interstate 40 bridge at Webbers Falls, OK by towing vessels.[3] *[[3]Refer to NMA Report #370-A, Rev. 2]*
- The 2007 collision between the tow of the M/V Mel Oliver and the tankship Tintomara that closed the lower Mississippi River for 5 days.

Many Cases Involve Drug and Alcohol Abuse

Our Association fully supports the ***reasonable enforcement*** of drug and alcohol laws and regulations.

Unfortunately, a large number of administrative cases brought before investigating officers and Administrative Law Judges involve mariners who abuse drugs or alcohol. Simply stated, if you are a credentialed mariner and "do" drugs of any sort either recreationally at home or on the job, you are in the wrong profession. Our Association cannot help you! License defense insurance cannot help you! We suggest that you either change your habits or change your profession. .

It is unfortunate that drug and alcohol abuse continues to impact the maritime industry. Wringing our hands will not make the abuses go away. ***Our Association supports the existing regulations that attempt to protect the public from a proven menace, but we will not support administrative actions that are taken to extremes*** as the remainder of this report clearly indicates.

Our Association prepared a series of reports[1] that discuss drug and alcohol regulations and testing. However, if you are a mariner who ***never*** abuses drugs or alcohol and believes that existing regulations can ***never*** threaten your credentials or livelihood, you are likely to have a very rude awakening. We suggest that you review our reports at your earliest convenience to better ***understand*** the regulations in 49 CFR Part 40, 33 CFR Part 95, and 46 CFR Part 16 to better understand some of the problems "law abiding" mariners face. *[[1]Refer to NMA #R-315 series reports.]*

Our Association and a small number of dedicated attorneys do our best to help a mariner if the drug and alcohol system mistakenly grinds him up in their gears as happens on occasion. However, we offer this statement as a fair warning: Our mariners must read and understand the regulations sufficiently well to ***understand*** every single step of the drug and alcohol testing procedure. Unfortunately, just because you passed a dozen drug tests does not mean you know the rules! You must live with the drug and alcohol testing procedures in any job you take in the transportation industry. We will do all we can to help you understand the regulations ***before*** you fall victim to them.

Captain Bob Jones and Captain Tom Smith[1] Illustrate the "Insurance" Difference

[[1]Fictitious names and incident.]

If you are a merchant marine officer, there is a way to "level the playing field" and avoid the worry and expense of license proceedings that can hang over your life for months if not years! It's called license defense insurance.

Before explaining the advantages of insuring an adequate defense of your license, it is useful to look at a typical "case study" of an incident that would trigger a Coast Guard investigation that could result in "negligence, incompetence, or misconduct" charges, a court hearing before an Administrative Law Judge (ALJ) and, potentially, a credential suspension or revocation.

Example: Two towboat/barge combinations collide while executing an agreed upon meeting situation on a river. Some barges are scattered at odd angles in the navigable channel, effectively blocking river traffic, while others drift and beach themselves on the riverbank. The pilots of both vessels report the incident as required and the Coast Guard investigators are on the scene in less than 30 minutes.[1] *[[1]Investigating officers are trained in law enforcement whereas most mariners never receive comparable training.]*

Coast Guard investigators board each towing vessel and take charge. This is the moment of truth as the licenses, livelihoods, and professional reputations of all involved license holders are quite literally on the line.

The Coast Guard takes very seriously its mandate to "maintain the standards of competence and conduct of merchant mariners for the safety of persons, property, and the environment."

With that in mind, the investigating officer begins his interview of Captain Bob Jones. The investigator eventually tells Jones that it would be "in his best interest" to agree to a "settlement" that calls for his license to be immediately suspended for two months. If he doesn't agree to the "settlement," the investigating officer ***strongly suggests***[1] that he's looking at a six-month suspension if his case is scheduled for a hearing before an Administrative Law Judge (ALJ). *[[1]Recognize this as a threat.]*

Captain Jones is unsure of his legal rights. He knows he cannot afford an expensive legal defense of his license. Captain Jones reluctantly signs a "settlement agreement" and surrenders his license to the Coast Guard for 60 days. He is obviously scared and two months without work, he figures, is better than the complete financial disaster that six months with no income would bring down on his family.

Captain Tom Smith hears the same "suggestions" from the investigating officer. However, he immediately reports the incident by cell phone to his license insurors by using the insurors toll-free number. He is advised to cooperate with the Coast Guard on factual and safety issues **but not to sign anything and not to agree to any settlement.** Within an hour an attorney, who is an expert in maritime law, contacts Captain Smith and advises him as to his next step. The attorney takes on the case and stays with it until its conclusion, no matter how small or large it is.

Captain Smith, with his license defense insurance, is confident that his license defense is in the hands of a professional maritime lawyer, who has only his best interests at heart. He has an expert on his side that knows his way around all the rules and regulations involved in marine license defense, from pollution to drug testing. Furthermore, it is all paid for!

The result? According to the agreed-upon "settlement" Captain Bob Jones' license is suspended for two months and he has a permanent black mark against his name in the Coast Guard file. On the other hand, Captain Tom Smith was told to complete a "CG-2692" Report of Marine Accident, Injury, or Death (and its barge addendum) and to wait to hear back from the Coast Guard for a more extensive interview at a later date.

At the interview scheduled during his time off work, Captain Smith will be accompanied and guided by ***his*** attorney. The fact that Captain Smith had license insurance and had the presence of mind to report his claim immediately may result in the dramatically different outcomes for the two masters involved in the same exact incident, and with the same degree of responsibility.

The License Defense Insurance Advantage

This comparison clearly highlights the difference between "going it alone" and having the advice and counsel of a local attorney skilled in admiralty and maritime law. License insurance gives you a ***safety net*** of legal expertise, to help you when you need it most. For an affordable annual premium,[1] from the moment Captain Tom Smith reported his claim, a maritime attorney is paid to defend him and his license for the duration of any legal proceedings before the Coast Guard. If the Coast Guard files negligence charges against him and conducts suspension and revocation proceedings as a result of the accident, his maritime attorney will be at his side every step of the way. Since he is covered by license defense insurance, Captain Smith will not have to pay an additional penny for legal expenses. *[(1)Compare the cost of the annual license defense insurance premium of about $200 to the problem of finding and the cost of hiring a knowledgeable attorney for just one or two hours!]*

Although an incident may appear small and you may be convinced of your innocence, as a mariner you will be a "fish out of water" in a courtroom. Legal defense of a Coast Guard license is tricky and expensive while license insurance is simple and affordable. Depending upon the specifics of the case, you may not win but if you lose it won't be for lack of the best available legal advice. A mariner has the option of sharing his risk of paying for costly license defense with thousands of other mariners by buying a license defense policy.[1] We believe these choices are alternatives worthy of serious consideration. Although our Association is ***not*** in the business of selling insurance, we recommend that you contact insurors directly and discuss the basic license defense insurance with them. *[(1)Refer to NMA Report #R-204-C, Rev. 6]*

Our Association recognizes that our mariners earned credentials important to their livelihood that Coast Guard administrative procedures can take away from them. The process of separating our mariners from their credentials can be more stressful than pulling teeth. It can cause aggravation, frustration, and stress. We have seen cases where the Coast Guard has allowed the process to drag on for months and even years. Even worse, our mariners learned through hard experience as described throughout this report that the procedure used are not always conducted in a fair and impartial manner. Our well-publicized attempts to bring about needed reforms to the system reached the point where we assert that the only recourse for our mariners is to protect themselves by purchasing license defense insurance.

Some mariners were shocked to learn that the Coast Guard can even proceed against them if they have broken a "company rule" set down in an "operations manual," memo, or other written document – and, even "verbal" orders that are written on the wind! A stroke of the pen that states you read and understood a book full of company rules on the day you were hired provides all the "proof" Coast Guard investigators need to throw the book at you as if you really understood every single item in the company rule book from cover to cover. Some of the rules change as fast as a simple change on a document in the main office's computer.

Following company policies cannot protect mariners who fall asleep on the job after violating the Coast Guard's "12-hour" rule.[1] The choice to insure yourself or not is left to each licensed officer to make. Think about it carefully. *[(1)Refer to all NMA Reports in the #R-370 series.]*

The Open Mouth Bespeaks the Vacant Mind

If you have a Coast Guard "***credential***"[(1)] and the Coast Guard ***notified*** you that you violated a law or a regulation you should expect them to investigate the offense. The result of any ***investigation*** by the Coast Guard could result in a punishment directed at your credential rather than your wallet. *[[(1)]New terminology. Before April 2009 a credential was either a "license" or a "merchant mariner document."]*

The Coast Guard will want to ***talk*** with you about what you might have done. This conversation may take a direction toward having you ***admit*** to a violation of a law or regulation. There are hundreds of pages of laws and regulations that you know nothing about – and one that covers almost any situation afloat. However, the popular saying that "ignorance of the law is no excuse" should trouble you.

First of all, you are a seaman and not a lawyer. Do not dispute a matter of law or regulation with any Coast Guard official because it is likely he or she knows more than you do – although possibly not understanding that much more than you do. In fact, treat it as a learning experience. Learn with your eyes and ears – not with your mouth. Expressed bluntly – ***shut up and listen*****!!!**

The Coast Guard would like you to admit you did something wrong for a very good reason – it will save them a great deal of time and effort in ***proving*** that you did something wrong. In fact, in many cases, they may not have seen you do whatever they claimed you did. Your big mouth could seal your fate – so close it and ***keep it shut***.

In the maritime world, the Coast Guard represents ***law enforcement.*** The word "enforcement" involves the use of force even if only psychological pressure. It does not mean a Coast Guard official will break your arm, torture, or even be rude to you. However, they may do many things including trickery to extract what they believe is the "***truth***" to help them win what may become their "case" against you. A solid record of winning cases leads to promotions within the Agency, so consider yourself as a stepping stone.

Do not ***assume*** the Coast Guard official is your ***friend***. The Coast Guard does many commendable things that our mariners admire like search and rescue and participate in humanitarian missions. Nevertheless, most merchant mariners do not picture the Coast Guard as being "friendly" when they issue credentials to mariners. In fact, over the years, many mariners complained of extremely shabby treatment in obtaining their credentials.[(1)] This also extends to the way the Coast Guard investigates suspected violations,[(2)] maritime accidents,[(3)] and especially personal injuries.[(4)] At this moment, opening your mouth, answering their questions before obtaining solid legal advice could cost you ***big bucks*** and loss of your credential with its ability to make a living. At this moment, it is best not to express any opinion. Just, keep your mouth shut unless human life is at stake or unless you can avert serious property damage or pollution. *[[(1)]Refer to our Reports #R-428-D and #R-428-D, Rev. 1. [(2)]Refer to our Report #R-429. [(3)]Refer to our Report #R-429-M. [(4)]Refer to our Report #R-350, Rev.5, Issue "Y" on personal injury reporting.]*

Do Not Sign Anything at an Accident Scene

Federal regulations require that "Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge shall notify the nearest Sector office, Marine Inspection Office or Coast Guard Group office…" You or one of the people specifically named here must tell the Coast Guard that there was a "casualty." The word "***immediate***" is compelling. The Coast Guard needs this information to properly regulate marine traffic.

If a company employs you, you owe it to your employer to contact the Coast Guard and do it immediately. However, if you ask a company official to do it, make a note of the name of the person you contacted and the time. Do not write anything else about the accident in the logbook. Read the following regulation in its entirety.

Report the Casualty Immediately

46 CFR §4.05-1 Notice of marine casualty.

(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—

(1) An unintended grounding, or an unintended strike of (allision)[(1)] with a bridge; *[[(1)]**Vocabulary: Allision** = when a floating object strikes a stationary object.]*

(2) An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (8);

(3) A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;

(4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;

(5) A loss of life;

(6) An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties; or

(7) An occurrence causing property-damage in excess of $25,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.[(1)] *[[(1)] **Vocabulary: Demurrage** = compensation for causing the delay of a vessel.]*

(8) An occurrence involving significant harm to the environment as defined in §4.03–65.

(b) Notice given as required by 33 CFR §160.215 satisfies the requirement of this section if the marine casualty involves a hazardous condition as defined by 33 CFR §160.203.

(c) Except as otherwise required under this subpart, if the marine casualty exclusively involves an occurrence or occurrences described by paragraph (a)(8) of this section, a report made pursuant to 33 CFR §153.203, 40 CFR §117.21, or 40 CFR §302.6 satisfies the immediate notification

requirement of this section.
[CGD 94–030, 59 FR 39471, Aug. 3, 1994, as amended by USCG–2000–6927, 70 FR 74676, Dec. 16, 2005; USCG–2006–25556, 72 FR 36330, July 2, 2007]

The Coast Guard ***also*** requires a ***written report*** prepared on their form CG-2692. This report also may be completed by the "owner, agent, master, operator, or person in charge." The written report must be filed ***within five (5) days*** of the accident. Again, extend the courtesy to your employer to allow him to complete the accident report because he or his company may have financial liability for the accident. Your employer has an insurance policy as well as access to legal counsel. The regulation governing the written report is as follows:

The Written Report Comes Later

46 CFR §4.05-10 Written report of marine casualty.

(a) The owner, agent, master, operator, or person in charge shall, within five days, file a written report of any marine casualty required to be reported under §4.05–1. This written report is in addition to the immediate notice required by §4.05–1. This written report must be delivered to a Coast Guard Sector Office or Marine Inspection Office. It must be provided on Form CG-2692 (Report of Marine Accident, Injury or Death), supplemented as necessary by appended Forms CG-2692A (Barge Addendum) and CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) If filed without delay after the occurrence of the marine casualty, the report required by paragraph (a) of this section suffices as the notice required by §4.05–1(a).

[CGD 94–030, 63 FR 19192, Apr. 17, 1998, as amended by USCG–2006–25556, 72 FR 36330, July 2, 2007]

The Investigation

A Coast Guard investigator may ask you to sign a statement at the scene of an accident "while the accident is fresh in your mind." The investigator may threaten or cajole you or tell you that you are obstructing his investigation if you do not prepare or sign a statement.

We suggest that you politely decline to do so. If the investigating officer insists, ask him for a blank copy of CG form 2692 (which he may not have) and ***tell him you will complete the written form within 5 days to fully comply with the regulation***. Wait until you have an opportunity to speak with a company official and preferably with their lawyer who will be able to give you legal advice.

At this point, remember that the "company" lawyer represents your employer's interests and not necessarily your interests as a mariner. This is an important point if you believe the casualty was your fault. Depending upon the seriousness of the accident, you may have to hire an attorney to represent your own interests – at your expense!

If you purchased a license defense ***insurance*** policy – as we recommend for all mariners who belong to the National Mariners Association – call the insurance company lawyer immediately to obtain the advice you paid for when you bought your policy.(1) However, understand from the outset that if you open your mouth or sign anything, your lawyer may not be able to properly defend you. *[(1)Refer to our Report #R-342, Rev.5. License Defense Insurance; Income Protection Insurance and Civil Legal Defense. Note: NMA does not sell insurance!]*

Our Association has serious problems with the Coast Guard's entire investigative process. We shared our thoughts with the Department of Homeland Security in fifteen (15) volumes of material in 2007 and 2008. As you read this book, you will learn how the Coast Guard betrayed a number of our mariners – ruined and destroyed their lives for little or no reason. Problems with "investigations" are longstanding as you will see in two government reports our Association re-published.(1) *[(1)Refer to our Reports #R-429-A and #R-429-B.]*

The Settlement Agreement

Our Association believes in law and order, and in maritime laws and regulations. We believe in the value of fair and impartial accident investigations to determine the root cause of accidents. Our Association has over 800 accident reports in our files or on request under the Freedom of Information Act.

You should be especially careful whenever a Coast Guard Investigating Officer (an "I.O.") approaches you with an offer of a "Settlement Agreement."

The moment when you sign a "settlement agreement" you admit your guilt to all charges and specifications. Signing such an agreement is an especially bad policy if you cannot read and understand every single word on the document you are reading. Of course, the "I.O." will explain it to you because he is required to do so. After he does, ask him for a copy of the document he expects you to sign but tell him you "will take it home and think about it" before you sign it.

Our Association does not give legal advice. So, when you take the document home, call any one of the ***maritime attorneys*** on our website at ***www.nationalmariners.org***. These are professionals our mariners have learned to rely on. They are always good people to know before you need them. Your license insurance company can introduce you to other names on their list. As a potential client, your first call asking for advice on whether you should sign this form will be free of charge.

You need to know that every "Settlement Agreement" that is signed must be accepted and approved by a Coast Guard Administrative Law Judge before it is valid and before its terms can be enforced. Our mariners often are told that the "deal" provided by a Coast Guard Investigative Officer will keep you from going before an Administrative Law Judge who, they often say, could assign you an even stiffer punishment than the settlement agreement proposes. Really! Why not get on the phone and talk with the ALJ. The I.O. will give you the judge's name and number, and the judge can give you some free legal advice about handling your "problem."

Actually, you can and ***we suggest that you should*** request a meeting with the judge or have a consultation over the phone with him in the presence of the Investigating Officer. The ALJ can give both sides (i.e., both you and the Coast Guard) legal advice and advise you of your rights to be certain in his own mind that you were not placed under any "pressure" to sign the "Settlement Agreement."

In some cases, the ALJ may be able to direct you to some legal assistance from law school students and faculty to represent your interests if you believe that the proposed punishment is out of line and you do not have the money to hire an attorney. Many law school students received more legal training than Coast Guard investigating officers. Think about this old truism: "Anyone who represents himself has a

fool for a client". This excellent program was started in New Orleans by ALJ Bruce T. Smith[1] in 2008. Our Association recommends the program and its mentor to our mariners. *[[1]Honorable Bruce T. Smith, ALJ, Hale Boggs Federal Building, 500 Poydras Sr., Suite 1211, New Orleans, LA 70130-3396. Phone: 504-671-2210; Fax: 504-671-2212.]*

Are You Really Guilty?

You may not want to plead guilty. One example as you will read later in this book, involved a river towboat pilot who was involved in a minor "fender bender." He signed a "Settlement Agreement" that suspended his license for one month. The investigating officer originally sought a two-month suspension but agreed to reduce her demand to one month. The "Settlement" cost this pilot $13,000 in lost wages but could have cost him $26,000. However, the damage caused by the accident that one of our most experienced river pilots agreed was "unavoidable" was only $5,000. His story appears in "Example #2" (below).

If You Are Involved in an Accident, Don't Expect to be Read Your Rights

*[**Source:** This is an article by Capt. Tuuli Anne Messer. Professional Mariner, Issue #72. Capt. Messer the author of the Third Edition of the Shipmaster's Handbook on Ship's Business. She is an associate professor and chair of the Marine Transportation Department at California Maritime Academy and has a law degree from the University of San Francisco. Added emphasis is ours.]*

"You have the right to remain silent." Those are words you probably ***won't*** hear from the U.S. Coast Guard during the investigation of an incident.

The Coast Guard, as a federal law enforcement agency, has authority to "Mirandize" (read the rights to) people they are investigating, but it rarely does so. To understand why mariners are generally not read their rights, one must first understand how the Coast Guard interacts with other law enforcement agencies, the purpose of Coast Guard investigations, and the application of Miranda warnings.

Mariners may not realize that the reports generated as a result of Coast Guard investigations can and will be given to other law enforcement agencies, such as the Federal Bureau of Investigation, Drug Enforcement Administration, Environmental Protection Agency, state departments of fish and game or wildlife, and other state agencies that are interested in pursuing criminal indictments or additional civil penalties against the mariner and/or maritime company. One senior Coast Guard investigator indicated that other federal agencies appreciate having the Coast Guard do the investigations because mariners are used to working with Coast Guard personnel and tend to "clam up" when, say, an FBI agent starts asking questions. The Coast Guard's Marine Safety Manual (available online at the Coast Guard website) encourages such inter-agency sharing of information.

The Coast Guard is usually the lead investigating agency after a marine incident. Even in cases where the FBI or EPA will likely pursue criminal indictments, the Coast Guard will be the agency to investigate first. Coast Guard personnel will arrive on the scene, often in civilian clothes, and with full federal subpoena powers, they will begin asking questions and collecting documents.

The Marine Safety Manual offers specific guidance on how Coast Guard investigators are to conduct an investigation. The manual advises investigators to act professionally and with the highest ethical standards, be highly cognizant of a mariner's rights, and take accurate and detailed notes after any interviews.

Investigators are advised not to take notes during the interview, as this may cause the subject anxiety. Arriving on-scene in civilian clothes is another effort to ***put mariners at ease and to get them to talk.*** Many Marine Safety Offices adhere to this practice.

Investigators are required to show identification and to announce the type of investigation being conducted, and mariners are well advised to ask politely to see such identification before answering any questions. ***Investigators are not required to read a mariner his or her rights unless criminal activity is suspected. If criminal activity is suspected, the investigating officer may ask the Coast Guard's Investigative Service, a group of Coast Guard special agents who handle criminal cases, to assist in the investigation***. Coast Guard investigators also can get assistance and guidance from Coast Guard lawyers who are stationed at various district offices.

Some incidents are difficult to classify as strictly civil incidents. Recent state and federal legislation has changed some "environmental accidents" into "environmental crimes." That adds the potential for criminal fines and incarceration to all the other forms of civil liabilities that already exist for these events. These penalties are in addition to any cleanup and repair costs.

There are two types of Coast Guard investigations: Part 4 and Part 5, corresponding to respective sections of 46 CFR (Code of Federal Regulations). A Part 4 investigation is a casualty investigation and usually is done first.

The Coast Guard is trying to determine what happened, and a mariner usually has no right to remain silent or to wait until counsel arrives before answering questions. A gray area is created, however, when answers to a Part 4 investigation may indicate criminal activity or when certain answers lead the investigator to ask additional questions he or she might not otherwise have known to ask and the subject mariner has not been read his or her rights.

At the first hint that criminal activity may have occurred, the investigator is supposed to stop and Mirandize the subject. A mariner generally has little right to delay answering Part 4 questions while waiting for an attorney. Undue delay may be construed as hampering the investigation.

According to a lawyer of the Coast Guard Investigative Service, information gathered during a Part 4 investigation is not admissible, as evidence, nor is it allowed to be used in future discovery efforts by other agencies. Thus, many questions asked during a Part 4 investigation will be repeated during the Part 5 investigation.

During a Part 5 investigation, a mariner may be able to postpone questioning until his or her attorney arrives, especially if the questions don't directly affect rescue or cleanup efforts. This is another minefield for mariners, as the investigator may feel refusal to answer questions is hampering the investigation. Although the investigator wants information gathered as soon as possible after an incident, there is usually no immediacy to many questions and a mariner should make every effort to secure legal representation before answering questions during a Part 5 investigation.

Again, there is a fine line between hampering an investigation and a reasonable delay in answering questions that have no immediate impact on the casualty at hand. If the mariner is reasonable in his or her requests, odds are the Coast Guard will be, too. If a request to delay questioning is denied, careful notes should be made as to the circumstances of this denial.

Miranda warnings apply only in criminal, not civil, cases. Thus, a mariner can't remain silent or "take the Fifth" when the potential sanctions are only civil in nature. ***Interestingly, the Marine Safety Manual advises Coast Guard investigators not to read mariners their rights, as it may have "a chilling effect" on the mariner's willingness to speak.*** The Manual does, however, advise that subjects be read their rights as soon as it becomes apparent to the investigator that criminal sanctions may be pursued.

Unfortunately, despite the best of intentions, ***many junior Coast Guard investigators have little legal training, have been on the job a few years at best, and may not know what actions carry criminal implications***. If the incident is of major proportions, there will probably be senior investigators present, or at least running the show. The Coast Guard's primary investigative efforts lie in determining what happened for statistical and educational reasons, and determining a mariner's fitness to hold a certain license or document. To this end, the Coast Guard conducts hearings before an administrative law judge, with no jury, to make administrative rulings that may result in civil fines and/or license or document suspension or revocation. ***The Coast Guard is not usually interested in pursuing mariners criminally – but other federal, state and even local agencies may be***.

Generally, information gathered before a person has been read his or her is will not be admissible in a criminal trial. This is not true of voluntary statements or actions made before an investigation has formally begun. Additionally, if a mariner is compelled to testify by way of a court order, that testimony cannot later be used against that person in a criminal trial. So, in some ways, not receiving a Miranda warning is a good sign. It means that at least the Coast Guard doesn't think there's any reason to suspect criminal activity. It also means that the information given by the mariner can most probably not be used against him or her, should there be a subsequent criminal trial.

Here are some guidelines for you to follow if you are involved in a marine accident

- ***Contact an attorney. If you have license insurance, contact your carrier***. Your union may also have legal services available.
- ***Don't volunteer any information (unless such information would help cleanup or rescue efforts); wait until you are asked.*** Once asked, answer the question factually, without injecting opinions or suppositions. ***Remember, voluntary admissions are admissible as evidence, even if you have not been read your rights***. Answer fully and truthfully, and avoid evasive responses. ***Don't speculate***, and don't cop an attitude.
- Don't go have a drink or do anything else that would hamper post-incident drug-and-alcohol testing. ***Refusal to test has the same (and in some ways worse) ramifications as a positive drug or alcohol test.***
- ***Always ask to see identification before answering questions, especially if the questioner is in civilian clothes***. Only three of the Marine Safety Offices have badges for their investigators, so they may only have the green active-duty armed forces ID and their business cards to offer. Usually, ideally, the Coast Guard investigators work as teams, so don't be surprised to see two investigators. This is to your benefit. ***It is not unheard of for opposing attorneys to misrepresent themselves, or not identify themselves at all, and just start asking questions***.
- Ask questions if you are confused. Ask the investigator to explain what type of investigation is being conducted, and ask what your rights are. For example, can you wait to answer until an attorney is presents? ***If you think you are in custody, meaning you are not free to leave, ask***. Being in custody has serious legal ramifications and if you are in custody, that status should always be made clear to you. ***Being detained is not the same as being in custody – ask. The investigators are not out to trick you and should answer truthfully***.
- ***Maintain notes, or preferably a recording, of any interviews***. The senior investigator I spoke with indicated there would be no problem with a mariner making his or her own recording of the investigation and/or having an uninvolved third party present as a witness to the questioning. ***Be sure to note the date, time, place and circumstances, and to have all speaking parties identify themselves on tape so the voices can later be identified properly.***

Investigators may write down notes after the interview. A mariner is entitled to review the notes taken by the investigator, and indeed, most investigators will show the notes to the mariner to be sure the testimony was accurately recorded.

- ***If you are advised that you have the right to remain silent, exercise that right***.

[End of article]

Settlement Agreements Admit Wrongdoing

If the Coast Guard asks to sign a "Settlement Agreement," **STOP!** It may be a sign that you or someone else has already said too much.

A "Settlement Agreement" is a legal instrument that you probably know next to nothing about. It can affect your future and is something for which you need legal advice. After an accident, oil spill etc. a Coast Guard Investigating Officer may ask you to sign a "Settlement Agreement." If you sign it, ***it certainly will make his job much easier***, but it might make your life a lot less rewarding. You need some legal advice. Legal advice comes from lawyers not from friends, boat buddies, or smiling investigating officers.

If you have a merchant mariner "credential" the Coast Guard ALJ (and ***only*** the ALJ) can ***suspend or revoke*** it if you admit that you have done something wrong. ***A "settlement Agreement" is an unqualified admission that you have done something wrong.***

If you have a credential, you should already have made advance arrangements for a lawyer who can help protect your license. If you do not have insurance, at least line up a ***maritime attorney*** that can explains the issue to you. Check out our Association's website for a list of attorneys at www.nationalmariners.org.

Here are several examples you should consider before you sign on the dotted line.

Example: Settlement Agreement #1

*[**Source:** Misle Activity #2757513, Misle Case #310485, File #M-658, Mnl#47. Release date Mar. 23, 2007].*

On August 16, 2006, at approximately 2200 local time, the towing vessel KATHRYN WATSON ("KW") was pushing two loaded barges when it allided with the barge Kirby 10427 which was moored in the staging area in the San Jacinto River. As a result, the "KW" broke the lines of other barges in the process of being moored by another vessel, the PAT SALVAGGIO and caused them to break free. There were no injuries or pollution. However, while retrieving the barges, the barge Kirby 30016T sustained $5,000 damage to its port manifold.

"According to the Master of the "KW" his 54-year old vessel failed to respond to his attempts to shift its engines into reverse. The subsequent Coast Guard investigation revealed that the "KW" did, in fact, lose its maneuverability because of two mechanical failures. In both cases, the mechanical problems occurred in the engineroom several decks below the pilothouse in an area not readily accessible to the Captain as he tried to maneuver his 110-foot towboat.

The Coast Guard accident report contained no statement from the Captain of the "KW" detailing his side of what happened to cause the accident or the corrective steps that were taken in the engineroom immediately after the accident. Furthermore, the accident report contained no required accident report form (CG-2692) from the vessel's operating company.

Like most towing vessels, the "KW" had no licensed "engineer" and the deckhand on duty was out on the head of the tow at the time of the accident and unavailable to manually shift gears in the engineroom if called upon to do so in an emergency. Hidden away in the data was the information that both barges that were being pushed by this poorly maintained towboat were ***loaded benzene barges***. Until the Coast Guard recognizes that training for lower-level engineers is important – something it consistently refused to do for over 35 years – accidents of the type described in this report are inevitable. Indeed, it is fortunate that the accident did not lead to a fire, explosion, injury or death considering the volatile nature of the cargo.

Several months after the accident, the Captain of the "KW" reported to us that he was notified by mail that the Coast Guard investigating officer presented him a "settlement agreement" offering him a "Letter of Warning" in return for his signature. The letter was opened by his grandmother who contacted the Captain on the boat warning him that most of the twenty-days allowed to answer the Coast Guard's "complaint" already had passed.

When the Captain called the Investigating Officer in Houston, he was told his ***only choice*** was to sign the letter of warning or, as an alternative, to contest a charge of negligence before an Administrative Law Judge (ALJ). Since the Captain had no license insurance to provide for a lawyer to defend him at a settlement hearing or before an ALJ, and since he did not really understand the process, he accepted the offer. Case closed – except for the "black mark" on his record. This letter could torpedo his eligibility to become a "Designated Examiner" and advance in the towing industry in the future. It also caused significant harassment and emotional upset extended over several months.

In reviewing the full record forwarded to Washington (obtained under FOIA), it does not appear that the Coast Guard collected ***any*** conclusive evidence that the Captain's "negligence" under 46 CFR §5.29 caused this accident. By definition, "**Negligence** is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." In fact, the "Enforcement Summary" even contains a factually incorrect statement that the "KW" collided with the M/V PAT SALVAGGIO – which it never did.

This accident report serves as an example[(1)] of how an incomplete investigation can adversely affect an individual mariner while it fails to address the root cause that there are significant training, maintenance, and manning issues that affect engineroom equipment operation throughout the towing industry. *[[(1)]Other examples appear in our Report #R-429, Report to Congress: How Coast Guard Investigations Adversely Affect Lower Level Mariners.]*

Example: Settlement Agreement #2

*[**Source:** Newsletter #39, April-May 2006. Our file# Mnl39.7b]*

While powerful corporations like the American River Transportation Company (ARTCO) rack up millions of dollars of damage to public and private infrastructure along the waterways without the Eighth District even raising a finger, we were brought back to the "real world" on Apr. 12, 2006 in a hearing before an investigative officer at MSU Morgan City.

Captain ■■, who has been on the water all his life and is a native of the local area, was pushing an empty "six-pack" tow down the Atchafalaya River during daylight hours in full view of the Morgan City Vessel Traffic System (VTS) cameras, radars, and its automatic identification system (AIS). An experienced VTS operator, who reportedly also held a towing officer's license, was on duty at VTS at that time.

At the time of the accident, the Atchafalaya River gage read 7.5 feet and is considered "high water" for the area. Captain ■■ held his tow at Twenty Grand Point where the Intracoastal Waterway joins the Atchafalaya River under the control of the VTS while another southbound tow passed under the three bridges joining Morgan City on the East with Berwick on the west. This is one of the most dangerous sections of the river and is the reason why the VTS was established there thirty years earlier. Two previous accidents in the 1970s damaged spans of the railroad bridge disrupting transcontinental rail service with one hazardous chemical accident threatening the area with a lethal chlorine spill.

The VTS gave Captain ■■ clearance to proceed down the river on a slow bell following the tow that just passed under the bridge. Feeling the force of the winds pushing him toward the nearby bank, Captain ■■ promptly pushed his tow into the river and turned south toward the "99-Mile Board" several miles away.

As Captain ■■ pulled out into the river out from behind the shelter of the trees his empty barges began to feel the effects of the wind pushing him across the channel toward the Berwick shore. The river is wide at that point and presented no real problem except that there were three tows leaving the "99-Mile Board" heading northbound in his direction. This kept him closer to the right descending bank (RDB) on the

Berwick side of the river. As he approached the sharp turn at the "99-Mile Board" he was unable to use full power to maneuver because all the northbound tows that had clearance to come out of the "99" had not yet cleared and completed their turn to the north. That held up the tow ahead of Captain ■■. Yet the current continued to carry him south and the wind pushed him toward the bank as he idled ahead.

About this time, the VTS controller realized that Captain ■■ was in trouble and called him on the radio. However, Captain ■■ was fully aware of this and found himself boxed in by the tow ahead of him and the tows coming out from the "99." He realized that he was being pushed by the wind toward three vessels tied alongside a dock on the Berwick side of the river as the current swept him downriver.

Captain ■■ made the best choice possible – which was captured in full color by the VTS camera. He was able, by applying full power, to stop his tow and hold it in the current thereby avoiding the tow ahead of him. He could not have powered out into the river because he would not have been able to clear the passing northbound tows. He immediately sounded the Danger Signal to alert the people on the boats tied alongside the dock. One small crewboat scooted away from the dock to safety. Captain ■■ then straightened his tow and made an eggshell landing against the vessels that were tied alongside the dock. Because he sounded a timely warning, there were no injuries. However, there was approximately $5,000 damage reportedly sustained by one of the aluminum vessels at the dock. This is inevitable when a six-pack tow pushing steel barges lands alongside you.

The fact that the small crewboat heard the warning and was able to pull away, gave Captain ■■ the opportunity to allow his lead barge to touch in at the dock, and pivot on the dock and out into the current and then head into the cut at the "99-mile board."

According to the Coast Guard, Captain ■■, as the pilot of an underpowered floating object (i.e., his six-barge tow) was guilty of alliding with a fixed object (i.e., moored vessels) in the navigable waters of the United States. The proof of this statement was as plain as the nose on your face in full color, in full motion complete with the sound of the warning issued by the vessel traffic controller in the background.

Captain ■■ received a "complaint" from the Coast Guard and spoke with the investigating officer. The Coast Guard was willing to enter into a "settlement agreement" with him in return for a three-month license suspension. Eventually, after Captain ■■ discussed the matter in detail, the offer was reduced to two months in lieu of bringing the matter before an Administrative Law Judge for settlement. The choice of bringing it before an ALJ always remained open. Nevertheless, the proof was on videotape. It was an open and shut case, easy for the Coast Guard to prosecute.

Captain ■■ belongs to our Association. He brought us the story only after he had spoken with the investigating officer. We brought in one of our top river pilots, a native of the Morgan City area, to discuss the matter with Captain ■■. Unfortunately, Captain ■■ had not followed our advice to purchase license insurance and did not have the money to hire a lawyer to represent him before an Administrative Law Judge if he decided to follow that route. Although we believed that Captain ■■ had done his utmost to prevent injury and serious damage when faced by the inevitability of a potential disaster, there had been some damage – and the Coast Guard was unwilling to overlook it in their apparent zeal to prosecute.

Our Association sought and received a hearing for Captain ■■ before the Investigating Officer monitored by the Marine Safety Unit's Assistant Senior Investigating Officer. Captain ■■ presented a carefully prepared drawing of the accident scene showing the number of tows in the river, the current, and the wind. He was allowed to present and was questioned in detail on everything that took place. He was reminded that he had the right to present everything to an Administrative Law Judge if he chose to do so and was under no obligation to accept any type of "settlement." Our representatives were given free and full opportunity to discuss all aspects of the issue on behalf of Captain ■■.

During the discussion that lasted for approximately an hour and a half, we questioned why the VTS controller had allowed such a large number of tows to operate in the short distance between Twenty-Grand Point and the 99-Mile Board at the same time. Unfortunately, the VTS controller on duty was on leave at the time and was unavailable. We learned that the controller in question had an advanced issue of a towing license and presumably understood and could predict the effect of crowding a large number of tows into a relatively small area during high water and with a brisk wind blowing. The Coast Guard maintained that the wind speed was recorded at 12 mph while Captain ■■ maintained it was closer to 20 or 25 mph. However, a mariner is at a disadvantage in rebutting the wind speed argument if his vessel is not equipped with a working anemometer.

The Coast Guard questioned whether the accident was "inevitable." What would the mariner do if presented with the same set of circumstances a second time. Why did Captain ■■ leave the comparative shelter behind trees that broke the wind at Twenty Grand Point and venture into the river?

Captain ■■ replied that the VTS controller gave him clearance to proceed with a slow bell but admitted that he did not order him out into the river. The vessel remained under the Captain's command and not the controller's command. Nevertheless, Captain ■■ felt obligated to follow the VTS controller's directions including the "slow bell" that kept him from running over the tow ahead yet restricted his ability to maneuver – a situation that became critical as he approached the 99-Mile Board and hindered his turn to the follow the Intracoastal Waterway to the west.

As a result of the discussion with the Hearing Officer, Captain ■■ was offered the option of presenting his evidence to the Administrative Law Judge or admitting to "negligence" accepting a ***one-month*** suspension of his license. One month was a significant reduction from three or even two months and certainly sweetened the offer. Negligence is defined in 46 CFR §5.29 as "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform."

"Negligence" is hard to admit to when you have done everything possible to avoid an accident and it occurs anyway. We pointed out that the Captain had made a "great save at the 99" by not wiping out three boats and another tow by attempting a "suicide turn" as some younger and less experienced pilot might attempt to do – but this was not to be.

Although two of our Directors offered to accompany and assist him in presenting the same evidence to an Administrative Law Judge that would be flown in for the occasion, Captain ■■ decided to accept the an admission of negligence and a one month suspension of his license. Consequently, he returned after lunch and "voluntarily deposited" his license with the Investigating Officer. Like any "settlement agreement" between a mariner and a Coast Guard investigating officer this one must be approved by an ALJ who must "sign-off" on the deal. This, however, is usually just a formality unless the Judge detects an error.

The decision cost Captain ■■ far more than the reported cost of the accident. At his reported gross pay rate of $450 per day for 30 days his personal financial loss amounted to ***$13,500***. That amount is almost 2½ times as much as the entire cost to repair the damage caused by the accident. It far exceeded the cost of basic license insurance that would have provided an experienced Admiralty attorney to argue his case before an ALJ. An experienced Admiralty attorney is knowledgeable in wading through the Coast Guard legalistic quagmire that often baffles our lower-level mariners. However, even with legal assistance, there is no guarantee that you will win a specific case – even if you have confidence in the fairness of the system – a confidence permanently shaken by recent revelations in "Justice Capsized?

Our experienced Director, who also had worked as a Pilot on towboats for the same company, stated that the allision probably would not have occurred if the size of the tow were limited to four barges rather than six barges. The extra 200 feet by 16 to 18 feet (estimated 3,600 sq. ft.) of wind area based on the height of the hull, coaming, and fiberglass covers on the lead barges of this ***oversize tow*** made the tow unmanageable under the fresh cross wind that Captain ■■ encountered as he traveled downriver. While the Coast Guard freely issues "permits" for all sorts of oversize tows to operate on the Gulf Intracoastal Waterway, it is up to the licensed officers to operate their tow safely. ***However, the Coast Guard knows full well that refusing to push extra barges for almost any reason usually is the last step before termination of a towing officer's employment***. Our mariners are "employees at will." Most do not work under the protection of a union contract that would prevent abuses of this nature!

If the case had gone before an ALJ, Captain ■■ could have called the VTS controller and had him explain his professional judgment in allowing the number of tows he did to traverse the river at the same time. Captain ■■ could have called upon the company to provide a shipyard haul-out report for the same vessel to repair wheel and possible rudder damage that occurred before this incident and may have further restricted the vessel's maneuverability at the time of the accident. Captain ■■ previously asked the company to provide this information but found his employer was unwilling to do so. By agreeing to accept a charge of "negligence" Captain ■■ avoided these challenges as well as the aggravation of continuing to fight a losing battle for months waiting a hearing date before an ALJ. All that can be chalked up to stress and strain – something it is best for all of us to avoid.

One of the things difficult for many of our mariners to accept is that ***many Coast Guard investigating officers have no practical experience within the industry itself*** – as was true in this case. Consequently, they "go by the book" against our mariners. However, we notice that the Coast Guard often appears to go by a different book against the same mariner's employer.

We suggest that towing companies with well maintained equipment and experienced crews invite Coast Guard Investigators to ride on their boats for several days on various routes or while conducting a variety of activities for the purpose of orientation so that they have a better idea of the problems the mariners they employ face on the job and before prosecuting them for things they have no control over. We note that it has been over 30 years since the Coast Guard assigned any of its officers in this part of the country to "ride the boats" and learn the practical side of regulating the operation of commercial vessels. We believe this contributes to their lack depth of understanding the industry they regulate.

Captain ■■ made it quite clear that he was within several years of retirement and, had it not been a financial necessity, he would leave the industry immediately rather than to endure the stress and strain of dealing with the Coast Guard's "justice" system.

Our representatives suggested that the Coast Guard consider issuing him a "Letter of Warning" since this was a small accident and he had successfully avoided a major accident by taking prudent action "in extremis." All experienced towing vessel officers, considering the hours they work and the routes they cover, have occasional "fender benders" from time to time. To allow such a "fender bender" ***to cost a working mariner $13,500 out of pocket*** is more than our mariners are willing to accept. However, a "Letter of Warning" in this case could not be put on the table because he had received a previous "LOW" in another Captain of the Port Zone for an unintended grounding. Consequently, the Investigating Officer said she was not allowed to offer such a letter in this case. Even though we could not locate the chapter and verse, the "book" prevailed and common sense went down the drain.

It is far from certain that any business enterprise, and this refers to the entire towing industry with its unattractive working conditions and poor reputation, can succeed when its employees are subjected to an arbitrary penalty for a minor accident while other mariners working for large and powerful corporations in the same Coast Guard District continue to have major allisions and never even receive a reprimand from a Coast Guard investigator.

CHAPTER 3 – THE CURSE OF DRUGS AND ALCOHOL

As Secretary of a brand new Association representing limited tonnage mariners that was determined to improve health, safety, and working conditions for thousands of working mariners, the last thing in my mind was to have to start out dealing with the problem of illegal drug use on boats.

Previously, as the manager of a boat company with nine oilfield crewboats and utility boats during the 1970s, I had some run-ins with mariners who used illegal drugs. Since I "don't do drugs," I have never been interested in drugs and intend to be a law-abiding citizen. I am turned off by excesses of both drugs and alcohol. I simply dealt with problems like this during the 1970s without any help or involvement with the Coast Guard. The problems were manageable – then.

During the 1980s and 1990s these problems grew unmanageable on a national level to the point where Congress told the U.S. Department of Transportation (including the Coast Guard) to bring the situation under control. It is clear that they put forth a great effort to do this, but the results were not always pretty. Put differently, did the ends justify the means? That is one part of the problem we will address.

In the late 1980s it became obvious that drug use and transportation were on a collision course. There were several major rail collisions in Maryland with fatalities during this period that drove the Reagan administration to introduce mandatory workplace testing in the transportation industry.

Since 1942, the merchant marine has been superintended by the U.S. Coast Guard which, from 1967 to 2003 was an Agency within the U.S. Department of Transportation. Throughout the world, most mariners traditionally consider themselves to be "transportation workers" and the fit was comfortable. The connection with Homeland Security since 2003 has been much less comfortable.

By 2000, our Association began to hear of problems that our "lower-level" mariners experienced with the interaction between illegal drugs and the Coast Guard's Administrative Law System. Frankly, I knew little about either the Coast Guard's drug war or the way that they attacked it. Call it ignorance on my part, but I would soon have my first "run-in" with both.

Our Association's First Drug Case

Shortly after our Association was formed in April 1999, we began to hear about drug cases. Our first case was a local tugboat Captain from down the bayou that was arrested and jailed by the Terrebonne Parish Sheriff's department when they stopped his boat in Houma, LA, and discovered a partially smoked marijuana cigarette in the pilothouse.

The fact that a deckhand admitted to owning and smoking the cigarette and that the vessel's Captain tested <u>negative</u> for marijuana use in a known and respected local medical clinic in a test taken sixteen hours after his arrest did not deter the Coast Guard from proceeding against the Captain's license, eventually taking it for 18 months, and making him go through drug rehabilitation.

After considerable discussion with our Association's Field Director, who was hard-boiled, realistic, and practical, with years of workplace experience in related industries, we exhaustively grilled the Captain at length and decided that our Association would hire a highly recommended Attorney from New Orleans, J. Mac Morgan, Esq. to prepare a defense for our mariner.

After studying the case, contacting the Coast Guard, and conducting some investigating for our attorney, we held a full conference several weeks later when we were told that after weighing all the evidence, that our mariner – <u>***although probably not guilty***</u> – would not stand a chance of prevailing before a Coast Guard Administrative Law Judge even with the help of an attorney representing him. We were given the choice of actually bringing the case to court or stopping the clock right there and paying the bill that already had consumed several thousand dollars.

Jointly, with the Captain, we decided to stop the clock. There was great temptation to continue in light of the fact that the deckhand admitted that the marijuana cigarette was his and the Terrebonne Parish District Attorney dropped charges against the Captain.

Nevertheless, the Coast Guard filed charges against the Captain's license and did not withdraw them. The Captain signed a "<u>***settlement agreement***</u>" to avoid appearing before an Administrative Law Judge (ALJ) where he would have to represent himself. The Association paid the legal bills for the consultation. Of course, we had serious doubts as to the mariner's guilt. However, none of us believed we had been lied to then – and this remains my feeling to this day. Nor did our lawyer ever suggest or accuse him.

The Captain was grateful for our help and support, and both he and his wife remained active in our organization. We were also very favorably impressed with J. Mac Morgan, who also has a background as a licensed heavy-tow pilot as well as an attorney. We were impressed with his knowledge and command of the subject of drug abuse and of the problems our mariners face.

An Unfamiliar Regulatory Area

With our fast paced introduction to this <u>***unfamiliar regulatory area***</u>, our Association may have taken some halting steps but learned a number of useful lessons we would never have learned anywhere else.

By the time I was introduced to my first "drug" case, I had been either teaching or writing "license prep" textbooks for mariners for thirty years. During this time, in reviewing the course material that mariners must learn to obtain Coast Guard licenses or merchant mariner documents, there was no call for me to go into those sections of the Code of Federal Regulations (CFR) in Title 46 CFR Part 5, <u>Marine Investigation Regulations – Personnel Action</u>. These regulations deal with investigations, suspension and revocation of licenses, hearings, appeals and similar matters. Most of the regulations in Part 5 have been there since 1985.

My textbooks deal with subjects that mariners are tested on when they sit for a license. I consider it significant that <u>***few if any***</u> questions are based on these regulations or others that expand upon them in a new 33 CFR Part 20 titled <u>Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard</u>.

Since there are few if any license exam questions based on these laws and regulations, there is no "market" for this material in the textbooks I write. Nevertheless, for the past three years, I included a Drug and Alcohol Testing chapter in my Limited Master, Mate, and Operator textbook. After all, what is the purpose for earning a credential if you go out, make a foolish mistake, and break drug laws – or any laws.

While many of the regulations in 46 CFR Part 5 are understandable to most of our mariners, 33 CFR Part 20 is written more for lawyers. If you forcefully pushed a mariner's face into Part 20, he would have three choices: 1) asphyxiate himself, 2) eat the pages, or 3) read them. The first two choices are more likely than the third.

Every mariner must undergo a pre-employment drug test, periodic "random" drug tests, and drug tests following accidents or serious injuries. The test is deceptively simple, but the regulations that support the testing program that apply to every transportation worker are very lengthy, complex, and complete in that they cover just about every possible case. These regulations appear in 49 CFR Part 40 titled Procedures for Workplace Drug and Alcohol Testing Programs. In fact, the drug tests are so common and the rules are so bureaucratic and longwinded that most mariners submit to drug tests without knowing the rules ***until something goes wrong.***

A mariner does not have to be a drug user to get in trouble. This type of trouble can easily ruin your career. We have several "horror stories" of things that mariners did or failed to do that got them into trouble. We want you to ***read these stories so you will not make the same mistakes.***

If You Don't Know the Law, It's Easy to Break it.

The vast majority of credentialed "limited tonnage" mariners entrusted by the Coast Guard to operate the nation's tugs, towboats, ferries, and other small passenger vessels including charter boats know very little about the brand of "justice" dispensed by the Coast Guard. The training mandated by the Coast Guard to earn these credentials is clearly deficient because it fails to require an introduction to many regulations are instantly significant to any commercial mariner.

Unfortunately, one of today's most serious and dangerous problems in the transportation workplace revolves around drug and alcohol abuse. To administratively combat this problem brings a number of other regulations in the areas mentioned above. There are ***no regulations*** that require any of our vessels to carry a copy of these regulations on board the vessels similar to the regulations that require a copy of the Navigation Rules be kept aboard for ready reference. On inspected vessels, many officers in charge, marine inspection (OCMI) do not even require a copy of the vessel inspection regulations be kept aboard for "ready reference" so there is little chance mariners will come across these regulations ("regs") in their daily work. Therefore, most mariners enter these regulatory minefields with incomplete and misleading information.

Although Congress held the Coast Guard responsible for superintending the U.S. Merchant Marine since World War II, the Coast Guard never included a significant number of questions on these and other regulatory subjects on their credentialing examinations to require mariners to become familiar with these regulations or the laws that serve as their foundation. Nor have they ever required that drug and alcohol subjects be taught in "approved courses" for our mariners as listed by the Coast Guard's National Maritime Center. Furthermore, most vessels, even Coast Guard inspected vessels, are not required to carry copies of these regulations on board for reference, study or review.

Under these circumstances, if you are a mariner and not a lawyer, much of this material is boring, uninteresting, as well as hard to read and comprehend. In short, if the material was readily available, it is not "compelling" reading for most of our mariners. Even more significant for our limited tonnage mariners, the "readability" scale shows that these, like most government regulations, are written at the 12th grade level – the highest level on the scale. Consequently, the only way to approach the subject and expect the average person to understand and comply with it is to "***teach***" it.

"Ignorance of the Law is No Excuse"

The Coast Guard "justice" system appears to be firmly rooted on this principle, which has been amazingly successful in thinning the ranks of our mariners. A little knowledge of the law is far better than none at all. Coast Guard "Investigations" brought to a screeching halt the careers of hundreds of our mariners who find it more convenient to plead guilty to a maritime-related offense and sign a "settlement agreement" instead of appearing as a "respondent" in a hearing conducted before an Administrative Law Judge (ALJ). Journalist Robert Little, of the Baltimore Sun researched these figures that appear in his article; reprinted later in this book. These numbers should alarm every commercial mariner and alert members of Congressional oversight committees.

If the Coast Guard wants to ***suspend or revoke*** a mariner's credential, this action must take place in a "settlement agreement" or at a suspension and revocation (S&R) hearing before an Administrative Law Judge. Although ALJs are not experienced mariners, they are far more than casual observers. We believe the Coast Guard investigators may have misused their use of "settlement agreements" as "tools" to avoid the inconvenience of preparing cases to submit to Administrative Law Judges (ALJ) as reported in the "Justice Capsized?" On occasion, our mariners report that these "tools" were used against them.

In a "settlement agreement," a Coast Guard "investigator" will try to convince a mariner that he or she should plead guilty to an offense that the Coast Guard believes it can prove. If you ***are*** guilty and you believe they can prove it, don't fight the problem and waste everybody's time. Take your punishment ***unless*** you believe that punishment is totally unfair or unreasonable. You can always ask the investigator to reconsider or reduce the proposed punishment. Remember that the investigating officer must present any "settlement agreement" you sign before an ALJ who will at least read it before he approves it.

A "settlement agreement" is often quick and easy procedure and often ***appears*** to be a more appealing alternative than to appear before an Administrative Law Judge (ALJ) especially if you are told that the ALJ ***could*** hand down a harsher punishment and that the investigator just might ask him to do so. However, all it takes is your signature to ***admit your guilt***, and you won't have to take that risk!

An "investigator" who acts as a prosecutor is likely to push for a stiffer sentence if he is forced to spend a great deal of time and effort in developing, polishing, and then formally presenting his case before an ALJ in a courtroom setting. This reasoning extends all the way down to encouraging a mariner to accept a "Letter of Warning" (LOW), the least severe of all administrative punishments. However, a Letter of Warning leaves a mark on your permanent record that you must report every five years when applying for a credential renewal or if you seek to become a Designated Examiner. A "Letter of Warning" is a ***permanent*** black mark on your record and may come back to haunt you in the future.

The pressure to sign a "settlement agreement" can be intense, and any mariner may feel trapped by his unfamiliarity with a system he knows absolutely nothing about. You are at the mercy of a Coast Guard investigator to explain it to you at what may seem to be the worst possible moment following an accident or incident. The effect upon most law-abiding mariners is akin to being hit over the head with a brick. Most mariners simply do not believe that something this traumatic could happen to them. How traumatic? Read the horror stories and suffer along with our mariners.

License Insurance

The vast majority of our lower-level mariners do not carry license insurance. License insurance, which costs between $200 and $1,000 per year, guarantees that you will have a competent lawyer available immediately on the phone and ready to stand by your side in a Coast Guard office setting or, if necessary, in a courtroom before an Administrative Law Judge.

If you are involved a situation where the Coast Guard ***could*** suspend or revoke your credential, contact the lawyer your insurance carrier designates FIRST ***before you speak with any investigator or sign anything***. Be polite and say nothing even though you may be asked to. This is the time to call your attorney and not to try to hire one from the phone book or see whether your family lawyer knows anything about Coast Guard regulations.

Based upon our Association's experiences with the Coast Guard's system of justice, we strongly recommend that every lower-level licensed mariner immediately obtain license insurance[(1)] and that no mariner attempt to defend himself before a Coast Guard investigator or appear before an Administrative Law Judge without professional legal help. [(1)] *[(1)Refer to our Report #R-342, Rev. 5.]*

License insurance does not guarantee success and it will not support acts that are clearly illegal. That is why it is so important for licensed mariners to know and understand the fundamental laws and regulations that govern the marine industry. However, license insurance can spreads the risk of being financially crippled from unexpected action aimed at your credential. Unfortunately, the alternative, even in a relatively simple hearing before an ALJ, can cost a minimum of $5,000 to $10,000 in legal fees with no guarantee of success.

The regulations that can suspend or revoke a mariner's credentials are construed in such a manner that the Coast Guard will probably prevail in most cases that go to trial. As Journalist Robert Little documents in "Justice Capsized?," the Coast Guard's success rate in prosecuting mariners approaches 97%. Consequently, most uninsured mariners often decide to simply accept the "settlement agreement" as the easiest and ***cheapest*** way out.

If you "cooperate" and take the settlement agreement in a drug or alcohol case, it helps preserve the ***myth*** that the Investigating Officer is really your friend by showing that he will help you to ***regain*** your license after it is suspended or revoked. In fact, it is one of the steps that he is supposed to follow. This "help" is little more than an introduction to the Coast Guard's own "***Administrative Clemency***" program that is an exercise in unfathomable bureaucracy at the national level.[(1)] Some Coast Guard investigators explain the procedure well, but many do not. Several of our mariners spent between four and six years to unravel its mysteries when local Coast Guard became "unhelpful." Unfortunately, the same regulations leave a mariner who loses his credentials little choice but to grovel before the Coast Guard for clemency or leave the industry. *[(1)Refer to our Report #R-377, Rev. 2, Administrative Clemency.]*

Suspending or revoking a credential is the only ***effective*** action the Coast Guard can take against a mariner – but it can be devastating. Fortunately, Congress did not give the Coast Guard the authority to put mariners in jail or levy huge fines. However, one or more months out of work can take its toll on a mariner's lifestyle and his family's economic security.

Coast Guard administrative procedures have become so simple and routine, that many investigating officers save time and effort simply by cutting corners and applying pressure to our mariners to make the "settlement agreement" they offer always appear as an attractive offer. By offering a "settlement agreement" the Coast Guard Investigator becomes the "good guy." He wins the case, gets a good job approval rating with the Commanding Officer, saves the government the time and effort of preparing a full-fledged case, and then facing the burden of arguing that case before an ALJ.

Many "investigators" are novices, and presenting a case before an ALJ can be a as traumatic for them as it is for the mariner they are prosecuting. Most are not lawyers. Some never even attended the Coast Guard's school for investigating officers as revealed in the famous COSCO BUSAN oil spill in San Francisco in 2007.[(1)] Nevertheless, there are considerable savings to the government who must bring in an Administrative Law Judge at government expense from a distant city hundreds or even thousands of miles away. *[(1)Our file #M-739 & M-739A]*

In spite of how forcefully the local Coast Guard investigator may push his "settlement agreement," some thick-headed mariners simply don't get their message and insist on their "right" to tell their story to the Judge. Unfortunately, most mariners never understand their "rights" in the first place. That fact may first dawn upon them when the ALJ, sometimes acting as a benevolent father-figure, takes the time to explain the rules of how the hearing will be conducted when it gets underway in the courtroom. This is the wrong time to have to learn the lesson, especially if you did not have the money to hire an attorney to help you apply the lesson you just learned. You will have to patch together a game plan on the fly as the judge gives his lecture and the Coast Guard investigator presents his case. After all, you will have several weeks to prepare – and you better be ready from the time you walk through the door.

Unfortunately, some attorneys fumble while in attempting to find their way through Administrative Law Procedures that

may be unfamiliar to them. As a layman, I watched more than one inexperienced lawyer stumble through an ALJ hearing. Unless you have an experienced maritime attorney, you will pay him to learn at your expense.

Here are two examples of "settlement agreements" we previously documented in Newsletters distributed to our mariners.

Drug and Alcohol Cases

Our Association's views on alcohol and drug use afloat are simple – DON'T DO IT!!! We don't dabble in morals, medicine, drug or alcohol prevention where others have much greater insight and expertise. And, in return, if you get caught "doing drugs" or "drinking on the job," ***please don't waste our time***. You did the crime, suffer the consequences.

The Coast Guard's approach to the use of illicit drugs is well summarized by Commandant Merlin O'Neill in a decision rendered on September 18, 1951:[1] "Whether the offense was committed while (the) Appellant was physically present aboard the ship on which he was serving at the time is of no significance in a case involving any association with narcotics. No clemency, based on individual hardship to the seaman or his family can be granted because of the great danger which his presence aboard American merchant vessels would impose upon many other seamen as well as the property of ship owners." *[[1]Commandant Decision on Appeal 521 (ALIBANG)]*

This "hard-line" approach has not withstood the test of time. 46 U.S. Code §7704(b)(c) now provides a little wiggle room short of revocation if the holder of a merchant mariner credential provides satisfactory proof of cure. There are administrative avenues to clemency, but the path is lengthy, takes considerable time, and is extremely difficult for the average mariner to navigate. Many mariners never regain their credentials, and in more than one case we are familiar with, Coast Guard bureaucracy turns the path to regaining a license into an administrative quagmire.

However, when our mariners become involved in a grey area and run afoul of some marine related federal law, regulation, policy or guideline, we may be able to help. It could be a drug, alcohol, or other regulation that brings down Coast Guard law enforcement's wrath on your back for some reason that you may not understand. There have been dozens of cases of all sorts where our Association has been called upon to help and even a few where we can find you help. We are willing to answer your questions ***if we know*** the answers or suggest who you might call or contact ***if we don't know***. First, however, I want you to read the book and see if you can find the answer yourself. Let's start out with the area of greatest peril – drugs and alcohol. Oh, you do not have to do drugs or alcohol to get in trouble. Here are some facts about drug and alcohol testing that you, as a working mariner, should know about.

CHAPTER 4 – DETAILS OF DRUG AND ALCOHOL TESTING

Introduction

Drug testing for safety-sensitive positions throughout the entire transportation industry has become a common, everyday, routine practice not only for mariners but also for airplane pilots, truck drivers, bus drivers, and train crews. It has become so common, in fact, that many mariners may forget that a single "positive" drug test can side-track your career for months and even years; and a second "positive" can end it permanently. In any case, if you test "positive" for drugs, you will have an up-close experience with "Coast Guard Justice." You will not enjoy that experience!

As a license candidate, you are most concerned about preparing for a license exam. There is little purpose in preparing for a license if you turn around and throw it away either by drug or alcohol abuse or by just not knowing the rules. Without becoming involved in moral issues, it is a fact of life that using illegal drugs is just not compatible with a career as a licensed merchant marine officer or rating. Even using certain legal prescription drugs had to be curbed because of valid safety considerations. Strict regulations[1] also prohibit the use of alcohol. *[[1] Refer to 33 CFR Part 95.]*

The purpose of this chapter is to explain some of the regulations that carry out the law. If you are a mariner, you need to understand these (and other) regulations to protect your career.

Drug and alcohol testing is now "the law of the land." If you disagree with the law, you have the right to work to change it. However, if you "do" drugs you are in the position of fighting the law as well as dealing with an addiction. If you need help with the addiction, seek professional help **before** it destroys your career. If you do not and continue working in the transportation industry, be sure you are prepared to accept the punishment. Every time you take a drug test, you hand your career in a pair of small bottles to persons you may have never met before to be processed with hundreds of samples in a laboratory far removed from your home or your job. One problem area involves the actual collection of the sample. If you are not alert during every step of the procedure, you are open to a number of errors that CANNOT be corrected at some future date. Knowing the rules BEFORE YOU TAKE YOUR DRUG NEXT TEST can prevent an error that could devastate your career. That is the sole purpose of our review of certain technical regulations in 49 CFR Part 40 in this chapter.

What you will read are drug and alcohol (aka "chemical") regulations you may not be familiar with although you may have taken many drug tests. You will see that some of these rules were revised as late as 2003.

[NMA Position: Every mariner must obey the laws promulgated by Congress and the regulations enforced by the Department of Homeland Security and the Coast Guard. We want to help you obey these rules by showing you what they are and how they are applied.]

HIGHLIGHTS OF 33 CFR PART 95
Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug

*[**Study Guide**: "Highlights" seek to condense this set of regulations and try to make them more understandable. The condensed version is not a verbatim copy but should be satisfactory for most purposes. You may look up the "references" to obtain the exact wording for legal purposes. Do NOT expect the Coast Guard to test you on these rules on your license exam.]*

☐ 1. What is the **purpose** of testing mariners for alcohol use aboard vessels?

An individual who is under the influence of alcohol or a dangerous drug in violation of law when operating a vessel as determined by standards prescribed by the Secretary is liable to the United States Government for a civil penalty of not more than $5,000.[1] Coast Guard regulations prescribe restrictions and responsibilities for personnel on vessels. However, this part[2] does not preempt (i.e., take the place of) enforcement by a State of its laws and regulations concerning operating a recreational vessel while under the influence of alcohol or a dangerous drug. Nothing in the regulations limits the authority of a vessel's marine employer to limit or prohibit the use or possession of alcohol on board a vessel.[3] *[[1]Refer to 46 U.S. Code §2302(c)(1). [2]Refer to 33 CFR Part 95. [3]As a marine employee, you must follow rules set by your employer…and the Coast Guard can suspend or revoke your license for not doing so!]*

☐ 2. Which vessels do the **laws prohibiting the use of alcohol** apply to?

These regulations apply to U.S.-flagged and foreign-flag vessels operated on waters subject to United States jurisdiction and to U.S. vessels on the high seas. *[Refer to 33 CFR 95.005]*

☐ 3. What **terms** (i.e., terminology) do the alcohol prohibition regulations use?

- Alcohol means any form or derivative of ethyl alcohol (ethanol).
- Alcohol concentration means either grams of alcohol per 100 milliliters of blood, or grams of alcohol per 210 liters of breath.
- Blood alcohol concentration level means a certain percentage of alcohol in the blood.
- Chemical test means a test that analyzes an individual's breath, blood, urine, saliva, and/or other bodily fluids or tissues for evidence of drug or alcohol use.
- Controlled substance has the same meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Part 1308).
- Drug means any substance (other than alcohol) that has known mind or function-altering effects on a person, specifically including any psychoactive substance, and including, but not limited to, controlled substances.
- Intoxicant means any form of alcohol, drug, or combination thereof.
- Law enforcement officer means a Coast Guard commissioned, warrant, or petty officer; or any other law enforcement officer authorized to obtain a chemical test

under Federal, State, or local law.

- Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel other than a recreational vessel.
- Recreational vessel means a vessel meeting the definition in 46 U.S.C. 2101(25) that is then being used only for pleasure.
- State means a State or Territory of the United States of America including but not limited to a State of the United States, American Samoa, the Commonwealth of the Northern Marianas Islands, District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.
- Under the influence means impaired or intoxicated by a drug or alcohol as a matter of law.
- Underway means that a vessel is not at anchor, or made fast to the shore, or aground.
- Vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.
- Vessel owned in the United States means any vessel documented or numbered under the laws of the United States; and, any vessel owned by a citizen of the United States that is not documented or numbered by any nation. *[Refer to 33 CFR 95.010.]*

☐ 4. When is a person "**operating a vessel**"?

You are "operating a vessel" when you have an essential role in the operation of a recreational vessel underway, including but not limited to navigation of the vessel or control of the vessel's propulsion system. Also, if you are a crewmember (including a licensed individual), pilot, or watchstander not a regular member of the crew, of a commercial vessel. Note that the USCG alcohol prohibition regulations apply to both recreational and commercial vessels. *[Refer to 33 CFR 95.015.]*

☐ 5. What is the **standard** by which you may be considered as being "**under the influence**" of alcohol or a dangerous drug?

You are "under the influence" of alcohol or a dangerous drug when you operate a recreational vessel with a Blood Alcohol Concentration (BAC) level of .08 percent or more, by weight, in your blood. If you operate any type of commercial vessel and have a Blood Alcohol Concentration (BAC) level of .04 percent by weight or more in your blood you are legally "under the influence." In addition, you may be "under the influence" if you operate any vessel and the effect of the intoxicant(s) consumed affects your manner, disposition, speech, muscular movement, general appearance, or behavior that is apparent by observation. The standard of .08% for recreational vessel operation is more liberal than that allowed for operating a commercial vessel which is .04%. Some employers will terminate an employee for testing positively for any alcohol in his system, even if less than .04%. *[Refer to 33 CFR §95.020.]*

☐ 6. Are you considered "**under the influence**" if you operate a **recreational vessel** and the **state standard** is different from the federal standard of .08% blood alcohol content (BAC)?

If applicable state law establishes a blood alcohol concentration level at which a person is considered or presumed to be under the influence of alcohol, then that level applies within the geographical boundaries of that state instead of the federal .08% level. A standard established by state statute and adopted under this section applies to the operation of any recreational vessel (but NOT a commercial vessel) on waters within the geographical boundaries of the state. For commercial vessels, the standard is always .04%. *[Refer to 33 CFR 95.025.]*

☐ 7. Under these regulations, what is **evidence** that you are "under the influence" of alcohol or a dangerous drug?

Personal observation of your manner, disposition, speech, muscular movement, general appearance, or behavior; or, a chemical test. *[Refer to 33 CFR §95.030 and definition of "chemical test."]*

☐ 8. **Who** may order you to undergo a "**chemical test**"?

Only **a law enforcement officer** or a **marine employer** may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. *[Refer to 33 CFR §95.035(a).]*

☐ 9. **When** may a law enforcement officer or your supervisor (representing a "marine employer") order you to take a "**chemical test**"?

Whenever they have "reasonable cause". The regulations say that reasonable cause exists when:

- You are directly involved in a marine casualty, or
- You are suspected of being in violation of the existing Blood Alcohol Concentration (BAC) standards.
- When practicable, a marine employer should base his determination of the existence of reasonable cause on observation by two persons.

When you are directed to undergo a chemical test, you must be informed of that fact and directed to undergo a test as soon as is practicable.

☐ 10. What happens if you **refuse** to take a "**chemical test**"?

If you refuse **for any reason** to submit to or cooperate with the administration of a timely chemical test when directed by a law enforcement officer or by your employer based on reasonable cause, evidence of the refusal is admissible in evidence in any administrative proceeding and you will be presumed to be under the influence of alcohol or a dangerous drug. Read this to mean that NO EXCUSES ARE ACCEPTABLE. *[Refer to 33 CFR §95.040. **Editorial Comment:** This is why you need to know what the rules that govern the testing to understand when or if they are being violated.]*

☐ 11. What **drug and alcohol prohibitions** does the Coast Guard impose on licensed officers and crewmembers?

A crewmember, including a licensed officer, pilot, or watchstander not a regular member of the crew must not perform or attempt to perform any scheduled duties within four hours of consuming any alcohol. Neither shall he be intoxicated at any time nor consume any intoxicant while on watch or duty. He may consume a legal non-prescription or prescription drug provided the drug does not cause him to be intoxicated. *[Refer to 33 CFR §95.045.]*

☐ 12. What must a marine employer do if he believes a mariner is intoxicated?

If the marine employer believes that an individual is

intoxicated, he shall not allow that individual to stand watch or perform other duties. *[Refer to 33 CFR 95.050(b).]*

HIGHLIGHTS OF 46 CFR PART 16 – CHEMICAL TESTING

*[**Study Guide:** These are the best known of the drug regulations but not necessarily those that cause the mariners the most grief. Unfortunately, they are the only drug regulations most mariners ever read about.]*

☐ 1. What is the **purpose** of the regulations in this Part?

They provide a means to minimize the use of intoxicants by merchant mariners and to promote a drug-free and safe work environment. They prescribe the minimum standards, procedures, and means to use to test for dangerous drug use.

As part of a "reasonable cause" drug testing program, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard[1] and, only then, for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold. *[Refer to 46 CFR §16.101. [1] Refer to 49 CFR §40.13.]*

☐ 2. How does the Coast Guard **define and interpret** the terms used in 46 CFR Part 16?

- Chemical test means a scientifically recognized test that analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.
- Consortium/Third Party Administrator (C/TPA) means a service agent who provides or coordinates a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks like operating an employers' drug and alcohol testing program. This term includes, but is not limited to, groups of employers who join together to administer the DOT drug and alcohol testing programs for its members.
- Crewmember means an individual who is on board a vessel acting under the authority of a license...or merchant mariner's document whether or not the individual is a member of the vessel's crew; or (who is) engaged or employed on board a U.S.-flagged vessel that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document **except** the following:
  – Individuals on fish processing vessels who are primarily employed in the preparation of fish or fish products, or in a support position, and who have no duties that directly affect the safe operation of the vessel;
  – Scientific personnel on an oceanographic research vessel;
  – Individuals on industrial vessels who are "industrial personnel" as defined in this chapter; and
  – Individuals not required under (USCG manning regulations[1]) who have no duties that directly affect the safe operation of the vessel. *[[1]Manning regulations appear in 46 CFR Part 15.]*
- Dangerous drug means a narcotic drug, a controlled substance, or a controlled-substance analog.[1] *[[1]As defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 [2]Title 42 U.S. Code § 802).]*
- Drug test means a chemical test of an individual's urine or evidence of dangerous drug use.
- Employer means a marine employer or sponsoring organization (e.g., a union).
- Fails a chemical test for dangerous drugs means that the result of a chemical test conducted in accordance with 49 CFR 40 was reported as "positive" by a Medical Review Officer because the chemical test indicated the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40.[1] *[[1]49 CFR Part 40 contains the technical regulations that establish "Procedures for Transportation Workplace Drug and Alcohol Testing Programs."]*
- Marine employer means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than a recreational vessel.
- Medical Review Officer (MRO) means a person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.
- Operation means to navigate, steer, direct, manage, or sail a vessel, or to control, monitor, or maintain the vessel's main or auxiliary equipment or systems. Operation includes:
  – Determining the vessel's position, piloting, directing the vessel along a desired track line, keeping account of the vessel's progress through the water, ordering or executing changes in course, rudder position, or speed, and maintaining a lookout;
  – Controlling, operating, monitoring, maintaining, or testing: the vessel's propulsion and steering systems; electric power generators; bilge, ballast, fire, and cargo pumps; deck machinery including winches, windlasses, and lifting equipment; lifesaving equipment and appliances; firefighting systems and equipment; and navigation and communication equipment; and
  – Mooring, anchoring, and line handling; loading or discharging of cargo or fuel; assembling or disassembling of tows; and maintaining the vessel's stability and watertight integrity.
- Passes a chemical test for dangerous drugs means the result of a chemical test conducted in accordance with (regulations)[1] is reported as "negative" by a Medical Review Officer… *[[1]49 CFR Part 40.]*
- Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals to take random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals to take random tests required by this part.
- Refuse to submit means you refused to take a drug test as set out in 49 CFR 40.191.[1] *[[1]**Study Guide:** We reprinted this important regulation in its entirety later in this chapter.]*
- Serious marine incident means an event defined in 46 CFR §4.03-2.[1] *[[1]**Study Guide:** We reprinted this important regulation in its entirety later in this chapter.]*

- Service agent means any person or entity that provides services specified in 46 CFR Part 16 or 49 CFR Part 40 to employers and/or crewmembers in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications in 49 CFR part 40. Service agents are not employers for purposes of this part.
- Sponsoring organization is any company, consortium, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.
- Stand-down means the practice of temporarily removing a crewmember from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.
- Substance Abuse Professional (SAP) means a person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.
- Vessel owned in the United States means any vessel documented or numbered under the laws of the United States; and any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

☐ 3. May an employer "**stand down**"[1] a mariner from a safety-sensitive position? *[[1]See the definition (above).]*

According to 49 CFR 40.21(a) an employer is prohibited from standing employees down except if it is done consistent with a waiver granted by the Coast Guard.

To obtain such a waiver, the employer must make a formal request for a waiver to the Commandant (G-MOA). If the Coast Guard grants the waiver, it could go into effect after a Medical Review Officer receives a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test,[1] or a substituted test pertaining to a crewmember. The purpose of requiring an immediate ""stand down" would be to prevent an intoxicated employee from causing accident, injury, or death as a result of his condition. Nevertheless there is a serious risk that the mariner's rights could be violated. *[[1]**Vocabulary: Adulterated test** = A test that has been altered by adding substances like bleach, eye drops, or altering the pH of a urine specimen. **Substituted test** = e.g., urine from another donor.]*

The "waiver" granted by the Coast Guard is supposed to help prevent abuse of the drug testing regulations before the Medical Review Officer completes his review of the drug test results. *[Refer to 46 CFR§16.107 and 49 CFR §40.21(c) for the specific elements required in the written waiver request. **Editorial Comment:** If ever faced with this problem, consult an attorney immediately and mention these specific regulatory citations to be certain that your employer has a waiver and that all your rights are protected.]*

☐ 4. May **service agents** (as defined above) be excluded from participating in drug and alcohol testing?

Yes. Service agents are subject to Public Interest Exclusion (PIE) actions if that agent demonstrates serious noncompliance with the drug and alcohol testing regulations[1] and is not currently acting in a responsible manner. *[Refer to 46 CFR §16.109. [1]Regulations in 46 CFR Part 16 & 49 CFR Part 40.]*

☐ 5. How must drug-testing programs be conducted?

Drug testing programs must be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Testing Programs. You must consult those regulations to determine the specific procedures that must be established and utilized. Drug testing programs required by this part must use only drug testing laboratories certified by the Department of Health and Human Services (DHHS).[1] *[Refer to 46 CFR 16.113(a). [1]The DHHS publishes an updated list of laboratories monthly in the Federal Register.]*

☐ 6. What are the only chemicals that a drug test may test to detect?

Marijuana; Cocaine; Opiates; Phencyclidine (PCP); and Amphetamines. *[Refer to 46 CFR §16.113(b) and 49 CFR §40.85 for specific prohibitions.]*

☐ 7. What are the **penalties** for violating drug-testing regulations?

Violation of 46 CFR Part 16 is subject to the civil penalties set forth by law[1] that apply to drug (and alcohol) testing. Any person who fails to implement[2] or conduct, or who otherwise fails to comply with the requirements for chemical testing for dangerous drugs, is liable to the U.S. Government for a civil penalty of not more than $5,000 for each violation. Each day of a continuing violation constitutes a separate violation. *[Refer to 46 CFR §16.115 Penalties. [1]46 U.S. Code §2115. [2]**Vocabulary: Implement** = to put in effect.]*

☐ 8. What must the Coast Guard **presume** if you **fail a drug test**?

If you fail a chemical test for dangerous drugs under this part, you are presumed to be a user of dangerous drugs. *[Refer to 46 CFR 16.201(b). **Editorial Comment:** This "presumption" is considered to be proof of your guilt. The burden will be on you to prove to an Administrative Law Judge (ALJ) that you are not guilty. This is a very tough order since the law and drug regulations are very carefully tailored. It is at this point where mariners find that license insurance is important as legal assistance is very expensive. One concern is that, even with legal assistance, few mariners succeed in "beating" drug charges – even in cases where there was no drug use.]*

☐ 9. Who must **report** to the Coast Guard if you **fail a drug test**?

If you hold a license or Merchant Mariner's Document (MMD) and fail a chemical test for dangerous drugs, your employer, prospective employer, or sponsoring organization must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). They must deny you employment as a crewmember or remove you from duties that directly affect the safe operation of the vessel as soon as practicable.[1] Your license or MMD is subject to suspension and revocation proceedings in accordance with regulations.[2] *[Refer to 46 CFR 16.201(c). [1]"As soon as practicable" in most*

cases is after the MRO finishes his work in evaluating your test results and discusses the results with you over the telephone. [2]S&R regulations appear at 46 CFR Part 5.]

☐ 10. What happens if you fail a drug test but do not hold a license or MMD?

You must be denied employment as a crewmember or removed from duties that directly affect the safe operation of the vessel as soon as possible. *[Refer to 46 CFR 16.201(d).]*

☐ 11. Can you be reemployed after failing a chemical test?

After failing a required chemical test for dangerous drugs, you may not be reemployed aboard a vessel until you meet the following requirements as well as those in 46 CFR Part 5:

Before returning to work aboard a vessel, the Medical Review Officer (MRO) must determine that you are drug-free and that the risk of subsequent use of dangerous drugs is sufficiently low to justify your return to work. In addition, you will have to agree to increased unannounced testing for a minimum of six (6) tests in the first year after you return to work[1] and for any additional period the MRO may determine for up to a total of 60 months.[2] *[Refer to 46 CFR §16.201. [1]In accordance with 49 CFR Part 40. [2]This statement conveys very little about the bureaucratic red tape you will endure when you try to get your license back after a drug conviction.]*

☐ 12. What are the responsibilities of the employer, Medical Review Officer (MRO), and Substance Abuse Professionals (SAP)?

Employers must ensure that they and their crewmembers meet the requirements of the drug regulations. In addition, employers are responsible for all the actions of their officials, representatives, and agents who carry out the chemical testing requirements. All agreements and arrangements, written or unwritten, between and among employers and service agents concerning drug testing require all persons to comply with every provision of the regulations and is a part of all such agreements and arrangements.

Medical Review Officer (MRO). An MRO must meet the training requirements and follow the procedures outlined in 49 CFR Part 40. MROs may report chemical drug test results to the Coast Guard for unemployed, self-employed, or individual mariners.

Substance Abuse Professional (SAP). Individuals performing SAP functions must meet the training requirements and follow the procedures in 49 CFR Part 40.[1] *[Refer to 46 CFR §16.203. [1]Refer to 49 CFR Subpart G for MRO requirements and Subpart O for SAP requirements.]*

☐ 13. Will the USCG **review** an employer's **drug testing program**?

Upon written request[1] of an employer, Commandant (G-MOA) will review the employer's chemical testing program to see if it complies with the regulations. *[Refer to 46 CFR §16.205(b). [1]Coast Guard DAPIs often make compliance checks without written requests.]*

☐ 14. When is a **pre-employment chemical test** required and when may such a test be waived?

If you are a marine employer, you shall NOT engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for you. However, as an employer, you may waive a pre-employment test required for a job applicant if he provides satisfactory evidence that he passed a chemical test within the last six months and had no "positive" drug tests since then; or if during the previous 185 days he was subject to a random testing program required by 46 CFR §16.230 for at least 60 days and did not fail or refuse to participate in any required chemical test for dangerous drugs. *[Refer to 46 CFR §16.210.]*

☐ 15. When must you submit a drug test to the Regional Exam Center (REC)?

With certain exceptions,[1] if you apply for any of the following, you must provide the results of a chemical test for dangerous drugs to the REC at the time you submit your application. The chemical test results must be completed and dated not more than 185 days before you submit the application:

- An original issuance or a license renewal.
- A certificate of registry (COR).
- A raise in grade of a license, or a higher grade of COR.
- An original issuance of a Merchant Mariner's Document (MMD).
- The first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman.
- The re-issuance of an MMD with a new expiration date.

[Refer to 46 CFR §16.220(a)(b).]

☐ 16. When might you NOT have to provide a chemical test for dangerous drugs to the REC?

- If you apply for an inactive license (i.e., for purposes of continuity.)[1]
- If you apply for an inactive Merchant Mariners Document.[2]
- If you passed a chemical test for dangerous drugs within the previous six months and had no subsequent positive chemical tests during the remainder of the six-month period.[3]
- If , during the previous 185 days, you were subject to a random testing program for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs.[4] *[Refer to 46 CFR §16.220. [1]46 CFR §10.209(h). [2]46 CFR §10.209(h). [3]46 CFR §16.220(c)(1). [4]46 CFR §16.220(c)(2).]*

☐ 17. When must a **first class pilot**[1] submit a **chemical test** for dangerous drugs to the REC?

Each pilot required to receive an annual physical examination must pass a chemical test for dangerous drugs as a part of that examination. The pilot must provide the results of each test to the REC when he applies for a license renewal or when requested by the Coast Guard. EXCEPTIONS:

- If you passed a chemical test in the last six months and had no subsequent "positive" chemical tests.
- If during the previous 185 days, you were subject to a random testing program required by §16.230 for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs.[2] required by this

part. *[Refer to 46 CFR §16.220(b)(c)(1)(2). (1)This does not refer to a Mate/Pilot of Towing Vessels unless that person also holds a first class pilot endorsement for specified pilotage waters. (2)As required by 46 CFR §16.230.]*

☐ 18. When, if ever, may you have to provide the REC with **two** chemical tests for dangerous drugs?

Except as provided for first class pilots[1] you are required to provide the results of only one chemical test for dangerous drugs when multiple transactions are covered by or requested in a single application to the REC. *[Refer to 46 CFR 16.220(d). (1)46 CFR 16.220(c)(1)(2).]*

☐ 19. Who is responsible for establishing a **random drug-testing program**?

Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis. *[Refer to 46 CFR 16.230(a).]*

☐ 20. Which crewmembers must participate in a **random drug-testing program** on **inspected vessels**?

- Those who occupy a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection (COI).
- Those who perform the duties and functions of patrolmen or watchmen as required.
- Those who are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies. *[Refer to 46 CFR 16.230(a).]*

☐ 21. Which crewmembers must participate in a **random drug-testing program** on **uninspected vessels**?

- Those who are required by law or regulation to hold a USCG license to perform their duties.
- Those who perform duties and functions directly related to the safe operation of the vessel;
- Those who perform the duties and functions of patrolmen or watchmen required by regulations or, are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies. *[Refer to 46 CFR §16.230(b).]*

☐ 22. How are crewmembers supposed to be **selected at random**?

By a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under whatever process is used, each covered crewmember must have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment.

As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection. *[Refer to 46 CFR §16.230(c).]*

☐ 23. Can an employer hire someone to run his drug program?

Yes. Marine employers may join with other employers to form a group use sponsoring organizations (e.g., labor unions), or may use contractors, to conduct their random chemical testing programs. *[Refer to 46 CFR §16.230(d).]*

☐ 24. What **percentage** of crewmembers must be **tested each year**?

The minimum annual percentage rate for random drug testing is 50%[1] of covered crewmembers. *[Refer to 46 CFR §16.230(e). (1)The Commandant publishes the annual rate based upon the previous year's figures. The procedure is described at 46 CFR §16.230(f) through (j) and is handed down by the Coast Guard.]*

☐ 25. When does "**Serious Marine Incident**" testing requirements apply?

A marine employer must ensure that all persons directly involved in a serious marine incident[1] be tested for evidence of dangerous drugs and alcohol in accordance with the requirements.

[Refer to 46 CFR 16.240. (1)A Serious Marine Incident (SMI) is defined below. Study Guide: This is an important definition because it may trigger an immediate drug-testing requirement.]

46 CFR §4.03-2 Serious Marine Incident.

The term serious marine incident includes the following events involving a vessel in commercial service:

(a) Any marine casualty or accident as defined in §4.03-1 that is required by §4.05-1 to be reported to the Coast Guard and which results in any of the following:

(a)(1) One or more deaths;

(a)(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties;

(a)(3) Damage to property, as defined in §4.05-1(a)(7) of this part, in excess of $100,000;

(a)(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(a)(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 gross tons or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S. Code §1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

☐ 26. What are "**Reasonable Cause**" drug testing requirements?

This requirement applies to any licensed or unlicensed crewmember that is reasonably suspected of using a dangerous drug. The regulation requires him to take a chemical test for dangerous drugs. The marine employer (and not the Coast Guard) is responsible for ordering (and paying for) the test to be carried out. *[Refer to 46 CFR §16.250(a).]*

☐ 27. What **basis** should an **employer** use in deciding to order a drug test for a crewmember?

The marine employer's decision to test must be based on

a reasonable and articulable[1] belief that the crewmember has used a dangerous drug based on direct observation of specific, contemporaneous[1] physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions. *[Refer to 46 CFR §16.250(b). [1]**Vocabulary: Articulable** = expressed, formulated, and with clarity and effectiveness. **Contemporaneous** = at the present time; presently.]*

☐ 28. What incidental steps should a marine employer take when requiring a crewmember to undergo "**Reasonable Cause**" chemical testing?

He must inform the crewmember that he is requiring him to take a "reasonable cause" drug test and direct him to provide a urine specimen as soon as practicable. This fact must be entered in the vessel's official logbook. If an individual refuses to provide a urine specimen when directed to do so by his employer, this fact also must be entered in the vessel's official logbook. *[Refer to 46 CFR §16.250(c)(d).]*

☐ 29. What type of **drug records** must an employer keep?

Employers must maintain records of chemical tests as provided for in the regulations[1] and must make these records available to Coast Guard officials upon request. The regulations call for an employer to identify the total number of individuals chemically tested each year for dangerous drugs in each category of testing required, and the annual number of individuals failing chemical tests, and the number and types of drugs for which individuals tested "positive". *[Refer to 46 CFR §16.260. [1]49 CFR §40.333; 46 CFR §16.210 and 46 CFR §16.220(c).]*

☐ 30. What is an **Employee Assistance Program (EAP)**?

An employer must provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as a part of its own personnel services or may contract with an outside firm to provide EAP services to crewmembers. Each EAP must include education and training on drug use for crewmembers and the employer's supervisory personnel.

Each EAP education program must include at least the display and distribution of informational material; display and distribution of a community service hot-line telephone number for crewmember assistance, and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

An EAP training program must be conducted for the employer's crewmembers and supervisory personnel. The training program must include at least the effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug and alcohol use and abuse; and documentation of training given to crewmembers and the employer's supervisory personnel. Supervisory personnel must receive at least 60 minutes of training. *[Refer to 46 CFR §16.401.]*

☐ 31. Must employers retain and report data on drug and alcohol abuse to the Coast Guard?

Yes. All marine employers must collect drug and alcohol testing program data for each calendar year: This is a management function.[1] *[[1]Refer to 46 CFR §16.500, Management Information System Requirements.]*

DRUG TESTING – URINE SPECIMEN COLLECTION
Highlights of Title 49 CFR Part 40, Subpart C – Urine Collection Personnel

*[**Study Guide**: Source: Our Report #R-315, Rev. 2. These regulations are technical regulations that describe, in part, how the U.S. Department of Transportation conducts its drug-testing program for all modes of transportation. These rules apply to U.S. merchant mariners under the superintendence of the Coast Guard within the Department of Homeland Security. In discussions with Coast Guard Headquarters staff in April 2002, we learned that this group of DOT regulations brought considerable grief to many limited tonnage merchant mariners. Since most mariners never have an opportunity to read and study these regulations, we reprinted this selection of regulations and added comments to inform you about some of the inner workings of the drug-testing program.]*

49 CFR §40.31 Who May Collect Urine Specimens for DOT Drug Testing?

(a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.

(b) A collector must meet training requirements of §40.33.[1]

(c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency[2] drug and alcohol regulations.

(d) You must not act as the collector for the employee being tested if you work for a HHS-certified laboratory (e.g., as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

*[65 FR 79462, Dec. 19, 2000. **Comment:** This notation explains that this regulation was first published in Volume 65 of the Federal Register on Dec. 19, 2000. [1]**Comment:** Each collector must have been trained to perform the job correctly. Your license and livelihood may depend upon how carefully the collector does his or her job! [2]**Comment:** "DOT Agency" regulations in this case refers to the U.S. Coast Guard regulations in 46 CFR Part 16. These regulations are still in effect even though the Coast Guard now is part of the Department of Homeland Security (DHS).]*

49 CFR §40.33 What Training Requirements Must a Collector Meet?

To be permitted to act as a collector in the DOT drug testing program, you[1] must meet each of the requirements of this section:

(a) **Basic information**. You must be knowledgeable about this part, the current "DOT Urine Specimen Collection Procedures Guidelines", and DOT agency regulations applicable to the employers for whom you perform collections, and you must keep current on any changes to these materials. The DOT Urine Specimen Collection Procedures Guidelines document is available from ODAPC (Department of Transportation, 400 7th Street, S.W., Room 10403, Washington

DC, 20590, 202-366-3784, or on the ODAPC web site (http://www.dot.gov/ost/dapc). *[[1]**Comment:** "You" refers to a specimen collector. However, mariners also need to be alert to these qualifications.]*

(b) **Qualification training**. You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(b)(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;[1]

(b)(2) "Problem" collections (e.g., situations like "shy bladder" and attempts to tamper with a specimen);

(b)(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(b)(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;[1] *[[1]**Comment:** CCF is the abbreviation for the Custody and Control Form, the paperwork that accompanies your sample and accounts for its custody throughout the process.]*

(c) **Initial Proficiency Demonstration**. Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(c)(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(c)(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are "error-free". This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by–

(c)(2)(i) Regularly conducting DOT drug test collections for a period of at least a year;

(c)(2)(ii) Conducting collector training under this part for a year; or

(c)(2)(iii) Successfully completing a "train the trainer" course.

(d) **Schedule for qualification training and initial proficiency demonstration**. The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(d)(1) If you became a collector before August 1, 2001, and you have already met the requirements of paragraphs (b) and (c) of this section, you do not have to meet them again.

(d)(2) If you became a collector before August 1, 2001, and have yet to meet the requirements of paragraphs (b) and (c) of this section, you must do so no later than January 31, 2003.

(d)(3) If you become a collector on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) **Refresher training**. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) **Error Correction Training**. If you make a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(f)(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(f)(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(f)(3) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were "error-free".

(g) **Documentation**. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs[1] who are using or negotiating to use your services.

*[54 FR 49866, Dec. 1, 1989, as amended at 59 FR 7356, Feb. 15, 1994; 61 FR 37699, July 19, 1996; 65 FR 79462, Dec. 19, 2000; 66 FR 3884, Jan. 17, 2001; 66 FR 41944, Aug. 9, 2001. [1]**Comment:** C/TPA is the abbreviation for a Consortium/ Third-Party Administrator. This is a service agent that provides drug and alcohol testing services. The term "consortium" refers to a group of employers, unions, etc., who join together to provide testing services for their employees or members.]*

49 CFR §40.35 What Information About the DER[1] Must Employers Provide to Collectors?

*[[1]**Comment:** A Designated Employer Representative (DER) is an employee that is authorized by the employer to immediately remove an employee from safety-sensitive duties. He is authorized to make decisions about testing and evaluations. He is authorized to receive test results and other correspondence on behalf of the employer.]*

As an employer, you must provide to collectors the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.37 Where is Other Information on the Role of Collectors Found in this Regulation?

You can find other information on the role and functions of collectors in the following sections of this part:

§40.3–Definition.
§40.43–Steps to prepare and secure collection sites.
§§40.45-40.47–Use of CCF.
§§40.49-40.51–Use of collection kit and shipping materials.
§§40.61-40.63–Preliminary steps in collections.
§40.65–Role in checking specimens.
§40.67–Role in directly observed collections.
§40.69–Role in monitored collections.
§40.71–Role in split specimen collections.
§40.73–Chain of custody completion and finishing the

collection process.

§40.103–Processing blind specimens.

§40.191–Action in case of refusals to take test.

§40.193–Action in "shy bladder" situations.

§§40.199-40.205–Collector errors in tests, effects, and means of correction.

[65 FR 79462, Dec. 19, 2000]

Highlights of Title 49 CFR Part 40, Subpart D – Collection Sites, Forms, EQUIPMENT, AND SUPPLIES USED IN DOT URINE COLLECTIONS

49 CFR §40.41 Where Does a Urine Collection for a DOT Drug Test Take Place?

(a) A urine collection for a DOT drug test must take place in a collection site meeting the requirements of this section.[1] *[[1]**Comment:** Be alert to these provisions. Point out any deficiencies to the collector at once to avoid the chance of an error on your test. However, do NOT refuse to take the test! File specific protests of violations with the collector immediately to accompany your specimen.]*

(b) If you are operating a collection site, you must ensure that it meets the security requirements of §40.43.

(c) If you are operating a collection site, you must have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, temporary storage, and shipping of urine specimens to a laboratory, and a suitable clean surface for writing.

(d) Your collection site must include a facility for urination described in either paragraph (e) or paragraph (f) of this section.

(e) The first, and preferred, type of facility for urination that a collection site may include is a single-toilet room, having a full-length privacy door, within which urination can occur.

(e)(1) No one but the employee may be present in the room during the collection, except for the observer in the event of a directly observed collection.

(e)(2) You must have a source of water for washing hands that, if practicable, should be external to the closed room where urination occurs. If an external source is not available, you may meet this requirement by securing all sources of water and other substances that could be used for adulteration and substitution (e.g., water faucets, soap dispensers) and providing moist towelettes outside the closed room.

(f) The second type of facility for urination that a collection site may include is a multi-stall restroom.

(f)(1) Such a site must provide substantial visual privacy (e.g., a toilet stall with a partial-length door) and meet all other applicable requirements of this section.

(f)(2) If you use a multi-stall restroom, you must either–

(f)(2)(i) Secure all sources of water and other substances that could be used for adulteration and substitution (e.g., water faucets, soap dispensers) and place bluing agent in all toilets or secure the toilets to prevent access; or

(f)(2)(ii) Conduct all collections in the facility as monitored collections (see §40.69 for procedures). This is the only circumstance in which you may conduct a monitored collection.

(f)(3) No one but the employee may be present in the multi-stall restroom during the collection, except for the monitor in the event of a monitored collection or the observer in the event of a directly observed collection.

(g) A collection site may be in a medical facility, a mobile facility (e.g., a van), a dedicated collection facility, or any other location meeting the requirements of this section.

[65 FR 79462, Dec. 19, 2000]

49 CFR §40.43 What Steps Must Operators of Collection Sites Take to Protect the Security and Integrity of Urine Collections?

(a) Collectors and operators of collection sites must take the steps listed in this section to prevent unauthorized access that could compromise the integrity of collections.

(b) As a collector, you must do the following before each collection to deter tampering with specimens:

(b)(1) Secure any water sources or otherwise make them unavailable to employees (e.g., turn off water inlet, tape handles to prevent opening faucets);

(b)(2) Ensure that the water in the toilet is blue;

(b)(3) Ensure that no soap, disinfectants, cleaning agents, or other possible adulterants[1] are present;

(b)(4) Inspect the site to ensure that no foreign or unauthorized substances are present;

(b)(5) Tape or otherwise secure shut any movable toilet tank top, or put bluing in the tank;

(b)(6) Ensure that undetected access (e.g., through a door not in your view) is not possible;

(b)(7) Secure areas and items (e.g., ledges, trash receptacles, paper towel holders, under-sink areas) that appear suitable for concealing contaminants;[1] and

(b)(8) Recheck items in paragraphs (b)(1) through (7) of this section following each collection to ensure the site's continued integrity. *[[1]**Comment: Vocabulary: Adulterant** or **contaminants** are substances that could affect, change or destroy the sample before it is tested. These can be easily detected and reported.]*

(c) If the collection site uses a facility normally used for other purposes, like a public rest room or hospital examining room, you must, as a collector, also ensure before the collection that:

(c)(1) Access to collection materials and specimens is effectively restricted; and

(c)(2) The facility is secured against access during the procedure to ensure privacy to the employee and prevent distraction[1] of the collector. Limited-access signs must be posted. *[[1]**Comment**: The collector must pay complete attention to the collection of each sample to prevent substitution, switching, or adulteration. Trying to handle too many people at one time can lead to errors that can destroy lives and careers. Never consider <u>any</u> collection to be "routine." Give every step your undivided attention.]*

(d) As a collector, you must take the following additional steps to ensure security during the collection process:

(d)(1) To avoid distraction that could compromise security, you are limited to conducting a collection for only one employee at a time. However, during the time one employee is in the period for drinking fluids in a "shy bladder"[1] situation (see §40.193(b),[2] you may conduct a collection for another employee. *[[1]**Comment:** "Shy bladder" = unable to urinate immediately. [2]We added 49 CFR §40.193(b) later in this chapter for your reference.]*

(d)(2) To the greatest extent you can, keep an employee's

collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed.[1] *[[1]**Comment:** You must do this because you will not have any meaningful opportunity to do it later. Keep your eyes on your specimen as you would your wallet…it is just as important!]*

(d)(3) Ensure you are the only person in addition to the employee who handles the specimen before it is poured into the bottles and sealed with tamper-evident seals.

(d)(4) In the time between when the employee gives you the specimen and when you seal the specimen, remain within the collection site.

(d)(5) Maintain personal control over each specimen and CCF throughout the collection process.[1] *[[1]**Comment:** Be sure you understand every single mark made on your custody and control form.]*

(e) If you are operating a collection site, you must implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored.

(e)(1) Only employees being tested, collectors and other collection site workers, DERs, employee and employer representatives authorized by the employer (e.g., employer policy, collective bargaining agreement[1]), and DOT agency representatives are authorized persons for purposes of this paragraph (e). *[[1]**Comment:** A Collective Bargaining Agreement refers to part of a union contract. Your union representative may be authorized to monitor the collection process to see that you are treated according to the agreement.]*

(e)(2) Except for the observer in a directly observed collection or the monitor in the case of a monitored collection, you must not permit anyone to enter the urination facility in which employees provide specimens.

(e)(3) You must ensure that all authorized persons are under the supervision of a collector at all times when permitted into the site.

(e)(4) You or the collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

(f) If you are operating a collection site, you must minimize the number of persons handling specimens.

[65 FR 79462, Dec. 19, 2000]

49 CFR §40.45 What Form is Used to Document a DOT Urine Collection?

(a) The Federal Drug Testing Custody and Control Form (CCF) must be used to document every urine collection required by the DOT drug-testing program. The CCF must be a five-part carbonless manifold form. You may view this form on the Department's web site: (http://www.dot.gov/ost/dapc) or the HHS web site: (http://www.workplace.samhsa.gov).

(b) You must not use a non-Federal form or an expired Federal form to conduct a DOT urine collection. As a laboratory, C/TPA, or other party that provides CCFs to employers, collection sites, or other customers, you must not provide copies of an expired Federal form to these participants. You must also affirmatively notify these participants that they must not use an expired Federal form (e.g., that beginning August 1, 2001, they may not use the old seven-part Federal CCF for DOT urine collections).

(c) As a participant in the DOT drug testing program, you are not permitted to modify or revise the CCF except as follows:

(c)(1) You may include, in the area outside the border of the form, other information needed for billing or other purposes necessary to the collection process.

(c)(2) The CCF must include the names, addresses, telephone numbers, and fax numbers of the employer and the MRO,[1] which may be preprinted, typed, or handwritten. The MRO information must include the specific physician's name and address, as opposed to only a generic clinic, health care organization, or company name. This information is required, and it is prohibited for an employer, collector, service agent, or any other party to omit it. In addition, a C/TPA's name, address, fax number, and telephone number may be included, but is not required. The employer may use a C/TPA's address in place of its own, but must continue to include its name, telephone number, and fax number. *[[1]**Comment:** MRO = Medical Review Officer (MRO). An MRO is a licensed physician who is responsible for receiving and reviewing laboratory results generated by a drug testing program and evaluating medical explanations for certain drug test results.]*

(c)(3) As an employer, you may add the name of the DOT agency under whose authority the test occurred as part of the employer information.

(c)(4) As a collector, you may use a CCF with your name, address, telephone number, and fax number preprinted, but under no circumstances may you sign the form before the collection event.

(d) Under no circumstances may the CCF transmit personal identifying information about an employee (other than a social security number (SSN) or other employee identification (ID) number) to a laboratory.[1] *[[1]**Comment:** You must never be identified by name to the drug lab, only by a social security number. This reflects your right to privacy and precludes possible racial or ethnic bias in testing.]*

(e) As an employer, you may use an equivalent foreign-language version of the CCF approved by ODAPC.[1] You may use such a non-English language form only in a situation where both the employee and collector understand and can use the form in that language.

*[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001. [1]**Comment:** ODAPC = Office of Drug and Alcohol Policy in the office of the Secretary of Transportation. This office coordinates drug and alcohol testing program matters within the DOT.]*

49 CFR §40.47 May Employers Use the CCF for Non-Federal Collections or Non-Federal Forms for DOT Collections?

(a) No, as an employer, you are prohibited from using the CCF for non-Federal urine collections. You are also prohibited from using non-Federal forms for DOT urine collections. Doing either subjects you to enforcement action under DOT agency regulations.

(b)(1) In the rare case where the collector, either by mistake or as the only means to conduct a test under difficult circumstances (e.g., post-accident or reasonable suspicion test with insufficient time to obtain the CCF), uses a non-Federal form for a DOT collection, the use of a non-Federal form does not present a reason for the laboratory to reject the specimen for testing or for an MRO to cancel the result.

(b)(2) The use of the non-Federal form is a "correctable

flaw". As an MRO, to correct the problem you must follow the procedures of §40.205(b)(2). *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.49 What Materials Are Used to Collect Urine Specimens?

For each DOT drug test, you must use a collection kit meeting the requirements of Appendix A of this part.
*[65 FR 79462, Dec. 19, 2000. [(1)]**Comment:** We added Appendix A to the end of this chapter.]*

49 CFR §40.51 What Materials Are Used to Send Urine Specimens to the Laboratory?

(a) Except as provided in paragraph (b) of this section, you must use a shipping container that adequately protects the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory.

(b) You are not required to use a shipping container if a laboratory courier hand-delivers the specimens from the collection site to the laboratory.
[59 FR 7357, Feb. 15, 1994, as amended at 60 FR 19679, Apr. 20, 1995; 65 FR 79462, Dec. 19, 2000]

Highlights of Title 49 CFR Part 40, Subpart E – Urine Specimen Collections

49 CFR §40.61 What Are the Preliminary Steps in the Collection Process?

As the collector, you must take the following steps before actually beginning a collection:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's work site, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has <u>refused to test</u>[(1)] (see §40.191(a)(1)). *[[(1)]**Comment:** Refusal to test is a very serious matter. We inserted 49 CFR §40.191(a)(1)later in this chapter to emphasize this point!]*

(b) Ensure that, when the employee enters the collection site, you begin the testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or is unable to urinate or because an authorized employer or employee representative is delayed in arriving.

(b)(1) If the employee is also going to take a DOT alcohol test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

Example to Paragraph (b)(1): An employee enters the test site for both a drug and an alcohol test. Normally, the collector would wait until the BAT[(1)] had completed the alcohol test process before beginning the drug test process. However, there are some situations in which an exception to this normal practice would be reasonable. One such situation might be if several people were waiting for the BAT to conduct alcohol tests, but a drug testing collector in the same facility were free. Someone waiting might be able to complete a drug test without unduly delaying his or her alcohol test. Collectors and BATs should work together, however, to ensure that post-accident and reasonable suspicion alcohol tests happen as soon as possible (e.g., by moving the employee to the head of the line for alcohol tests). *[[(1)]BAT = Breath Alcohol Technician. A BAT is a person who instructs and assists employees in the alcohol testing process and operates an evidential breath testing device. Coast Guard regulations for testing for alcohol appear in 33 CFR Part 95 and in amended regulations later in this chapter.]*

(b)(2) If the employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to collect a specimen.

(b)(3) You[(1)] must not collect, by catheterization or other means, urine from an <u>unconscious employee</u> to conduct a drug test under this part. Nor may you catheterize[(2)] a conscious employee. However, you must inform an employee who normally voids through self-catheterization that the employee is required to provide a specimen in that manner. *[[(1)]**Comment:** [(1)]You, the collector. [(2)]**Vocabulary: Catheterize** = inserting a hollow tube inserted to drain fluids from body cavities.]*

(b)(4) If, as an employee, you normally void through self-catheterization, and decline to do so, this constitutes a <u>refusal to test</u>.[(1)] *[[(1)]Remember, refusal to test is an absolute "no-no"!]*

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (e.g., a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name, but does not have to include your picture, address, or telephone number.

(e) Explain the basic collection procedure to the employee, including showing the employee the instructions on the back of the CCF.

(f) Direct the employee to remove outer clothing (e.g., coveralls, jacket, coat, hat) that could be used to conceal items or substances that could be used to tamper with a specimen. You must also direct the employee to leave these garments and any briefcase, purse, or other personal belongings with you or in a mutually agreeable location. You must advise the employee that <u>failure to comply with your directions constitutes a refusal to test</u>.

(f)(1) If the employee asks for a receipt for any belongings left with you, you must provide one.[(1)] *[[(1)]**Comment:** Notice how the rules cover just about everything – and they do not leave anything to chance. This is why you must know the rules for your own protection!]*

(f)(2) You must allow the employee to keep his or her

wallet.

(f)(3) You must not ask the employee to remove other clothing (e.g., shirts, pants, dresses, underwear), to remove all clothing, or to change into a hospital or examination gown (unless the urine collection is being accomplished simultaneously with a DOT agency-authorized medical examination).

(f)(4) You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee, you must allow the collector to make this observation.

(f)(5) If, in your duties under paragraph (f)(4) of this section, you find any material that could be used to tamper with a specimen, you must:

(f)(5)(i) Determine if the material appears to be brought to the collection site with the intent to alter the specimen, and, if it is, conduct a directly observed collection using direct observation procedures (see §40.67); or

(f)(5)(ii) Determine if the material appears to be inadvertently brought to the collection site (e.g., eye drops), secure and maintain it until the collection process is completed and conduct a normal (i.e., unobserved) collection.

(g) You must instruct the employee **not** to list medications that he or she is currently taking on the CCF. (The employee may make notes of medications on the back of the employee copy of the form for his or her own convenience, but these notes must **not** be transmitted to anyone else.) *[65 FR 79462, Dec. 19, 2000 . [(1)]The MRO will ask you some very direct questions about your medications and how and when you use them in the event you have a "positive" (i.e., bad) drug test. Be alert to and ready for such questions.]*

49 CFR §40.63 What Steps Does the Collector Take in the Collection Process Before the Employee Provides a Urine Specimen?

As the collector, you must take the following steps before the employee provides the urine specimen:

(a) Complete Step 1 of the CCF.

(b) Instruct the employee to wash and dry his or her hands at this time. You must tell the employee not to wash his or her hands again until after delivering the specimen to you. You must not give the employee any further access to water or other materials that could be used to adulterate or dilute a specimen.

(c) Select, or allow the employee to select, an individually wrapped or sealed collection container from collection kit materials. Either you or the employee, with both of you present, must unwrap or break the seal of the collection container. You must not unwrap or break the seal on any specimen bottle at this time. You must not allow the employee to take anything from the collection kit into the room used for urination except the collection container.

(d) Direct the employee to go into the room used for urination, provide a specimen of at least 45 mL, **not** flush the toilet, and return to you with the specimen as soon as the employee has completed the void.

(d)(1) Except in the case of an observed or a monitored collection (see §§40.67 and 40.69), neither you nor anyone else may go into the room with the employee.

(d)(2) As the collector, you may set a reasonable time limit for voiding.

(e) You must pay careful attention to the employee during the entire collection process to note any conduct that clearly indicates an attempt to tamper with a specimen (e.g., substitute urine in plain view or an attempt to bring into the collection site an adulterant or urine substitute). If you detect such conduct, you must require that a collection take place immediately under direct observation (see §40.67) and note the conduct and the fact that the collection was observed in the "Remarks" line of the CCF (Step 2). You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

[59 FR 7357, Feb. 15, 1994, as amended at 59 FR 43001, Aug. 19, 1994; 60 FR 19679, Apr. 20, 1995; 65 FR 79462, Dec. 19, 2000]

49 CFR §40.65 What Does the Collector Check for When the Employee Presents a Specimen?

As a collector, you must check the following when the employee gives the collection container to you:

(a) **Sufficiency of specimen**. You must check to ensure that the specimen contains at least 45 mL of urine.

(a)(1) If it does not, you must follow "shy bladder" procedures (see §40.193(b)).[(1)] *[[(1)]This regulation, 49 CFR §40.193(b), appears at the end of this chapter.]*

(a)(2) When you follow "shy bladder" procedures, you must discard the original specimen, unless another problem (i.e., temperature out of range, signs of tampering) also exists.

(a)(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(a)(4) You must discard any excess urine.

(b) **Temperature**. You must check the temperature of the specimen no later than four minutes after the employee has given you the specimen.

(b)(1) The acceptable temperature range is 32-38°C/90-100°F.

(b)(2) You must determine the temperature of the specimen by reading the temperature strip attached to the collection container.

(b)(3) If the specimen temperature is within the acceptable range, you must mark the "Yes" box on the CCF (Step 2).

(b)(4) If the specimen temperature is outside the acceptable range, you must mark the "No" box and enter in the "Remarks" line (Step 2) your findings about the temperature.

(b)(5) If the specimen temperature is outside the acceptable range, you must immediately conduct a new collection using direct observation procedures (see §40.67).

(b)(6) In a case where a specimen is collected under direct observation because of the temperature being out of range, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but the temperature is out of range. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(b)(7) In a case where the employee refuses to provide

another specimen (see §40.191(a)(3)) or refuses to provide another specimen under direct observation (see §40.191(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure.

(c) Signs of tampering. You must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering (e.g., if you notice any unusual odor).

(c)(1) If it is apparent from this inspection that the employee has tampered with the specimen (e.g., blue dye in the specimen, excessive foaming when shaken, smell of bleach), you must immediately conduct a new collection using direct observation procedures (see §40.67).

(c)(2) In a case where a specimen is collected under direct observation because of showing signs of tampering, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but it shows signs of tampering. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(c)(3) In a case where the employee refuses to provide a specimen under direct observation (see §40.191(a)(4)), you must discard any specimen the employee provided previously during the collection procedure. Then you must notify the DER as soon as practicable.

[59 FR 7357, Feb. 15, 1994, as amended at 59 FR 43002, Aug. 19, 1994; 60 FR 19679, Apr. 20, 1995; 65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]

49 CFR §40.67 When and How is a Directly Observed Collection[1] Conducted? *[**Comment:** A "directly observed" and a "monitored" collection as described in 49 CFR 40.69 refer to two slightly different procedures.]*

(a)As an employer you must direct an immediate collection under direct observation with no advance notice to the employee, if:

(a)(1) The laboratory reported to the MRO that a specimen is invalid, and the MRO reported to you that there was not an adequate medical explanation for the result; or

(a)(2) The MRO reported to you that the original positive, adulterated, or substituted test result had to be cancelled because the test of the split specimen could not be performed.

(b) As an employer, you may direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

(c) As a collector, you must immediately conduct a collection under direct observation if:

(c)(1) You are directed by the DER to do so (see paragraphs (a) and (b) of this section); or

(c)(2) You observed materials brought to the collection site or the employee's conduct clearly indicates an attempt to tamper with a specimen (see §§40.61(f)(5)(i) and 40.63(e)); or

(c)(3) The temperature on the original specimen was out of range (see §40.65(b)(5)); or

(c)(4) The original specimen appeared to have been tampered with (see §40.65(c)(1)).

(d)(1) As the employer, you must explain to the employee the reason for a directly observed collection under paragraph (a) or (b) of this section.

(d)(2) As the collector, you must explain to the employee the reason, if known, under this part for a directly observed collection under paragraphs (c)(1) through (3) of this section.

(e) As the collector, you must complete a new CCF for the directly observed collection.

(e)(1) You must mark the "reason for test" block (Step 1) the same as for the first collection.

(e)(2) You must check the "Observed, (Enter Remark)" box and enter the reason (see §40.67(b)) in the "Remarks" line (Step 2).

(f) In a case where two sets of specimens are being sent to the laboratory because of suspected tampering with the specimen at the collection site, enter on the "Remarks" line of the CCF (Step 2) for each specimen a notation to this effect (e.g., collection 1 of 2, or 2 of 2) and the specimen ID number of the other specimen.

(g) As the collector, you must ensure that the observer is the same gender[1] as the employee. You must never permit an opposite gender person to act as the observer. The observer can be a different person from the collector and need not be a qualified collector. *[[1]**Comment:** Gender = male or female.]*

(h) As the collector, if someone else is to observe the collection (e.g., in order to ensure a same gender observer), you must verbally instruct that person to follow procedures at paragraphs (i) and (j) of this section. If you, the collector, are the observer, you too must follow these procedures.

(i) As the observer, you must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container.

(j) As the observer but not the collector, you must not take the collection container from the employee, but you must observe the specimen as the employee takes it to the collector.

(k) As the collector, when someone else has acted as the observer, you must include the observer's name in the "Remarks" line of the CCF (Step 2).

(l) As the employee, if you decline to allow a directly observed collection required or permitted under this section to occur, this is a refusal to test.

(m) As the collector, when you learn that a directly observed collection should have been collected but was not, you must inform the employer that it must direct the employee to have an immediate recollection under direct observation. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.69 How is a Monitored Collection Conducted?

(a) As the collector, you must secure the room being used for the monitored collection so that no one except the employee and the monitor can enter it until after the collection has been completed.

(b) As the collector, you must ensure that the monitor is the same gender as the employee, unless the monitor is a medical professional (e.g., nurse, doctor, physician's assistant, technologist, or technician licensed or certified to practice in the jurisdiction in which the collection takes place). The monitor can be a different person from the collector and need not be a qualified collector.

(c) As the collector, if someone else is to monitor the collection (e.g., in order to ensure a same-gender monitor), you must verbally instruct that person to follow the procedures of paragraphs (d) and (e) of this section. If you, the collector, are the monitor, you must follow these procedures.

(d) As the monitor, you must not watch the employee urinate into the collection container. If you hear sounds or make other observations indicating an attempt to tamper with a specimen, there must be an additional collection under direct observation (see §§40.63(e), 40.65(c), and 40.67(b)).

(e) As the monitor, you must ensure that the employee takes the collection container directly to the collector as soon as the employee has exited the enclosure.

(f) As the collector, when someone else has acted as the monitor, you must note that person's name in the "Remarks" line of the CCF (Step 2).

(g) As the employee being tested, if you decline to permit a collection authorized under this section to be monitored, it is a refusal to test. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.71 How Does the Collector Prepare the Specimens?

(a) All collections under DOT agency drug testing regulations must be split specimen collections.

(b) As the collector, you must take the following steps, in order, after the employee brings the urine specimen to you. You must take these steps in the presence of the employee.

(b)(1) Check the box on the CCF (Step 2) indicating that this was a split specimen collection.

(b)(2) You, not the employee, must first pour at least 30 mL (milliliters) of urine from the collection container into one specimen bottle, to be used for the primary specimen.

(b)(3) You, not the employee, must then pour at least 15 mL of urine from the collection container into the second specimen bottle to be used for the split specimen.

(b)(4) You, not the employee, must place and secure (i.e., tighten or snap) the lids/caps on the bottles.

(b)(5) You, not the employee, must seal the bottles by placing the tamper-evident bottle seals over the bottle caps/lids and down the sides of the bottles.

(b)(6) You, not the employee, must then write the date on the tamper-evident bottle seals.

(b)(7) You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the "Remarks" line of the CCF (Step 2) and complete the collection process.

(b)(8) You must discard any urine left over in the collection container after both specimen bottles have been appropriately filled and sealed. There is one exception to this requirement: you may use excess urine to conduct clinical tests (e.g., protein, glucose) if the collection was conducted in conjunction with a physical examination required by a DOT agency regulation. Neither you nor anyone else may conduct further testing (such as adulteration testing) on this excess urine and the employee has no legal right to demand that the excess urine be turned over to the employee. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.73 How is the Collection Process Completed?

(a) As the collector, you must do the following things to complete the collection process. You must complete the steps called for in paragraphs (a)(1) through (a)(7) of this section in the employee's presence.

(a)(1) Direct the employee to read and sign the certification statement on Copy 2 (Step 5) of the CCF and provide date of birth, printed name, and day and evening contact telephone numbers.(1) If the employee refuses to sign the CCF or to provide date of birth, printed name, or telephone numbers, you must note this in the "Remarks" line (Step 2) of the CCF, and complete the collection. If the employee refuses to fill out any information, you must, as a minimum, print the employee's name in the appropriate place. *[(1)**Comment:** So the MRO can contact you with the results of your test or with any further questions he or she may have.]*

(a)(2) Complete the chain of custody on the CCF (Step 5) by printing your name (note: you may pre-print your name), recording the time and date of the collection, signing the statement, and entering the name of the delivery service transferring the specimen to the laboratory,

(a)(3) Ensure that all copies of the CCF are legible and complete.

(a)(4) Remove Copy 5 of the CCF and give it to the employee.

(a)(5) Place the specimen bottles and Copy 1 of the CCF in the appropriate pouches of the plastic bag.

(a)(6) Secure both pouches of the plastic bag.

(a)(7) Advise the employee that he or she may leave the collection site.

(a)(8) To prepare the sealed plastic bag containing the specimens and CCF for shipment you must:

(a)(8)(i) Place the sealed plastic bag in a shipping container (e.g., standard courier box) designed to minimize the possibility of damage during shipment. (More than one sealed plastic bag can be placed into a single shipping container if you are doing multiple collections.)

(a)(8)(ii) Seal the container as appropriate.

(a)(8)(iii) If a laboratory courier hand-delivers the specimens from the collection site to the laboratory, prepare the sealed plastic bag for shipment as directed by the courier service.

(a)(9) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must fax or otherwise transmit these copies to the MRO and DER within 24 hours or during the next business day. Keep Copy 3 for at least 30 days, unless otherwise specified by applicable DOT agency regulations.

(b) As a collector or collection site, you must ensure that each specimen you collect is shipped to a laboratory as quickly as possible, but in any case within 24 hours or during the next business day. *[65 FR 79462, Dec. 19, 2000]*

Highlights of Title 49 CFR Part 40, Subpart H – Split Specimen Tests

49 CFR §40.171 How Does an Employee Request a Test of a Split Specimen?

*[**Scenario:** You left your urine specimen with the collector and watched it as he/she sealed it for shipment to the drug lab. You also signed the seal and the Custody and Control Form (CCF) and handed it over for shipment.*

The Medical Review Officer (MRO) is on the telephone and says you have a "Verified Positive Drug Test". You have a problem! If you are a drug user, they caught you. If you did the crime, expect to surrender your credentials (i.e., either Suspension or Revocation). However, if you did not use drugs, you have only one final safeguard to prove that the lab made some kind of a technical mistake. Take the time to read these regulations carefully!]

(a) As an employee, when the MRO has notified you that you have a verified positive drug test or refusal to test because of adulteration or substitution, you have 72 hours from the time of notification to request a test of the split specimen. The request may be verbal or in writing.

If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen.

(b)(1) If, as an employee, you have not requested a test of the split specimen within 72 hours, you may present to the MRO[1] information documenting that serious injury, illness, lack of actual notice of the verified test result, inability to contact the MRO (e.g., there was no one in the MRO's office and the answering machine was not working), or other circumstances unavoidably prevented you from making a timely request. *[[1]**Comment:** Just by taking a drug test, you have placed your career and your livelihood in other peoples' hands. Be sure you or someone reliable is available to receive the MRO's phone call or to receive the written notification at the address you gave on the Custody and Control form. Until the MRO contacts you, consider this test as "unfinished business". Don't just pack up, leave town, or go to sea. Be available and be prepared to act promptly if the unexpected happens – you only have 72 hours to act!.]*

(b)(2) As the MRO, if you conclude from the employee's information that there was a legitimate reason for the employee's failure to contact you within 72 hours, you must direct that the test of the split specimen take place, just as you would when there is a timely request.[1] *[[1]**Comment:** This is a safeguard built into the system for your benefit.]*

(c) When the employee makes a timely request for a test of the split specimen under paragraphs (a) and (b) of this section, you must, as the MRO, immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen[1] to a second HHS-certified laboratory. You must also document the date and time of the employee's request. *[65 FR 79462, Dec. 19, 2000. [[1]**Comment:** This will be a second test of the other half of your original urine specimen. It will be performed by a different laboratory. This part of the procedure **will not** require or allow you to provide a second specimen.]*

49 CFR §40.173 Who is Responsible for Paying for the Test of a Split Specimen?

(a) As the employer, you are responsible for making sure (e.g., by establishing appropriate accounts with laboratories for testing split specimens) that the MRO, first laboratory, and second laboratory perform the functions noted in §§40.175-40.185 in a timely manner, once the employee has made a timely request for a test of the split specimen.[1] *[**Comment:** Your employer **must** pay to have the second half of your specimen tested. This is a very important point if you even suspect that the first laboratory incorrectly tested the first part of your original split specimen. It is very important that the second half of the split sample be tested by a different laboratory or you will never be able to prove the first lab made a mistake! Drug labs **do** make mistakes.]*

(b) As the employer, you must not condition your compliance with these requirements on the employee's direct payment to the MRO or laboratory or the employee's agreement to reimburse you for the costs of testing. For example, if you ask the employee to pay for some or all of the cost of testing the split specimen, and the employee is unwilling or unable to do so, you must ensure that the test takes place in a timely manner, even though this means that you pay for it.[1] *[[1]**Comment:** Don't let anyone talk you out of your rights!]*

(c) As the employer, you may seek payment or reimbursement of all or part of the cost of the split specimen from the employee (e.g., through your written company policy[1] or a collective bargaining agreement.[2]. This part takes no position on who ultimately pays the cost of the test, so long as the employer ensures that the testing is conducted as required and the results released appropriately. *[65 FR 79462, Dec. 19, 2000. **Comment:** [1]Most new employees are required to read company policy manuals and letters. Know where the company stands on paying for split-sample tests before you run into the problem. Also know that drug tests generally cost no more than $40.00. Your investment in your career is much greater than that! Your career is at risk here; protect it. [2]A union collective bargaining agreement will generally provide details…and you are expected to read and understand your rights.]*

49 CFR §40.175 What Steps Does the First Laboratory[1] Take With a Split Specimen?

*[[1]**Comment:** The "First Laboratory" is the laboratory the collector sent one-half of your split sample (i.e., the "primary" sample) to for testing. They do not know your name, only a number. If the first laboratory tests your primary specimen as "positive," then you can request the other part of your split sample to be sent to a second HHS/SAMSHA-approved laboratory for an independent test.]*

(a) As the laboratory at which the primary and split specimen first arrive, you[1] must check to see whether the split specimen is available for testing.

*[[1]**Comment:** In this section, "you" refers to the first laboratory.]*

(b) If the split specimen is unavailable[1] or appears insufficient,[2] you must then do the following:

*[**Comment:** [1]"Unavailable" could cover a variety of excuses such as spilled specimen, lost bottles, etc. The test of the available sample can go on, but the problem may reappear in some cases later. [2]"Insufficient" means there is not enough urine to test, possibly as a result of leakage. Possibly you did not provide enough urine for two complete samples…something you should have been aware of at the time of collection.]*

(b)(1) Continue the testing process for the primary specimen as you would normally. Report the results for the primary specimen without providing the MRO information regarding the unavailable split specimen.[1] *[[1]**Comment:** This means that the Medical Review Officer will talk to you only about the "primary" specimen. At this point, the MRO will not know of possible problems in testing the second half of your split sample.]*

(b)(2) Upon receiving a letter from the MRO instructing

you to forward the split specimen to another laboratory for testing, report to the MRO that the split specimen is unavailable for testing. Provide as much information as you can about the cause of the unavailability.

(c) As the laboratory that tested the primary specimen, you are not authorized to open the split specimen under any circumstances (except when the split specimen is re-designated as provided in §40.83).

(d) When you receive written notice instructing you to send the split specimen to another HHS-certified laboratory, you must forward the following items to the second laboratory:

(d)(1) The split specimen in its original specimen bottle, with the seal intact;

(d)(2) A copy of the MRO's written request; and

(d)(3) A copy of Copy 1 of the CCF, which identifies the drug(s)/metabolite(s) or the validity criteria to be tested for.

(e) You must not send to the second laboratory any information about the identity of the employee. Inadvertent disclosure does not, however, cause a fatal flaw.[1] *[[1]**Comment:** A "fatal flaw" is one that destroys the validity of the entire test. A wide assortment of Commandant Decisions on Appeal decided upon thru the years have reduced the chances of a "fatal flaw" occurring and are reflected in the latest regulations.]*

(f) This subpart does not prescribe who gets to decide which HHS-certified laboratory is used to test the split specimen. That decision is left to the parties involved. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.177 What Does the Second Laboratory Do With the Split Specimen When it is Tested to Reconfirm the Presence of a Drug or Drug Metabolite?

(a) As the laboratory testing the split specimen, you must test the split specimen for the drug(s)/drug metabolite(s) detected in the primary specimen.

(b) You must conduct this test without regard to the cutoff concentrations of §40.87.

(c) If the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) that were reported positive in the primary specimen, you must conduct validity tests in an attempt to determine the reason for being unable to reconfirm the presence of the drug(s)/metabolite(s). You should conduct the same validity tests as you would conduct on a primary specimen set forth in §40.91.

(d) In addition, if the test fails to reconfirm the presence of the drugs/drugs metabolites or validity criteria that were reported in the primary specimen, you may transmit the specimen or an aliquot of it to another HHS-certified laboratory that will conduct another reconfirmation test. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.179 What Does the Second Laboratory do With the Split Specimen When it is Tested to Reconfirm an Adulterated Test Result?

As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen, using the criteria of §40.95 just as you would do for a primary specimen. The result of the primary specimen is reconfirmed if the split specimen meets these criteria. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.181 What Does the Second Laboratory Do With the Split Specimen When it is Tested to Reconfirm a Substituted Test Result?

As the laboratory testing the split specimen, you must test the split specimen using the criteria of §40.93(b), just as you would do for a primary specimen. The result of the primary specimen is reconfirmed if the split specimen meets these criteria. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.183 What Information do Laboratories Report to MROs Regarding Split Specimen Results?

(a) As the laboratory responsible for testing the split specimen, you must report split specimen test results by checking the "Reconfirmed" box or the "Failed to Re-confirm" box (Step 5(b)) on Copy 1 of the CCF.

(b) If you check the "Failed to Re-confirm" box, one of the following statements must be included (as appropriate) on the "Reason" line (Step 5(b)):

(b)(1) "Drug(s)/Drug Metabolite(s) Not Detected".

(b)(2) "Adulterant not found within criteria".

(b)(3) "Specimen not consistent with substitution criteria [specify creatinine, specific gravity, or both]".

(b)(4) "Specimen not available for testing".

(c) As the laboratory certifying scientist, enter your name, sign, and date the CCF. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.185 Through What Methods and to Whom Must a Laboratory Report Split Specimen Results?

(a) As the laboratory testing the split specimen, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or another service agent (e.g., a C/TPA).

(b) You must fax, courier, mail, or electronically transmit a legible image or copy of the fully completed Copy 1 of the CCF, which has been signed by the certifying scientist.

(c) You must transmit the laboratory result to the MRO immediately, preferably on the same day or next business day as the result is signed and released. *[65 FR 79462, Dec. 19, 2000]*

49 CFR §40.187 What Does the MRO Do With Split Specimen Laboratory Results?

As an MRO, you must take the following actions when a laboratory reports the following results of split specimen tests:

(a) **Re-confirmed**. (1) In the case of a re-confirmed positive test for a drug or drug metabolite, report the reconfirmation to the DER and the employee.

(a)(2) In the case of a reconfirmed adulterated or substituted result, report to the DER and the employee that the specimen was adulterated or substituted, either of which constitutes a refusal to test. Therefore, "refusal to test" is the final result.

(b) **Failed to Reconfirm: Drug(s)/Drug Metabolite(s) Not Detected**. (1) Report to the DER and the employee that both tests must be cancelled.

(b)(2) Using the format in Appendix D to this part, inform ODAPC of the failure to reconfirm.

(c) **Failed to Reconfirm: Adulteration or Substitution** (as appropriate) Criteria Not Met. (1) Report to the DER and the employee that both tests must be cancelled.

(c)(2) Using the format in Appendix D to this part, inform ODAPC of the failure to reconfirm.

(d) **Failed to Reconfirm: Specimen not Available for**

Testing. (1) Report to the DER and the employee that both tests must be cancelled and the reason for cancellation.

(d)(2) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(d)(3) Using the format in Appendix D to this part, notify ODAPC of the failure to reconfirm.

(e) **Failed to Reconfirm: Specimen Results Invalid**. (1) Report to the DER and the employee that both tests must be cancelled and the reason for cancellation.

(e)(2) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(e)(3) Using the format in Appendix D to this part, notify ODAPC of the failure to reconfirm.

(f) **Failed to Reconfirm: Split Specimen Adulterated**. (1) Contact the employee and inform the employee that the laboratory has determined that his or her split specimen is adulterated.

(f)(2) Follow the procedures of §40.145 to determine if there is a legitimate medical explanation for the laboratory finding of adulteration.

(f)(3) If you determine that there is a legitimate medical explanation for the adulterated test result, report to the DER and the employee that the test is cancelled. Using the format in Appendix D to this part, notify ODAPC of the result.

(f)(4) If you determine that there is not a legitimate medical explanation for the adulterated test result, take the following steps:

(f)(4)(i) Report the test to the DER and the employee as a verified refusal to test. Inform the employee that he or she has 72 hours to request a test of the primary specimen to determine if the adulterant found in the split specimen also is present in the primary specimen.

(f)(4)(ii) Except that the request is for a test of the primary specimen and is being made to the laboratory that tested the primary specimen, follow the procedures of §§40.153, 40.171, 40.173, 40.179, and 40.185.

(f)(4)(iii) As the laboratory that tests the primary specimen to reconfirm the presence of the adulterant found in the split specimen, report your result to the MRO on a photocopy (faxed, mailed, scanned, couriered) of Copy 1 of the CCF.

(f)(4)(iv) If the test of the primary specimen reconfirms the adulteration finding of the split specimen, as the MRO you must report the test result as a refusal as provided in §40.187(a)(2).

(f)(4)(v) If the test of the primary specimen fails to reconfirm the adulteration finding of the split specimen, as the MRO you cancel the test. Follow the procedures of paragraph (e) of this section in this situation.

(g) Enter your name, sign, and date (Step 7) Copy 2 of the CCF.

(h) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see §40.163) to the employer and keep a copy for your records. Transmit the document as provided in §40.167. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.189 Where is Other Information Concerning Split Specimens Found in This Regulation?

You can find more information concerning split specimens in several sections of this part:

§40.3–Definition.

§40.65–Quantity of split specimen.

§40.67–Directly observed test when split specimen is unavailable.

§§40.71-40.73–Collection process for split specimens.

§40.83–Laboratory accessioning of split specimens.

§40.99–Laboratory retention of split specimens

§40.103–Blind split specimens–MRO notice to employees on tests of split specimen.

§§40.193 and 40.201 – MRO actions on insufficient or unavailable split specimens.

Appendix D to Part 40 – Report format for split specimen failure to reconfirm. *[65 FR 79462, Dec. 19, 2000]*

Refusal to Test and Other Testing Problems

49 CFR §40.191 What is a Refusal to Take a DOT Drug Test, and What Are the Consequences?

(a) As an employee, you have refused[1] to take a drug test if you: *[[1]**Comment:** Be careful! The Coast Guard interpretation of "refusal" to test covers a wide assortment of cases settled by Commandant Decisions on Appeal (CDOA) that have closed just about every possible loophole. Dozens of failed legal opinions advanced by lawyers at great expense to mariners and decided years ago litter the landscape!]*

(a)(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.61(a));

(a)(2) Fail to remain at the testing site until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test;

(a)(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations;[1] Provided, That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see §40.63(c)) for a pre-employment test is not deemed to have refused to test; *[[1]**Comment:** The reference is to Coast Guard "Chemical Testing" regulations in 46 CFR Part 16 or 33 CFR Part 95.]*

(a)(4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§40.67(l) and 40.69(g));

(a)(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.193(d)(2));

(a)(6) Fail or decline to take a second test the employer or collector has directed you to take;

(a)(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under

§40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment; or

(a)(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a "shy bladder" condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(d)(1) As the collector, you must note the refusal in the "Remarks" line (Step 2), and sign and date the CCF.

(d)(2) As the MRO, you must note the refusal by checking the "refused to test because" box (Step 6) on Copy 2 of the CCF, and add the reason on the "Remarks" line. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have **NOT REFUSED** to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR §40.193 What Happens When an Employee Does Not Provide a Sufficient Amount of Urine for a Drug Test?

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(b)(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see §40.65(b) and (c)).

(b)(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(b)(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(b)(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(b)(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine (see paragraph (b)(4) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(c)(1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(c)(1)(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of urine to complete the test;

(c)(1)(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(c)(1)(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

(c)(2) [Reserved]

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(d)(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(d)(1)(i) Check "Test Cancelled" (Step 6) on the CCF; and

(d)(1)(ii) Sign and date the CCF.

(d)(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(d)(2)(i) Check "Refusal to test because" (Step 6) on the CCF and enter reason in the remarks line; and

(d)(2)(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.

(f) As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(g) If, as the referral physician making this evaluation in the case of a pre-employment test, you determine that the employee's medical condition is a serious and permanent or

long-term disability that is highly likely to prevent the employee from providing a sufficient amount of urine for a very long or indefinite period of time, you must set forth your determination and the reasons for it in your written statement to the MRO. As the MRO, upon receiving such a report, you must follow the requirements of §40.195, where applicable.

(h) As the MRO, you must seriously consider and assess the referral physician's recommendations in making your determination about whether the employee has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. You must report your determination to the DER in writing as soon as you make it.

(i) As the employer, when you receive a report from the MRO indicating that a test is cancelled as provided in paragraph (d)(1) of this section, you take no further action with respect to the employee. The employee remains in the random testing pool. *[65 FR 79462, Dec. 19, 2000; 66 FR 41944, Aug. 9, 2001]*

49 CFR Appendix A to Part 40 – DOT Standards for Urine Collection Kits

The Collection Kit Contents:

1. Collection Container

(a). Single-use container, made of plastic, large enough to easily catch and hold at least 55 mL of urine voided from the body.

(b). Must have graduated volume markings clearly noting levels of 45 mL and above.

(c). Must have a temperature strip providing graduated temperature readings 32-38°C/90-100°F, that is affixed or can be affixed at a proper level on the outside of the collection container. Other methodologies (e.g., temperature device built into the wall of the container) are acceptable provided the temperature measurement is accurate and such that there is no potential for contamination of the specimen.

(d). Must be individually wrapped in a sealed plastic bag or shrink wrapping; or must have a peelable, sealed lid or other easily visible tamper-evident system.

(e). May be made available separately at collection sites to address shy bladder situations when several voids may be required to complete the testing process.

2. Plastic Specimen Bottles

(a). Each bottle must be large enough to hold at least 35 mL; or alternatively, they may be two distinct sizes of specimen bottles provided that the bottle designed to hold the primary specimen holds at least 35 mL of urine and the bottle designed to hold the split specimen holds at least 20 mL.

(b). Must have screw-on or snap-on caps that prevent seepage of the urine from the bottles during shipment.

(c). Must have markings clearly indicating the appropriate levels (30 mL for the primary specimen and 15 mL for the split) of urine that must be poured into the bottles.

(d). Must be designed so that the required tamper-evident bottle seals made available on the CCF fit with no damage to the seal when the employee initials it nor with the chance that the seal overlap would conceal printed information.

(e). Must be wrapped (with caps) together in a sealed plastic bag or shrink wrapping separate from the collection container; or must be wrapped (with cap) individually in sealed plastic bags or shrink wrapping; or must have peelable, sealed lid or other easily visible tamper-evident system.

(f). Plastic material must be leak resistant.

3. Leak-Resistant Plastic Bag

(a). Must have two sealable compartments or pouches which are leak-resistant; one large enough to hold two specimen bottles and the other large enough to hold the CCF paperwork.

(b). The sealing methodology must be such that once the compartments are sealed, any tampering or attempts to open either compartment will be evident.

4. Absorbent material

Each kit must contain enough absorbent material to absorb the entire contents of both specimen bottles. Absorbent material must be designed to fit inside the leak-resistant plastic bag pouch into which the specimen bottles are placed.

5. Shipping Container

(a). Must be designed to adequately protect the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory (e.g., standard courier box, small cardboard box, plastic container).

(b). May be made available separately at collection sites rather than being part of an actual kit sent to collection sites.

(c). A shipping container is not necessary if a laboratory courier hand-delivers the specimen bottles in the plastic leak-proof bags from the collection site to the laboratory.

[59 FR 43002, Aug. 19, 1994, as amended at 60 FR 19537, Apr. 19, 1995; 65 FR 79462, Dec. 19, 2000

Changes in Alcohol and Drug Testing Effective June 20, 2006

*[**Source:** This final rule appeared in the Federal Register of Dec. 22, 2005 at 70 FR 75954-75961. Docket #USCG-2001-8773. **For further information** contact Mr. Robert Schoening at Coast Guard Headquarters (G-MOA) at (202)-267-0684]*

This final rule revised Coast Guard requirements for alcohol testing after a serious marine incident to ensure that mariners involved in such an incident were tested for alcohol use within 2 hours as Congress requires.

Congress ordered strict alcohol testing after it discovered in hundreds of maritime accidents there were no efforts to conduct alcohol testing to determine whether alcohol use played any part in the accident. In reviewing scores of accident reports in our files, we also believe that most employers never accepted responsibility to conduct effective alcohol testing in the past.

This final rule also requires that most commercial vessels carry alcohol testing devices on board. The rule authorizes the use of saliva as an acceptable specimen for alcohol testing. The rule also made minor procedural changes, including a 32-hour time limit for collecting specimens for drug testing following a serious marine incident.

The Revised Testing Regulations

*[**Authority:** 33 U. S. Code § 1231; 43 U. S. Code §1333; 46 U. S. Code §§2103; 2303a; 2306; 6101; 6301; and 6305; 50 U.S. Code §198; Department of Homeland Security Delegation No. 0170.1, Subpart 4.40 issued under 49 U. S. Code §1903(a)(1)(E). [**Source**: CGD 86-067, 53 FR 47078, Nov. 21, 1988, unless otherwise stated.]*

46 CFR §4.06-1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use as required in this part.

*[**Definition of a Serious Marine Incident (SMI):** Re-read ☐ 25(above).]*

(c) The marine employer determines which individuals are directly involved in a Serious Marine Incident (SMI). A law enforcement officer may determine that additional individuals are directly involved in the SMI. In these cases, the marine employer must take all practical steps to have these additional individuals tested according to this part.

(d) The requirements of this subpart do not prevent personnel who are required to be tested from performing duties in the aftermath of an SMI when their performance is necessary to respond to safety concerns directly related to the incident.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG-2000–7759, 66 FR 42967, Aug. 16, 2001 and USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]

§4.06-3 Requirements for alcohol and drug testing following a serious marine incident.

When a marine employer determines that a casualty or incident is, or is likely to become, an SMI, the marine employer must ensure that the following alcohol and drug testing is conducted:

(a) **Alcohol testing**.

(a)(1) Alcohol testing must be conducted on each individual engaged or employed on board the vessel who is directly involved in the SMI.

(a)(1)(i) The alcohol testing of each individual must be conducted within 2 hours of when the SMI occurred, unless precluded by safety concerns directly related to the incident.

(a)(1)(ii) If safety concerns directly related to the SMI prevent the alcohol testing from being conducted within 2 hours of the occurrence of the incident, then alcohol testing must be completed as soon as the safety concerns are addressed.

(a)(1)(iii) Alcohol testing is not required to be conducted more than 8 hours after the occurrence of the SMI.

(a)(2) Alcohol-testing devices must be used according to the procedures specified by the manufacturer of the testing device and by this part.

(a)(3) If the alcohol testing required in paragraphs (a)(1)(i) and (a)(1)(ii) of this section is not conducted, the marine employer must document on form CG–2692B the reason why the testing was not conducted.

(a)(4) The marine employer may use alcohol-testing results from tests conducted by Coast Guard or local law enforcement personnel to satisfy the alcohol testing requirements of this part only if the alcohol testing meets all of the requirements of this part.

(b) **Drug testing**.

(b)(1) Drug testing must be conducted on each individual engaged or employed on board the vessel who is directly involved in the SMI.

(b)(1)(i) The collection of drug-test specimens of each individual must be conducted within 32 hours of when the SMI occurred, unless precluded by safety concerns directly related to the incident.

(b)(1)(ii) If safety concerns directly related to the SMI prevent the collection of drug-test specimens from being conducted within 32 hours of the occurrence of the incident, then the collection of drug-test specimens must be conducted as soon as the safety concerns are addressed.

(b)(2) If the drug-test specimens required in paragraphs (b)(1)(i) and (b)(1)(ii) of this section were not collected, the marine employer must document on form CG-2692B the reason why the specimens were not collected.

[USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]

§4.06-5 Responsibility of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in an SMI must provide a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide a blood, breath, saliva, or urine specimen, this refusal must be noted on form CG-2692B and in the vessel's official log book, if a log book is required. The marine employer must remove the individual as soon as practical from duties that directly affect the safe operation of the vessel.

(c) Individuals subject to alcohol testing after an SMI are prohibited from consuming alcohol beverages for 8 hours following the occurrence of the SMI or until after the alcohol testing required by this part is completed.

(d) No individual may be compelled to provide specimens for alcohol and drug testing required by this part. However, refusal to provide specimens is a violation of this subpart and may subject the individual to suspension and revocation proceedings under part 5 of this chapter, a civil penalty, or both.

[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]

§4.06-10 (Removed)

§4.06-15 Accessibility of chemical testing devices.

(a) **Alcohol testing.**

(a)(1) The marine employer must have a sufficient number of alcohol testing devices readily accessible on board the vessel to determine the presence of alcohol in the system of each individual who was directly involved in the SMI.

(a)(2) All alcohol testing devices used to meet the requirements of this part must be currently listed on either the Conforming Products List (CPL) titled "Modal Specifications for Devices To Measure Breath Alcohol" or "Conforming Products List of Screening Devices To Measure Alcohol in Bodily Fluids," which are published periodically in the Federal Register by National Highway Traffic Safety Administration (NHTSA).

(a)(3)(a) The alcohol testing devices need not be carried on board each vessel if obtaining the devices and conducting the required alcohol tests can be accomplished within 2 hours from the time of occurrence of the SMI.

(a)(3)(b) *Drug testing*.

(a)(3)(b)(1) The marine employer must have a sufficient number of urine-specimen collection and shipping kits meeting the requirements of 49 CFR part 40 that are readily accessible for use following SMIs.

(a)(3)(b)(2) The specimen collection and shipping kits need not be carried on board each vessel if obtaining the kits and collecting the specimen can be completed within 32 hours from the time of the occurrence of the SMI.
[USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]

§4.06-20 Specimen collection requirements.

(a) **Alcohol testing**.

(a)(1) When conducting alcohol testing required in §4.06–3(a), an individual determined under this part to be directly involved in the SMI must provide a specimen of their breath, blood, or saliva to the marine employer as required in this subpart.

(a)(2) Collection of an individual's blood to comply with §4.06–3(a) must be taken only by qualified medical personnel.

(a)(3) Collection of an individual's saliva or breath to comply with §4.06–3(a) must be taken only by personnel trained to operate the alcohol-testing device in use and must be conducted according to this subpart

(b) **Drug testing.**

(b)(1) When conducting drug testing required in §4.06–3(b), an individual determined under this part to be directly involved in the SMI must provide a specimen of their urine according to 46 CFR part 16 and 49 CFR part 40.

(b)(2) Specimen collection and shipping kits used to conduct drug testing must be used according to 49 CFR part 40.
[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by USCG-2000–7759, 66 FR 42967, Aug. 16, 2001 and USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]

§4.06-60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) When the serious marine incident requires the submission of Form CG-2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with §4.05–10, the report required by paragraph (a) of this section shall be appended to Form CG-2692.

(c) In incidents involving discharges of oil or hazardous substances as described in §4.03–2 (b) and (c) of this part, when Form CG-2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted.

(e) The Commandant may approve alternate electronic means of submitting reports and test results as required under paragraphs (a) through (d) of this section. *[CGD 86–067, 53 FR 47078, Nov. 21, 1988, as amended by CGD 97–057, 62 FR 51041, Sept. 30, 1997; USCG-1999–6216, 64 FR 53223, Oct. 1, 1999*]

§4.06-70 Penalties.

Violation of this part is subject to the civil penalties set forth in 46 U.S.C. 2115.[(1)] *[[(1)]$5,000 for each violation. Each day of a continuing violation shall constitute a separate violation. Refer to USCG-2001-8773, 70 FR 75960, Dec. 22, 2005.]*

CHAPTER 5 – THE PERIMAN CASE: FRAUDLENT DRUG TEST AND COAST GUARD INTRANSIGENCE

***(Source:** NMA Report #R-315-C, Rev. 1)*

Keeping up with the Periman case was unbelievable in its intensity. There was something new every day. Starting with the Periman Case in 2000, I began to examine the DOT drug testing regulations in 49 CFR Part 40 very carefully and discuss all aspects of the case with Greg's father Val Periman. I would also examine the Administrative Law Judge (ALJ) system by requesting information on internal practices and procedures under the Freedom of Information Act. I also reviewed large numbers of ALJ decisions on appeal to the Commandant and Vice-Commandant, and then by starting to attend hearings where "limited tonnage" mariners were brought before various Administrative Law Judges. Then I began to hear of other types of cases, occasionally accompanied by other members of our Board of Directors. By 2009 I estimate I had attended over 20 ALJ hearings and related procedures within the Eighth Coast Guard District.

Our First "National" Drug Case

Our "local" misgivings about drug regulatory enforcement were soon followed by a drug case at the "national" level. Based on our previous limited experience with the local case briefly described recounted above and impressed with the knowledge, expertise, and maritime background of the competent attorney who had worked on this case with us, J. Mac Morgan, Esq., we recommended that Captain Greg Periman retain his professional legal services although Greg lived hundreds of miles away in northwest Arkansas.

The Periman Case was a unique case and consumed a tremendous amount of our time, effort, limited resources and focus. In this case while working with Captain Periman, we encountered and identified every possible obstacle and roadblock that the Coast Guard could possibly throw at this mariner from every level from the investigating officer in MSO St. Louis, through his Commanding Officer and up to and including the Vice Commandant. The Coast Guard completely mishandled this case – and proved themselves to be poor losers!

A mariner deprived of his license is like a fish out of water. Left out of water, a fish is deprived of air and will soon die. The longer he is left without a source of income, a mariner and his family are also vulnerable and likely to perish. In this nasty affair that lasted over three years, Captain Periman after serving as the Master of towing vessels for over twenty years, lost everything he owned – his house, his car, and his dignity as a human being. Fortunately, his family stood by him throughout this ordeal and our Association took up his cause only after he proved to our satisfaction that he was not guilty of the offenses he was charged with.

During this ordeal that extended over three years and reached all the way to the doorstep of former Coast Guard Commandant Thomas H. Collins, Captain Periman maintained his innocence as our Association began to lose confidence in the entire Coast Guard "justice" system.

The Periman Case also brought to the surface another, apparently unrelated matter that was dormant since 1997. In 1997, I served as Editor of the National Association of Maritime Educators (NAME) Newsletter, a publication that reached most instructors responsible for training lower-level mariners. My full time job was preparing and editing textbooks for lower-level mariners. In June 1997, I wrote an article in NAME Newsletter #57 based on my conversation with Administrative Law Judge Rosemary Denson. The information in that article is captured in the chapter titled How Western Rivers Mariners Lost Their Administrative Law Judge **Report #R-396).**

That article and the supporting documentation led me to suggest that Captain Periman and his father Val Periman contact former ALJ Denson and discuss with her on a professional basis the flack they encountered in dealing with Coast Guard officers and civilian bureaucrats both in the Coast Guard Docketing Center as well as with the Coast Guard's Legal office in Headquarters. Armed with helpful information allowed all of us to focus on the tremendous problems at hand. Eventually, after spending hundreds of hours, through his own efforts in investigating what had happened to him, Captain Periman was able to prevail and the Coast Guard very grudgingly returned his license to him. The fact that taking his license in the first place had prevented him from earning a living for three years was conveniently forgotten.

Nevertheless, the Coast Guard actively thwarted his attempt to recover his attorney fees under provisions of the Equal Access to Justice Act as provided for under Department of Transportation Regulations in 49 CFR Part 6. These fees were considerable because Captain Periman, through his attorney J. Mac Morgan, had to file a lawsuit against the Coast Guard in Federal District Court in Washington, DC – proving that even if a mariner is right, it takes a great deal of money and, in this case, ***a team of three Attorneys*** in three different cities, New Orleans, Washington, and St. Louis, to prevail. Even after Commandant Collins returned Captain Periman's license, there was never a hint of an apology or compensation for the Coast Guard's egregious conduct.

Our Association opposes drug and alcohol use by mariners that endangers the lives of fellow mariners and compromises the safety of a vessel's operation. We are not opposed to drug testing if done strictly by procedures for drug and alcohol testing of transportation workers issued by the federal government. Our Association also supports the humane treatment of mariners with addictions and believes that all who suffer from such an illness should have an opportunity to receive affordable treatment and be given a second chance at their careers after rehabilitation.

Overview of the Case

Captain Gregory L. Periman took a drug test after a minor allision on the Upper Mississippi River in Illinois. According to the drug laboratory, the Medical Review Officer (MRO), his employer Lawton and Lawton Towing, and the U.S. Coast Guard Marine Safety Office in St. Louis,

he tested positive for drug use.

Captain Periman knew he didn't use drugs and there must have been an error. This is the story of his three-year crusade to prove his innocence. Aided by New Orleans-based attorney J. Mac Morgan, Captain Periman's fight continued in state court.

This story centers around his trial in St. Louis conducted by U.S. Coast Guard Administrative Law Judge Peter Fitzpatrick, a tired traveler from Norfolk, Virginia, who in early January 1999 wearily faced this mariner from northwest Arkansas who insisted he wasn't guilty and had the temerity to argue the point in court without a lawyer to represent him against a Coast Guard prosecutor. What a crazy thought, what a lot of trouble for nothing ... all for only a license to run a towboat.

Timely Reporting of the Accident

When I first heard details about this case in its earliest stages, I truly believed it had the potential to tarnish the Coast Guard's reputation. Having no desire to do this or to undermine the efforts to control the use of drugs in the marine industry, I wrote a personal note to Vice Admiral James Card, the Coast Guard Vice-Commandant, on Mar. 21, 2000 and stated: "I believe that something here is seriously out of place and needs to be brought to the attention of other mariners." My hope was that this mild cautionary note might alert the Admiral to look beneath the surface. I received a pleasant reply from Admiral Carmichael that apparently ended this futile effort. The train had left the station.

In all likelihood, you have never heard of Captain Greg Periman. Greg is a licensed mariner with twenty-two years of service on the western rivers and the Gulf Intracoastal Waterway and operates linehaul towboats. The chances are slim to none that you would ever learn about this case unless you read this article as the Coast Guard prefers to show the public a white glove rather than its iron fist when it deals with our mariners. The frightening thing is that what happened to Captain Periman could happen to any merchant mariner who earns his or her livelihood with a Coast Guard-issued credential. What the Coast Guard giveth, the Coast Guard can take away – and they are willing to do with a vengeance.

On a foggy night in August 1998, Captain Periman serving as Pilot aboard the towing vessel STEVE T had a minor allision while heading upriver on the Mississippi River at Chester, Illinois. He reported his accident in an accurate and timely manner both to the Coast Guard and to his employer. Although there was only relatively minor damage to the comer of one barge, his employer routinely instructed him to take a drug test when he reached St. Louis. Testing is required after a "serious marine incident" described in 46 CFR §4.03-2 as described in Chapter 3 ☐25 (above).

Clearly, this did not fit the definition of a "serious marine incident" by any stretch of the imagination. It was not a "random" test because he was the only person tested. Nor was it a "reasonable cause test" because it did not fit the pertinent parts of the definition in 46 CFR §16.250(a)(b). But, if he had "refused to test" the result would have been the same as a "positive" test – lose job, lose license.

When Greg reached St. Louis, he submitted a urine specimen that was subsequently determined by LabOne, certified by the U.S. Department of Health and Human Services, and located in Lenexa, Kansas, to be positive for marijuana.

Captain Periman relates that he could not believe he had tested "positive" because he did not use dangerous drugs. Like hundreds of other mariners in his position, he was given the opportunity to admit to drug use and go through "rehabilitation" and, at its conclusion 12 to 18 months later, apply for the return of his license under the Coast Guard's Administrative Clemency program.

Knowing that the drug charges were false, he chose to appear before Administrative Law Judge Peter Fitzpatrick in St. Louis and "tell it to the judge." Believing that some obvious mistake had been made, Greg chose to represent himself in court to refute the charges. This proved to be a serious mistake – and one that no mariner should ever make.

After the Coast Guard Investigating Officer LTJG Christopher O'Neil from the Coast Guard Marine Safety Office in St. Louis presented evidence from LabOne of the positive test, Greg's license was taken on Jan. 7, 1999 at the trial and was formally revoked by a written Decision and Order served on Mar. 26, 1999.

Although Greg was given ample opportunity (to the point of harassment) to plead guilty to the charges and to agree to "rehabilitation," ***he had no intention of pleading guilty to a crime he never committed***. After all, you are supposed to be presumed innocent until you are proven guilty! On Jan. 7, 1999 he was proven guilty.

Where Does This Railroad End?

In a Decision and Order dated Jan. 22, 2001 (CDOA #2621), the Vice Commandant of the Coast Guard remanded the Periman case on appeal involving alleged drug use back to the same Administrative Law Judge to "withdraw the original decision "..."reopen former proceedings on an expedited basis"..."In the interest of Justice and the integrity of the entire drug testing system." The judge was the Honorable Peter Fitzpatrick.

Any case that involves "the integrity of the entire drug testing system" is a very serious matter. I completely support the concept that drug abuse in any mode of transport-rail, highway, air, and marine-can have a dire impact on public safety and must be eliminated-but not by trampling the rights of individual mariners in the process. The myopic pursuit of individuals that may not be drug offenders should be a grave concern of each and every working mariner every time he or she takes a DOT drug test. ***If the Coast Guard can bring false or even questionable charges against one mariner, they can bring them against any mariner***!

When the Coast Guard makes an error so grievous as to destroy a person's life and career, they not only should admit their mistake but also make restitution to the mariner. Mariners who are treated disrespectfully by the system quickly lose their respect for it. The honesty and integrity of drug testing and enforcement always must be beyond reproach since every merchant mariner that stands a watch is subject to random drug testing throughout his employment.

Burden of Proof Placed on the Mariner

Mariners need to know that the burden of proof automatically falls upon you if the Coast Guard can prove it has a "prima facie" case. A "prima facie" case is one that is