

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF HOMELAND SECURITY  
**UNITED STATES COAST GUARD**

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UNITED STATES COAST GUARD  
Complainant

vs.

WILLIAM DEA AILSWORTH

Respondent

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Docket Number 2009-0085  
Enforcement Activity No. 3420522

**DECISION AND ORDER**

**Issued: August 31, 2009**

**By Administrative Law Judge: Honorable Michael J Devine**

**Appearances:**

**LT Candice Casavant  
LTJG Maria C. Wiener  
USCG Sector Hampton Roads**

**For the Coast Guard**

**MICHAEL DONNER, Esq.**

**For the Respondent**

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## I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of William Dea Ailsworth's (Respondent) Merchant Mariner License (MML).<sup>1</sup> This action is brought pursuant to the legal authority contained in 46 U.S.C. 7703 and the underlying regulations codified at 46 CFR Part 5.

The Coast Guard issued a Complaint on March 3, 2009. The Coast Guard amended the Complaint several times. The final amended Complaint, issued on April 28, 2009, charged Respondent with four (4) violations:

1. **Negligence:** The Coast Guard alleged Respondent, the master of a towing vessel, beached a listing barge on January 11, 2009 to prevent the barge from further listing and/or sinking. The Coast Guard alleged Respondent negligently pulled the barge away from the shore on January 12, 2009, without first remedying the cause of the listing, resulting in the barge subsequently sinking.
2. **Violation of Law or Regulation:** The Coast Guard alleged Respondent failed to report the sinking of the barge to the Coast Guard within five (5) days of the sinking. The Coast Guard alleged that not submitting a marine casualty report within five (5) days of a marine casualty is a violation of 46 CFR 4.05-10(a).
3. **Misconduct:** The Coast Guard alleged Respondent wrongfully failed to appear at the Norfolk Federal Building on March 4, 2009, in response to a properly issued subpoena served by the Coast Guard.
4. **Violation of Law or Regulation:** The Coast Guard alleged that while serving as the master of a towing vessel on January 10, 2009, Respondent noticed an occurrence materially and adversely affecting one of his barge's seaworthiness. After addressing the safety concerns, the Coast Guard alleged Respondent failed to notify the Coast Guard of the problems, as required by 46 CFR 4.05-1.

Respondent filed a timely answer that admitted to the jurisdictional allegations, but denied certain factual allegations.

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<sup>1</sup> The Complaint requested revocation of Respondent's Merchant Mariner's Document and Mariner License. During the hearing it was discovered that Respondent's only maritime credential is his Merchant Mariner License (MML). (Tr. at 6-7).

On March 31, 2009, this case was assigned to the undersigned judge for adjudication. On April 29, 2009, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed and a hearing date was set. A second pre-hearing conference was held on May 18, 2009. During that pre-hearing conference, procedural questions were addressed. The Coast Guard sought to amend Charge II of the Complaint to correct a typographical error. Respondent did not object to the change. The parties also discussed ongoing discovery issues.

The hearing took place at Norfolk, Virginia on June 9, 2009. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. 551-59 and Coast Guard procedural regulations located at 33 CFR Part 20. Lieutenant Candice Casavant and Lieutenant (JG) Maria Weiner, represented the Coast Guard at the hearing. Respondent appeared at the hearing and was represented by attorney Michael Donner. Nine (9) witnesses testified on behalf of the Coast Guard. One (1) witness, Respondent himself, testified on behalf of Respondent.

Prior to the hearing the Coast Guard provided notice of twenty (20) Exhibits in discovery. At the hearing, a stipulation agreed to by the parties was entered as Government Exhibit 21. Government Exhibits 1-6, 11, 18, 20 and 21 were admitted into evidence at the hearing. Government Exhibits 7-10, 14, 16, 17 and 19 were withdrawn and not offered as evidence at the hearing. Government Exhibits 12, 13 and 15 were offered, but as a preliminary ruling, not admitted into evidence for the reasons stated on the record. (Tr. at 38-43, 206). As discussed in the sanction section infra, Government Exhibit 15 is admitted for purposes of aggravation evidence under 33 CFR 20.1315. Prior to the hearing Respondent provided notice of four (4) Exhibits in discovery. The exhibits were offered and admitted into Evidence during the hearing as Respondent's Exhibits A, B, C and D.

The Coast Guard also requested official notice of seven (7) Commandant Decisions on Appeal and provided copies to opposing counsel.<sup>2</sup> Official notice is granted in keeping with 33 CFR 20.806. These decisions are also applicable as precedent and may be cited in briefs. At the close of the Government case-in-chief, Respondent moved to dismiss the negligence charge. The motion was denied. (Tr. 209-10); See Appeal Decision 2294 (TITTONIS) (1983).

On June 30, 2009, the Coast Guard submitted a post hearing brief. This post hearing brief contained enumerated Proposed Findings of Fact and Proposed Conclusions of Law. Rulings on these proposed findings and conclusions are found in Attachment B. Also on June 30, 2009, Respondent filed a post hearing brief. In this post hearing brief Respondent submitted enumerated Proposed Findings of Fact which have been ruled upon and are also listed in Attachment B. Respondent's brief also contained Proposed Conclusions of Law Rulings that were addressed within the discussion section of the post hearing brief. Since the proposed conclusions of law were not individually enumerated, individual rulings on Respondent's Conclusions of Law are not made. However, all the facts and issues raised in Respondent's post hearing brief have been addressed throughout the body of this Decision.

After careful review of the facts and applicable law in this case, the undersigned finds the Coast Guard has proved, by a preponderance of reliable and credible evidence, the allegations contained in Charge 1, Charge 2, and Charge 4. The allegations in Charge 3 are found not proved. In view of the record as a whole, the evidence establishes that in keeping with the interests of maritime safety as provided in 46 CFR 5.5, the appropriate sanction in this matter is that Respondent's mariner license shall be REVOKED.

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<sup>2</sup> Appeal Decision 2597 (TIMMEL) (1998); Appeal Decision 557 (HOYT) (1952); Appeal Decision 592 (DELK) (1952); Appeal Decision 2063 (CORNELIUS) (1976); Appeal Decision 2639 (HAUCK) (2003); Appeal Decision 2520 (DAVIS) (1991); Appeal Decision 2321 (HARRIS) (1983).

## II. FINDINGS OF FACT

The Findings of Fact are based on documentary evidence, witness testimony, and the entire record as a whole.

1. On January 9, 2009, Respondent was employed as the master of the towing vessel JACQUELINE A. and began a voyage departing from the ANA shipyard pushing two barges, the SL-118 and the SL-119. (Tr. at 216-17).
2. Respondent proceeded with the barges up the James River to Hopewell, Virginia. (Tr. at 217).
3. At approximately 1830 on January 9, 2009, Respondent moored the barges to the south-side of the loading pier at the Honeywell International Plant (Honeywell facility) in Hopewell, Virginia. (Gov't Ex. 11 at 1; Tr. at 220).
4. On January 9, 2009, a Honeywell employee (called the gantry operator) began loading the barges (SL-118 and SL-119) with ammonium sulfate (fertilizer). (Tr. at 221-22). The SL-118 was the first barge to be loaded. (Id.).
5. At some time between 0330 and 0400 on the morning of January 10, 2009, the loading of ammonium sulfate into the barges was completed. (Stipulation entered as Exhibit CG 21; Tr. at 229).
6. After the two (2) barges were loaded, barge SL-119 was observed to have a noticeable list. (Tr. at 99, 109, 121-24, 237-38). It was also observed to have the stern down and water was being pumped off the barge. (Tr. at 123-24).
7. On the morning of January 10, 2009, the Honeywell facility informed Respondent they expected a new vessel to arrive at the south-side of loading pier for loading. (Tr. at 232-33). Upon direction from Honeywell personnel, Respondent moved barges SL-118 and SL-119 from the south-side of the loading pier to the north-side of the loading pier. (Id.).
8. Respondent observed approximately four (4) inches of water in the number four (4) compartment of the barge SL-119. (Tr. at 122, 237-39). Respondent was able to pump the water out of the number four (4) compartment of the barge with a three-quarters (3/4) inch electric pump. (Id.). Respondent did not determine the source of the leak. (Id.).
9. During the afternoon of January 10, 2009, Respondent observed water in the number two (2) compartment of the barge SL-119. (Tr. at 240-41). Respondent used a two (2) inch electric pump to expel the water. (Id.).
10. The Honeywell facility was designed to load barges and did not have equipment on the pier to offload the product from the barge. (Tr. at 117-18).

11. On the morning of January 11, 2009, the barge was observed to be grounded on the shoreline which was perpendicular to the loading pier at the Honeywell facility. (Tr. at 115-16, 248). The shoreline was observed to be composed of riprap.<sup>3</sup> (Id.).
12. Respondent testified at the hearing that at approximately 0900 on January 11, 2009, Respondent moved barge SL-119 from the Honeywell pier and grounded the barge to prevent further listing and/or sinking. (Tr. at 246).
13. The stern of the barge was pushed onto the shoreline approximately forty-five (45) feet from the pier and the bow of the barge remained tied against the pier. (Tr. at 250).
14. While the barge was grounded, Respondent continued to pump water out of the barge. (Tr. at 250-52).
15. Respondent asked Honeywell personnel if they had any gasoline powered pumps. (Tr. at 132). The Honeywell facility did not have any gasoline powered pumps. (Id.).
16. Gasoline powered pumps can have a higher dewatering rate than an electric pump. (Tr. at 141).
17. Sometime on January 11, 2009, after the barge was grounded, Respondent contacted Dave Bushy, the president of Pro-Dive, Incorporated (Pro-Dive). (Tr. at 170-71, 263-64). Respondent requested Mr. Bushy come to the Honeywell facility to inspect the barge for damage and to bring additional pumps. (Gov't Ex. 21; Tr. at 171).
18. Respondent informed Mr. Bushy that he was concerned SL-119 may have a hole in the hull and he wanted it looked at. (Tr. 172).
19. Mr. Bushy was not able to send a crew to inspect the SL-119 until the morning of January 12, 2009. (Tr. at 172).
20. Mr. Bushy sent a crew with pumps to Hopewell on the morning of January 12, 2009 who arrived sometime after 0800. (Id.) After they arrived the crew captain called Mr. Bushy and informed him the barge had already sunk. (Id.).
21. Respondent contacted an excavation contractor who would be able to offload the product from barge SL-119. (Tr. at 254-57).
22. At approximately 0900 on January 12, 2009, Respondent pulled the barge from its grounded position and pushed it against the loading pier. (Tr. at 256-60).
23. Respondent had requested the contractor be at the pier to unload the product by 0900, however the contractor was not present when Respondent moved the barge. (Tr. at 258-61).

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<sup>3</sup> Riprap is a term used to describe a shoreline consisting of rocks or other material.

24. At approximately 0935 on January 12, 2009, barge SL-119 sank by the loading pier at the Honeywell facility. (Gov't Ex. 1, 2, 5; Tr. at 261; Answer).
25. Respondent did not contact the Coast Guard about the problems associated with barge SL-119 at any time on January 10 or 11, 2009. (Tr. at 57, 264-65). Respondent contacted the Coast Guard about barge SL-119 for the first time at approximately 1000 on January 12, 2009, providing notice that the barge had sunk. (Id.).
26. Respondent did not submit a Report for Marine Accident, Injury or Death report (form CG-2692), concerning the January 12, 2009 sinking of barge SL-119, to the Coast Guard until January 23, 2009. (Gov't Ex. 1).
27. Respondent later submitted a revised Report for Marine Accident, Injury or Death report (form CG-2692), concerning the January 12, 2009 sinking of barge SL-119, to the Coast Guard on February 26, 2009. (Gov't Ex. 2).
28. On February 24, 2009, the Coast Guard served a subpoena on Respondent commanding him to appear on February 27, 2009 at the Norfolk Federal Building. (Gov't Ex. 3).
29. Respondent did not appear at the Norfolk Federal Building on February 27, 2009 as commanded by the February 24, 2009 subpoena. (Tr. at 60).
30. After discussions with Respondent's counsel, the appearance commanded in the subpoena was rescheduled and Respondent was supposed to appear at the Norfolk Federal Building on March 4, 2009. (Gov't Ex. 21; Tr. at 60-64). Respondent failed to appear at the rescheduled date of March 4, 2009. (Id.).

### **III. DISCUSSION**

#### **a. Jurisdiction**

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). When a mariner is engaged in the service of a vessel the mariner is considered to be acting under the authority of their mariner credentials when the holding of such credentials is required by law and/or for condition of employment. 46 CFR 5.57(a). The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner violated a law or regulation, committed an act of negligence, and/or committed an act of misconduct while acting under the authority of that credential. 46 U.S.C. 7703(1)(A).

In this case, Respondent's Answer admitted to paragraphs one (1) through four (4) of the jurisdictional allegations in the Complaint. Respondent did not specifically answer paragraph five (5) in the complaint, but it was not contested that he was acting under the authority of his license at all relevant times for all Charges in this matter. (Answer). In view of the undisputed facts regarding Respondent's actions as master of the towing vessel, Respondent's counsel agreed that jurisdiction was not disputed in this matter. (Tr. at 9). I find that Respondent was acting under the authority of his license as the master of the towing vessel JACQUELINE A. during the dates in question is proven. Therefore, if Respondent is found to have committed any of the charged violations, the Coast Guard has jurisdictional authority to revoke or suspend Respondent's Coast Guard issued merchant mariner credentials.

#### **b. Allegations**

##### *i. Burden of Proof*

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. 7701. To assist in this goal, Coast Guard Administrative Law Judges (ALJs)

have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. 7703. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 CFR 20.701-702; see also Appeal Decision 2485 (YATES) (1989). In this case, the Coast Guard seeks to prove, by a preponderance of the evidence, that Respondent: (1) committed an act of negligence by pulling a barge, that had been listing, off a stable mooring at a dock and beach without first diagnosing and remedying the cause of the list which resulted in its sinking; (2) violated a regulation by failing to timely submit a written report (CG 2692 form) of the sinking of that barge; (3) committed an act of Misconduct by failing to appear as directed by a subpoena; and, (4) violated a regulation by failing to immediately notify the Coast Guard of a condition that materially affected the seaworthiness of a barge under his control, a marine casualty. In keeping with the chronology of events, the discussion of the charges will begin with Charge I, followed by a discussion of Charge IV, Charge II, and then Charge III.

*ii. Charge I– Negligence*

In Charge I, the Coast Guard alleged Respondent was negligent in moving barge SL-119 on January 12, 2009 without first diagnosing and remedying the cause of the barge’s list, resulting in its sinking. For the violation alleged in Charge I (negligence), the minimum elements necessary to prove negligence under 46 CFR 5.29 requires the Coast Guard prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was acting under the authority of his license when the charged violation occurred (January 10 through 12, 2009); and
- (3) that Respondent either (1) committed an act which a reasonable and prudent person/mariner would not commit under the same circumstances; or (2) failed to perform an act which a reasonable and prudent person/mariner would have taken under the same circumstances.

As discussed in the jurisdiction section above, there is no dispute Respondent is the holder of a merchant mariner license and that he was acting under the authority of that license on January 10-12, 2009. (Tr. at 9). Therefore, the first two (2) elements listed above are found proved. The dispute to be determined in this case concerns the third element. The following analysis discusses whether Respondent's actions or omissions, leading up to the sinking of barge SL-119, were that which a reasonable and prudent person of the same station would have taken under the same circumstances. See 46 CFR 5.29.

On January 9, 2009, Respondent departed ANA shipyard on the Western Branch of the Elizabeth River and served as the master of the towing vessel JACQUELINE A. (Tr. at 216-17). The JACQUELINE A. was pushing two (2) barges, the SL-118 and the SL-119, enroute to Hopewell, Virginia. (Tr. at 217). At approximately 1830 on January 9, 2009, Respondent delivered the barges to the south-side of the loading pier at the Honeywell International Plant (Honeywell facility) in Hopewell, Virginia to be loaded with ammonium sulfate (fertilizer). (Gov't Ex. 11 at 1; Tr. at 220). On the morning of January 10, 2009, the loading of ammonium sulfate on the barges was completed. (Gov't Ex. 21; Tr. at 229). Shortly after loading was completed, barge SL-119 was observed to have developed a list. (Tr. at 99, 109, 121-22, 135-36).

After the barges SL-118 and SL-119 were loaded on January 10, 2009, the Honeywell facility informed Respondent they expected a new vessel to arrive at the south-side of loading pier. (Tr. at 232-33). Respondent moved barges SL-118 and SL-119 from the south-side of the loading pier to the north-side of the loading pier as directed by Honeywell personnel. (Id.). As noted above, the list of the barge SL-119 was noted and the efforts of Respondent to pump water off of the barge were observed. (Tr. at 121-24, 236-38). Upon an inspection to determine the source of the list, Respondent discovered approximately four (4) inches of water in the number four (4) compartment of the barge. (Tr. at 122, 237-39). Respondent testified he was able to

pump all the water out of the barge with a three-quarters (3/4) inch electric pump. (Id.). During the afternoon of January 10, 2009, Respondent discovered water in the number two (2) compartment of the barge. (Tr. at 240-41). Respondent used a two (2) inch electric pump to expel the water. (Id.). Sometime on Saturday, the Honeywell facility personnel became aware that barge SL-119 had a list. (Tr. at 150). By the evening of January 10, 2009, Respondent was concerned the water coming into the barge was greater than the capacity of the pumps to expel the water. (Tr. at 241-42). The SL-119 developed a severe list. (Id.). Respondent testified he spoke with Honeywell personnel about the need to offload the product from barge SL-119. (Tr. at 245). It is unclear whether unloading equipment was requested or when requests for assistance from Honeywell were made. (Tr. 138-139). However, the Honeywell facility apparently did not have equipment to offload the product from the barge. (Tr. at 117-18). Respondent testified that by the morning of January 11, 2009, the SL-119's deck was about level with the waterline. (Tr. at 246). Respondent was concerned with the stability of barge SL-119 and at approximately 0900 on January 11, 2009, pushed barge SL-119 from the Honeywell pier and grounded it. (Id.). Respondent grounded the barge on the rocky shoreline which was perpendicular to the loading pier at the Honeywell facility. (Tr. at 115-16, 248). The stern of the barge was pushed onto the shoreline approximately forty-five (45) feet from the pier and the bow of the barge remained tied against the pier. (Tr. at 250). It is unknown whether this grounding caused any damage to the hull of the barge.

Respondent testified that while the barge was grounded he continued to pump water out of the barge, however he was concerned with the level of freeboard of the barge. (Tr. at 250-52). Respondent asked Honeywell personnel if they had gasoline powered pumps and was told that Honeywell only had electric pumps. (Tr. at 132). Gasoline pumps may have a higher dewatering rate than an electric pump. (Tr. at 141). Respondent contacted Dave Bushy, the vice president of Commonwealth Pro-Dive Incorporated (hereinafter "Pro-Dive"). (Gov't Ex. 21; Tr.

at 170-71, 263-64). Respondent requested Mr. Bushy come to the Honeywell facility to inspect the barge for damage and to bring additional pumps. (Tr. at 171-72). Mr. Bushy was not able to send a crew to inspect the SL-119 until the morning of January 12, 2009. (Tr. at 172). Mr. Bushy was informed by his crew that, by the time they arrived, the barge had already sunk. (Id.). Respondent testified he had made arrangements for an excavation contractor to be at the Honeywell facility's loading pier at 0900 on January 12, 2009 to offload the product from the SL-119. (Tr. at 254-57). At approximately 0900 on January 12, 2009, Respondent pulled the barge from its moored and partially grounded position and pushed it against the loading pier. (Tr. at 256-60). The excavation contractor was not at the pier. (Tr. at 258-61). At approximately 0935 on January 12, 2009, barge SL-119 sank at the loading pier at the Honeywell facility. (Tr. at 261). Respondent did not contact the Coast Guard about the problems associated with the SL-119 at any time on January 10 or 11, 2009. Respondent contacted the Coast Guard regarding barge SL-119 when calling to notify that it had sunk at approximately 1000 on January 12, 2009. (Gov't Ex. 5, 6; Tr. at 32-33, 57-58, 81-84, 264-65).

Respondent contends in his post hearing brief that his action in moving barge SL-119 back to the Honeywell pier was not negligent and that the action was necessary because the barge was in "extremis." The assertion that barge SL-119 was in "extremis" and had to be moved at 0900 on January 12, 2009 to the position where it sank is not persuasive. Extremis is a doctrine applied in excusing orders or actions in a collision emergency where the situation was not caused by the actor's own negligence. Appeal Decision 2359 (WAINE) (1984); Appeal Decision (2101) (KELLOG) (1977); Griffin on Collision, (1949) p. 534-36 (when extremis rule is not applicable). There was no collision emergency in this matter and Respondent's claim that he had an immediate need to move the barge on the morning of January 12, 2009 is not supported by the evidence. Instead, the evidence supports a finding of negligence both directly

and alternatively by the application of the Pennsylvania Rule.<sup>4</sup> Both bases for finding negligence are explained below.

#### Evidence Presented at the Hearing Establishes Negligence

First, based on the evidence in the record as a whole, I find the Coast Guard has proven negligence in that (1) Respondent failed to take adequate measures to obtain assistance after deciding the condition of barge SL-119 required grounding for stability on January 11, 2009; and (2) actions in moving the SL-119 on January 12, 2009 were negligent under 46 CFR 5.29. Throughout his post hearing brief and during the hearing, Respondent contended that barge SL-119 was overloaded because of the fault of the Honeywell facility. Respondent provides some general maritime law analysis and asserts the fault of the Honeywell personnel in overloading the SL-119 was the reason for the incident and Respondent's actions were prudent in attempting to save the SL-119. (RPHB at 12-18).<sup>5</sup> Respondent's argument fails to address the distinction between negligence charged in a suspension and revocation proceeding under the standard stated in 46 CFR 5.29 and a civil action in admiralty to determine fault for liability and damages purposes. Suspension and revocation proceedings are remedial in nature and a finding of fault of another person or entity or comparative negligence of others is not a defense to negligence under 46 CFR 5.29. Appeal Decision (2639) (HAUCK) (2003); Appeal Decision 2261 (SAVOIE) (1981) (not necessary to determine fault or causation). Honeywell personnel did not necessarily agree with the characterization presented on behalf of Respondent. (Tr. at 150, 153-55). There is no conclusive evidence as to whether a pre-existing condition of the barge or overloading or

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<sup>4</sup> Under the Rule of *The Pennsylvania*, a party that fails to observe a safety regulation has the burden of showing "not merely that [its] fault might not have been one of the causes [of the loss], or that it probably was not, but that it could not have been." The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873). The finding below regarding Charge IV (violation of 46 CFR 4.05-1) requiring notice to the Coast Guard of the marine casualty immediately after addressing any safety concerns is the basis for the application of the Pennsylvania Rule.

<sup>5</sup> RPBH stands for Respondent's Post Hearing Brief which was submitted on June 30, 2009 and is entitled Proposed Findings of Fact and Conclusions of Law of the Defendant William Dea Ailsworth.

any combination of factors caused it to list.<sup>6</sup> Additionally, since Respondent did not wait for the Pro-Dive personnel to inspect the hull of the barge it is unknown what caused the SL-119 to take on water or whether the grounding made the condition any worse. However, even if Respondent's assertions that the Honeywell facility overloaded the SL 119 were considered to be fully accurate, contributory negligence or negligence of others is not a defense to the charge of negligence in suspension and revocation proceedings, which are remedial in nature. See Appeal Decision 2478 (DUPRE) (1988); See also Appeal Decision 2585 (COULON) (1997); Appeal Decision 2639 (HAUCK) supra. The only issue to be determined in this case is whether Respondent's actions were negligent under the standard provided in 46 CFR 5.29.

After barge SL-119 was loaded, it began to list. Respondent took action to dewater the barge with an electric pump after finding water in a compartment, however, as the problem with the barge SL-119 increased, Respondent intentionally grounded the barge. Respondent's action in partially grounding the barge on January 11, 2009, to maintain its stability, is considered within the range of actions that a person in a similar situation would take in keeping with 46 CFR 5.29.<sup>7</sup> Respondent's failure to take sufficient action to obtain assistance after intentionally grounding the barge SL-119 on January 11, 2009, before moving the barge on January 12, 2009 to the position where it sank, constitutes negligence under 46 CFR 5.29.

Respondent intentionally grounded barge SL 119 at approximately 0900 on January 11, 2009, and moored it in a stable position. The evidence in the record demonstrates that there was time to seek additional assistance before moving the barge back to the Honeywell pier the next day. Respondent clearly knew the barge had a leak and was not stable. After mooring the SL-119, Respondent requested a gasoline powered pump from the Honeywell facility; the

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<sup>6</sup> Government Exhibit 11 was admitted into evidence but is not given much weight since it documents the condition of the barge well after it sank. There was no testimony provided by a marine surveyor or other witness to explain how the materials show what damage may have existed prior to the sinking.

<sup>7</sup> E.g. Houma Well Service, Inc. v. Tug CAPT. O'BRIEN, 312 F.Supp 257 (E.D. LA 1970).

Honeywell facility had no gasoline pump. (Tr. at 132). At approximately noontime on January 11, 2009, Respondent contacted Mr. David Bushy of Pro-Dive and requested additional pumps and requested that divers inspect the barge. (Tr. at 171-72). Mr. Bushy informed Respondent they would be unable to get to the Honeywell facility until the morning of January 12, 2009. (Id.). However, prior to the arrival of Pro-Dive, Respondent directed the movement of barge SL-119, on the morning of January 12, 2009, from its grounded position to the pier at the Honeywell facility where it sank. (Tr. at 256-60). This action was taken by Respondent even though he knew the SL-119 had been taking on water, he had not obtained gas powered pumps, and with the knowledge that the equipment to offload the cargo from the barge was not present at the dock. I find a reasonable and prudent person with the knowledge and experience of the Respondent would not have moved the barge from its grounded position without first obtaining assistance in some form, including but not limited to contacting the Coast Guard for support and assistance from the Captain of the Port, Coast Guard Sector Hampton Roads or other Coast Guard entity; obtaining gas powered pumps that may have been able to pump out the compartments with water in them; waiting until a diver could arrive and assess the condition of the barge; and/or waiting for the offloading equipment to be present at the dock prior to moving the barge.

As noted above, Respondent's citation to a number of cases that apply general maritime law in admiralty for civil liability do not provide a valid defense.<sup>8</sup> To the extent that general maritime law is referenced, there is also case law which indicates that once aware of an unstable condition, a prudent mariner in charge of a tug and tow must take appropriate action or they may be found negligent. E.g. McDounough Marine Service, Inc. v. M/V ROYAL STREET, 465

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<sup>8</sup> While these cases are of some interest with respect to some standards of care in admiralty, causation and damages are not needed to prove a charge of negligence under 46 CFR 5.29; See Appeal Decision 2261 (SAVOIE)(1981).

F.Supp. 928 (E.D. LA 1979); Houma Well Service, Inc., v. Tug CAPT O'BRIEN, 312 F.Supp. 257 (E.D. LA 1970). In the absence of extreme weather or some other condition, seaworthy barges do not sink by themselves. Here, there is clear evidence that Respondent was aware the barge was listing and had been taking on water and was concerned with the problem of the stability of SL-119. (Tr. at 281; Findings of Fact 11-15, 17-18). He even took action to intentionally ground the barge to improve stability. Although he contacted a diver and attempted to obtain more pumps, he moved the barge without waiting for the Pro-Dive personnel to arrive with additional pumps and potentially dive and inspect or survey the hull of the barge and potentially help repair a leak. Additionally, Respondent provided no explanation on why he moved the barge if the offloading equipment was not already visibly present on the pier. There is no logical support to the argument by Respondent that the barge was in "extremis" and had to be moved before obtaining assistance. The barge was in sight of the pier in a stable position. (Tr. at 121-23, 131-33, 138). Respondent's action in moving the barge SL-119 from its stable position before determining whether a leak needed to be repaired or having gas powered pumps to dewater the barge was not an action that would have been taken by a reasonable and prudent person of the same station. Likewise, the failure to notify the Coast Guard and seek assistance from the Coast Guard is a failure to perform an act that a reasonable and prudent person of the same station would take. Respondent's actions were contrary to good seamanship and common sense. Appeal Decision 2302 (FRAPPIER) (1983). Therefore, based on the evidence in the record I find Charge I (negligence) is proven.

#### Presumptions of Negligence

At the end of the hearing the undersigned noted that no final determinations had been made and counsel were invited to consider whether some of the presumptions and doctrines related to finding negligence in admiralty would apply in this case. (Tr. at 296-99). It appeared

the doctrine of *res ipsa loquitor*<sup>9</sup> may apply, but the rule of The Oregon<sup>10</sup> or The Pennsylvania<sup>11</sup> may not. (Id.). As discussed above, without applying any of the legal doctrines relating to presumptions of negligence, I find there is sufficient proof to establish negligence under 46 CFR 5.29 in this case. Additionally, after reviewing the entire record and considering the post hearing briefs and applicable regulations and law, further analysis of the doctrines regarding presumptions of negligence was deemed warranted. Based on further review, I find that application of *res ipsa loquitor* is not ordinarily applied where there is direct proof of negligence and the Oregon Rule and does not apply in this case where the partial grounding of the barge was intentionally done to improve stability of the SL-119. However, under the specific facts and circumstances of this case, the Pennsylvania Rule may be applied as an alternative basis for finding negligence in this matter. While fault is not necessary to make a determination of negligence under 46 CFR 5.29, application of the Pennsylvania Rule to show that the sinking of the SL-119 and related damages was the fault of Respondent is a matter that may be considered in aggravation.

First, since the only grounding that occurred in this matter was intentional and made in order to address the concern of the stability of the barge, the presumption of negligence from The Oregon<sup>12</sup> and its progeny is not applicable. E.g. Houma Well Service, Inc. v. Tug CAPT. O'BRIEN, 312 F.Supp 257 (E.D. LA 1970).

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<sup>9</sup> Latin phrase meaning “the thing speaks for itself.” This doctrine may be applied to infer negligence from circumstantial evidence. It may be applied to create a rebuttable presumption of negligence on the part of a party who is in exclusive control of an instrumentality with regard to a mishap that does not ordinarily occur in the absence of negligence. Thomas Schoenbaum, Admiralty and Maritime Law § 12-3 at 773 (4th ed. 2001).

<sup>10</sup>158 U.S. 186 (1884).

<sup>11</sup> 86 U.S. (19 Wall.) 125, 136 (1873).

<sup>12</sup> “Federal courts have consistently applied the presumption of fault to find the navigator of a vessel involved in an allision to be negligent.” Appeal Decision 2594 (GOLDEN) (1997) (citing The Oregon, 158 U.S. 186 (1884)).

Second, while a seaworthy barge under the control of a tug should not sink in the absence of negligence, it would appear that the doctrine of *res ipsa loquitor*<sup>13</sup> is not necessary to prove negligence under the facts of this case. Barge SL-119 was under the control of Respondent when it sank, however, the facts in this matter demonstrated the SL-119 had been taking on water, began to list, and its stability was in question. There is no dispute Respondent was the person in control of barge SL-119 and that he knew of the condition of the barge, but he still moved the barge on January 12, 2009 without taking more precautions in regard to the stability of the barge. These facts are sufficient to demonstrate negligence under 46 CFR 5.29.

Third, although I find negligence has been proven directly, the Pennsylvania Rule is also applicable in this case regarding the underlying charge of negligence and as a matter to be considered in aggravation in regard to the sinking of the barge SL-119 at the Honeywell pier.

The application of the Pennsylvania Rule<sup>14</sup> is an available means to prove negligence in Coast Guard suspension and revocation cases. Appeal Decision 2412 (LOUVIERE) (1985). The Pennsylvania Rule is not limited to regulations or rules regarding collisions but may also be applied to violations of regulations intended to prevent the injury that actually occurred. United States v. Nassau Marine Corp., 778 F.2d 1111(5<sup>th</sup> Cir. 1985). In this case, the regulation that was violated provides that the master of a vessel shall provide immediate notice to the Coast Guard of a marine casualty that results in “[a]n occurrence materially and adversely affecting the vessel’s seaworthiness or fitness for service . . . .” 46 CFR 4.05-1(a)(4).

After a tragic incident arising from an allision with a railroad bridge that caused the derailment of the Amtrak Sunset Limited in September 1993, resulting in extensive injury and loss of life, this regulation was updated to clarify which marine casualties require immediate

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<sup>13</sup> See United States v. Nassau Marine Corp., 778 F.2d 1111 (5<sup>th</sup> Cir. 1985); United States v. Baycon Industries, Inc., 804 F.2d 630 (11<sup>th</sup> Cir. 1986).

<sup>14</sup> Under the Rule of *The Pennsylvania*, a party that fails to observe a safety regulation has the burden of showing “not merely that [its] fault might not have been one of the causes [of the loss], or that it probably was not, but that it could not have been.” The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873).

notice so prompt corrective or investigative efforts can be initiated. See 59 Fed. Reg. 39469-02 (August 3, 1994). The regulation was specifically updated to ensure immediate notice to the Coast Guard to avoid dangerous situations and provide the opportunity for a response. I find this rule is intended to apply to situations such as the condition of the SL-119 on January 11, 2009. Although the initial situation of the barge listing on January 10, 2009, may not have created the type of situation that triggers the reporting requirement, it is clear at the point Respondent deemed it necessary to take the action to ground the SL-119 at approximately 0900 on January 11, 2009 due to concerns over its stability; a notice under 46 CFR 4-05-1(a)(4) was required. No notice regarding the condition of the barge was provided to the Coast Guard until after the SL-119 had sunk. (Gov't Ex. 5, 6; Tr. at 264-65). Since the regulation is designed to require immediate notice to allow corrective measures to be taken, application of the Pennsylvania Rule would require Respondent to demonstrate his failure to comply with the regulation was not a cause of the negligent sinking of the barge. Here, the testimony of LT Burkett and LT Sheldon support the conclusion that had Respondent taken such action and notified the Coast Guard at approximately 0900 on January 11, 2009, the Coast Guard would have been in a position to provide or direct a response to address the stability of the barge SL-119 before it was moved to the pier where it sank at approximately 0930 on January 12, 2009. (Tr. at 74, 80-92).

Respondent attempts to minimize Respondent's failure to report the marine casualty by implying that a four (4) to six (6) hour water transit time, for a possible Coast Guard afloat unit to respond to the Honeywell facility from the Hampton Roads area, had some relevance and had Respondent reported the situation sooner it would have been for "investigating." That is not an accurate reflection of the evidence in the record. Instead, it was stated that assets used depended on the situation and could be either airborne or waterborne. (Tr. at 87-88). Additionally, just as the Pro-Dive personnel were able to travel by car to the Honeywell facility with pumps, the Coast Guard could have taken that same action or coordinated some other response. Moreover,

the barge sank at approximately 1000 on January 12, 2009, more than twenty-four (24) hours after Respondent grounded the barge. As discussed below, the grounding of the barge SL-119 at approximately 0900 on January 11, 2009 constituted a marine casualty requiring immediate notice under 46 CFR 4.05-1. Respondent failed to comply with a regulation that was intended to prevent such situations that happened to the SL-119. I find Respondent did not demonstrate a basis to rebut the application of the Pennsylvania Rule since there was no persuasive evidence that providing notice to the Coast Guard on January 11, 2009 would not have resulted in corrective action being initiated by the Coast Guard that could have prevented the sinking. Therefore, Respondent is also found negligent on that alternative basis. Even where not applied to establish negligence, the Pennsylvania Rule applies to demonstrate as a matter of aggravation that Respondent's negligent actions in this case caused the sinking of the barge SL-119 and resulting harm from the sinking.

*iii. Charge IV – Violation of Law or Regulation*

In Charge IV, the Coast Guard alleged Respondent committed a Violation of Law by failing to immediately notify the Coast Guard upon noticing an occurrence that materially and adversely affected barge SL-119's seaworthiness, in violation of 46 CFR 4.05-1. For the violation alleged in Charge IV, the Coast Guard must prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was acting under the authority of his license when the charged violation occurred (January 10, 2009);
- (3) that Respondent violated a law or regulation of the United States or of a State (here the regulation in question is 46 CFR 4.05-1).

As discussed in the jurisdiction section above, Respondent did not contest he is the holder of a merchant mariner license and was acting under the authority of that license on January 10, 11, and 12, 2009 while operating the towing vessel JACQUELINE A. and Barges SL-119 and SL-118. Therefore, the first two elements listed above are proved by the Answer. The disputed

issue concerns the third element. Whether Respondent violated 46 CFR 4.05-1 by failing to provide timely notice to the nearest Coast Guard Office of a marine casualty, specifically the listing condition of barge SL-119 which materially and adversely affected barge SL-119's seaworthiness?

In accordance with 46 CFR 4.05-1(a), immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge of a vessel shall notify the nearest Coast Guard Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty. The regulation provides a listing of what a marine casualty may consist of including:

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 of the criterion of paragraphs (a)(3) through (8);  
46 CFR 4.05-1(a)(2),

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, life-saving equipment, auxiliary power-generating equipment, or bilge pumping systems;  
46 CFR 4.05-1(a)(4),

In this case, barge SL-119 was loaded with ammonium sulfate at the Honeywell facility on January 10, 2009. Shortly after being loaded, barge SL-119 was observed to have developed a list. (Tr. at 99, 109, 135-36). Actions were taken by Respondent, first to use a pump to dewater compartments that he found had water in them and then to ground the barge for stability.

On its face the regulation clearly places a requirement for the master or person in charge of a vessel to provide notice to the nearest Coast Guard Office of a marine casualty. The question here is (1) at what point did the incident become a marine casualty such that notice pursuant to 46 CFR 4.05-1(a) was required; and (2) if notice to the Coast Guard was required, was the notice provided in keeping with the regulation. There was no dispute as to the facts that the SL-119 was in Respondent's charge and that the SL-119 had developed a list upon

completion of loading. Respondent's initial actions on January 10, 2009, to attempt to address the list after the loading was completed, were not unreasonable and at that point the situation had not yet developed to the point of constituting a marine casualty under 46 CFR Part 4.

However, the evidence shows that by Saturday evening, January 10, 2009, barge SL-119 had a severe list. (Tr. at 150). On Sunday morning January 11, 2009 the barge was observed to have been grounded. (Tr. at 138). Respondent testified that by Sunday morning January 11, 2009, he believed the water coming into the barge was greater than the capacity of the pumps he had to expel the water from SL-119. (Tr. at 241-246). At approximately 0900 on the morning of January 11, 2009, Respondent testified he pushed barge SL-119 aground because the dewatering pumps were not keeping up with the leakage. (Id.).

Based on the evidence in the record as a whole, I find the condition of the barge reflected by Respondent's action to ground it at approximately 0900 January 11, 2009, constituted a marine casualty under 46 CFR 4.05-1(a)(4)<sup>15</sup> requiring Respondent, as master of the JACQUELINE A. and operator of the SL-119, to notify the Coast Guard of the situation immediately after addressing any safety concerns. Once the barge was moored in a stable position there is no evidence of any safety concerns that would need to be addressed before contacting the Coast Guard as required by the regulations. Respondent testified at the hearing he knew the water entering the barge was a serious problem, but he did not call the Coast Guard regarding the condition of the barge SL-119. (Tr. at 282-86). Respondent did take action around noontime on January 11, 2009 to contact a diver, Mr. David Bushy, of Pro-Dive to provide assistance. (Tr. 171-173, 264). He told Mr. Bushey the barge was taking on water and he wanted Mr. Bushy to take a look at the barge and see if they could repair it. (Tr. 172-73). Mr.

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<sup>15</sup> 46 CFR 4.05-1 contains a listing of matters considered to be marine casualties including: (a)(4) "An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service." It also includes an intended grounding in keeping with 46 CFR 4.05-1(a)(2).

Bushy sent a crew with pumps at approximately 0700 on the morning of January 12, 2009. (Id.).

Respondent did not call or otherwise provide notice to the Coast Guard of the condition of the Barge SL 119 at any time on January 11, 2009. It was not until January 12, 2009, after the sinking of the barge, that Respondent contacted the Coast Guard regarding the SL-119. (Gov't Ex. 5, 6; Tr. at 32-33, 57-58, 81-84, 264-65).

At that point it was obviously too late for the Coast Guard to provide any assistance of any variety to prevent the sinking of the barge. The intent of the regulation (as noted in the 1994 changes) is to require persons involved in a marine casualty to provide notice to the Coast Guard immediately after any safety concerns are addressed when there may still be time to take action. See 59 Fed.Reg. 39469-02 (1994).<sup>16</sup> The evidence in the record shows Respondent did not provide notice to the Coast Guard regarding the condition of the SL-119 for more than twenty-four (24) hours after he grounded it for stability. In view of the facts as discussed above I find Charge IV is proven.

*iv. Charge II – Violation of Law or Regulation*

In Charge II, the Coast Guard alleged Respondent committed a Violation of Law by failing to submit a CG-2692 form within five (5) days of a marine casualty, in violation of 46 CFR 4.05-10(a). In order to prove the violation alleged in Charges II, the Coast Guard must prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was acting under the authority of his license when the charged violation occurred (January 12, 2009); and
- (3) that Respondent violated a law or regulation of the United States or of a State (here the regulation in question is 46 CFR 4.05-10(a)).

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<sup>16</sup> Charge IV (failure to provide notice) does not require proof that any specific response action would be taken by the Coast Guard, however, there was some evidence presented that contacting the Coast Guard in accordance with 46 CFR 4.05-1 may have resulted in obtaining timely assistance. (Tr. at 74, 82).

As discussed in the jurisdiction section above, the first two (2) elements listed above were not disputed and are found proved by the Answer. The facts regarding the late filing of the form are not in dispute either. In his post hearing brief Respondent admits he filed his initial CG Form 2692 six (6) days late but contends the late filing was “de minimus.”

In accordance with 46 CFR 4.05-10(a), the owner, agent, master, operator or person in charge of any vessel involved in a marine casualty shall file a written report to the Coast Guard within five (5) days of the incident. This report is in addition to the oral report that provides immediate notice of a marine casualty to the Coast Guard. See 46 CFR 4.05-(1)(a). In this case, barge SL-119 sank on January 12, 2009 while under Respondent’s control. (Answer). On January 23, 2009, Respondent submitted a Report for Marine Accident, Injury or Death report (form CG-2692) concerning the January 12, 2009 sinking of barge SL-119. (Gov’t Ex. 1). This report was filed eleven (11) days after the sinking of the SL-119, this was six (6) days after the five (5) day deadline to file the report. This report was incomplete and on February 26, 2009, Respondent filed an updated Report for Marine Accident, Injury or Death report (form CG-2692) regarding the sinking of the SL-119. (Gov’t Ex. 2). These facts are not in dispute. The evidence establishes Respondent failed to timely file his report to the Coast Guard concerning the sinking of the barge SL-119, in violation of 46 CFR 4.05-10(a). Charge II is proven.

*v. Charge III – Misconduct*

In Charge III, the Coast Guard alleged Respondent committed an act of misconduct by failing to comply with a Coast Guard issued subpoena issued on February 24, 2009. In order to prove the violation alleged in Charges III, the Coast Guard must prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine document or license;
- (2) that Respondent was acting under the authority of his license when the charged violation occurred (February 27, 2009);

(3) that Respondent committed an act of misconduct in failing to comply with the subpoena issued by the Coast Guard in violation of 46 CFR 5.27.

As discussed in the jurisdiction section above, there is no dispute over jurisdiction and the first two (2) elements listed above are found proved.<sup>17</sup> The dispositive issue concerns the third element. Did Respondent commit an act of misconduct in failing to comply with the subpoena issued by the Coast Guard on February 24, 2009?

On February 24, 2009, the Coast Guard duly served a subpoena on Respondent. (Gov't Ex. 3). The subpoena commanded Respondent to appear on February 27, 2009 at the Norfolk Federal Building. (Id.). Respondent failed to comply with the subpoena and took no prior action seeking to quash the subpoena. (Tr. at 60-64). Arrangements were made with Respondent's counsel to reschedule the appearance set forth in the subpoena and a rescheduled date of March 4, 2009 was agreed upon. (Id.). However, Respondent failed to appear at the rescheduled date as well. (Id.). While it was referenced during the hearing, there was no direct testimony or introduction of evidence that established why Respondent failed to comply with the subpoena. In Respondent's post hearing brief, counsel asserted Respondent did not comply with the subpoena because counsel was unable to be present. (RPHB at 21-22). However, this is not a valid basis to excuse the failure to comply with a subpoena. If a delay were desired or justified, Respondent could have submitted a motion to quash the subpoena and/or submitted some other documentation explaining the reasons for his inability to comply with the subpoena as directed.

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<sup>17</sup> Pursuant to 46 CFR 5.57(b), a person is considered to be acting under the authority of their license while engaged in official matters regarding that license. This includes the suspension and revocation process (an official matter regarding Coast Guard issued licenses). Coast Guard investigating officers are provided the authority to issue subpoenas. 46 CFR 5.301(b). A refusal to comply with a subpoena during the suspension and revocation process is therefore an occurrence where Respondent was acting under the authority of his license.

Although there is a question as to when counsel actually entered an appearance in this matter, even if one assumes Respondent's allegations that his counsel could not attend is accurate, that does not provide an excuse for failure to appear. Mere existence of a counsel in the case does not make a subpoena somehow invalid.

The Coast Guard may issue subpoenas under two (2) regulatory bases. For investigations conducted under 46 CFR Part 4, subpoenas may be issued in accordance with 46 CFR 4.07-5. Additionally, for marine investigations under Part 5 subpoenas may be issued in accordance with 46 CFR 5.103 and 5.301. Caselaw regarding enforcement of Part 5 subpoenas indicates that misconduct issues regarding Part 5 subpoenas arise when these subpoenas are used for requiring production of information in discovery and attendance at a hearing, rather than to appear and provide information for an investigation. It is also noted that admissions made by a respondent during a 46 CFR part 4 investigation may not normally be used in a Suspension and Revocation hearing in accordance with 33 CFR 20.1313 (except for impeachment). If the materials requested in the subpoena were needed in discovery there is a separate process for compelling discovery. See 33 CFR 20.607. There is also a process to enforce the failure to comply with a subpoena contained in the regulations. See 5 CFR 5.307. An application may be made through the U.S. District Court to issue an order to compel compliance with a subpoena; that process was apparently not followed here. See Appeal Decision (2681) (ROGERS) (2008). While ignoring the subpoena is not condoned, all of the cases finding misconduct proven, that were cited by the Coast Guard, involve 46 CFR Part 5 subpoenas for compelling attendance of a witness (or production) for a hearing – not for investigations or discovery. See Appeal Decision 557 (HOYT) (1952); see also Appeal Decision 592 (DELK) (1952); see also Appeal Decision 2063 (CORNELIUS) (1976). There were no motions in this matter submitted by the Coast Guard to seek enforcement of discovery or to compel production of any of the information or matters sought in the subpoena. On June 9, 2009, Respondent appeared at the hearing and testified on

his own behalf. While failure to comply with a subpoena issued under 46 CFR Part 5 (and 46 USC 7705) may in some instances be determined to be misconduct, on the limited facts presented in this particular matter, including the absence of efforts to enforce the subpoena, it appears the Coast Guard has not fully met its burden of proof for showing misconduct in this case. I find the evidence presented regarding this matter is not sufficient and the Charge of Misconduct is not proven.

#### **IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. §§ 7703-7704, 46 CFR Part 5, and 33 CFR Part 20.
2. Respondent failed to notify the Coast Guard of the condition of the barge SL-119 on January 11, 2009 and failed to wait for assistance of the personnel from Pro-Dive, before moving barge SL-119 on January 12, 2009. Moving the barge SL-119 on January 12, 2009 without first contacting the Coast Guard or obtaining assistance from Pro Dive is an action which a reasonable and prudent person of the same station, under the same circumstances would not have done. Therefore the allegations in Charge I are found **PROVED** by a preponderance of the reliable and credible evidence including Government Exhibits 5 and 6 and testimony in the record considered as a whole.
3. Respondent failed to file a CG-2692 Report of Marine Casualty, Injury or Death within five (5) days of the sinking of the SL-119, as required by 46 CFR 4.05-10(a). Therefore, the allegations in Charge II, "Violation of law or regulation," are found **PROVED** by a preponderance of the reliable and credible evidence including Government Exhibits 1 and 2 and testimony in the record considered as a whole.

4. Respondent did not appear at the Norfolk Federal Building as directed by a subpoena issued by the Coast Guard on February 24, 2009, however Respondent did appear at the hearing on June 9, 2009, testified on his own behalf, and complied with discovery requests. In keeping with the discussion above, the allegations in Count III, “Misconduct,” against Respondent are found **NOT PROVED**.
5. The condition of the SL-119 at approximately 0900 on January 11, 2009, that resulted in Respondent mooring the barge in a partially grounded position, is an occurrence that constituted a marine casualty requiring the vessel operator to provide immediate notice to the Coast Guard under 46 CFR 4.05-1(a)(2) and (a)(4).
6. Respondent did not provide any notice to the Coast Guard regarding the condition of the barge SL-119 until approximately 1000 on January 12, 2009 after the barge sank. There was no evidence of safety concerns after the SL-119 was moored at approximately 0900 on January 11, 2009 that prevented immediate notice to the Coast Guard of the marine casualty situation. Therefore, the allegations in Charge IV, “Violation of law or regulation,” against Respondent are found **PROVED** but modified to occurring on January 11, 2009 by a preponderance of the reliable and credible evidence including Government Exhibits 5 and 6 and testimony in the record considered as a whole.

#### **V. SANCTION**

It is the nature of this administrative proceeding to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 2294 (TITTONIS) (1983). These proceedings are remedial, not penal in nature, and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5.

In this case, the Coast Guard seeks revocation based on the combination of the charged offenses and contends Respondent demonstrated an uncooperative attitude which presents a risk of a more serious casualty in the future along with the aggravating factors presented in this matter. Respondent contested the charges but at the end of Respondent's Post Hearing Brief acknowledges that submission of the CG-2692 form was six (6) days late but argues that such late submission was a de minimus violation and should not form the basis for license suspension or revocation.

As a result of the preponderance of evidence in the entire record the undersigned found that Charges I, II and IV are proven. All of the evidence presented regarding those charges is also considered with regard to determining a sanction. Additionally, the Coast Guard presented matters in aggravation in support of the proposed sanction of revocation. I ruled during the hearing that some of the matters presented were limited to consideration in aggravation or mitigation and some matters were considered not relevant. In keeping with administrative practice, those determinations are not final until the Decision and Order is issued. The Coast Guard argued in its post hearing brief that various matters are relevant and should be considering with respect to determining a sanction. Those matters are addressed as follows.

Government Exhibit 11 (marine survey of the barge SL-119 after it was refloated) was offered by the Coast Guard and objected to by Respondent as not being relevant. (Tr. at 35-38). The preliminary ruling at the hearing was that Government Exhibit 11 may not be relevant to the issue of negligence because it does not present clear evidence of the condition of the barge prior to sinking. While it does not present anything of significant weight for the merits of the negligence charge in this matter, it is admitted for the limited purpose of showing damage to the barge as evidence in aggravation and to impeach the Respondent's assertions that the problem with the barge was caused only by the alleged overloading of the barge at the Honeywell facility.

At the hearing the Coast Guard offered Government Exhibit 12 (transcript of driver history record). Respondent's counsel objected to this evidence. The Coast Guard contends it is relevant for consideration under 33 CFR 20.1315. At the hearing it was noted there was no charge against Respondent for an offense under 46 USC 7703(3), so as a preliminary ruling it was not admitted into evidence. (Tr. at 39-40). The Coast Guard also presented Government Exhibit 13 (Virginia DMV Compliance) and the same objection and ruling followed. (Tr. at 41). Since neither of these documents is a final judgment of conviction in Federal or State court and neither document fits within any of the other matters listed in 33 CFR 20.1315, I find they are not proper evidence of aggravation under 33 CR 20.1315 and will not be considered for any purpose. Whether Exhibits 12 and 13 or other information might be used in determining if the Coast Guard should renew Respondent's license is not at issue in this case. The Coast Guard also offered Government Exhibit 15, which includes documentation of a Conviction for Reckless Driving. (Tr. at 41-42). Respondent was not charged with this under 46 USC 7703(3)<sup>18</sup> but this exhibit fits within 33 CFR 20.1315(a)(4) by presenting evidence of a judgment of conviction for reckless driving. Therefore it will be considered for that limited purpose in aggravation.

The Coast Guard offered Government Exhibit 18 (statement of LT Jon Lane, USCG) and LT Lane also testified by telephone during the hearing regarding the substance of Government Exhibit 18 and was subject to cross examination. This evidence is considered for the limited purposes of showing Respondent's knowledge of the requirements for reporting a marine casualty under 46 CFR Part 4. Since the Coast Guard did not pursue charges against Respondent for this matter, it is not considered as a prior record and it is not admitted for consideration as evidence with regard to the charge of negligence. However, since LT Lane testified to a

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<sup>18</sup> 49 U.S.C. 30304(a)(3)(B) includes reckless driving.

conversation with Respondent regarding the reporting requirements, it is admitted and considered with regard to Charges II and IV.

As matters in support of mitigation, Respondent submitted Exhibits A, B, C and D and his own testimony at the hearing in contesting the Charges and has argued that any delay in submitting the written notice of marine casualty (CG 2692) was “de minimus.”

Respondent is an experienced mariner with over twenty (20) years of experience. (Tr. at 280). Respondent took some actions in regard to the unstable condition of the barge and argued the fault for the situation is the result of the alleged negligent overloading of the barge by the Honeywell facility. However, negligence of others is not a defense and the half-measures taken reflect poor judgment and a lack of understanding of the obligation to provide notice to the Coast Guard. While barge SL-119 may have been loaded with more product than desired, there is no conclusive evidence that that is the sole cause of the sinking of the barge. Respondent’s testimony is self-serving and not credible with respect to claims that he was unable to get more assistance. Respondent’s failure to wait for the divers to examine the barge prevented finding out whether there were other problems with the barge that could have caused the leak and listing problems, including additional leaking from any damage incurred by grounding the barge. Respondent’s effort in attempting to blame Honeywell for the entire problem ignores his own negligence and does not explain his failure to comply with the regulations requiring notice to the Coast Guard. Whether the barge was overloaded or not, the facts indicate the sinking could have been avoided by contacting the Coast Guard or by following through with the request for assistance from Pro Dive. Additionally, the Coast Guard presented evidence in aggravation to show the Honeywell facility incurred damages as a result of the sinking of Barge SL-119 which prevented completion of dredging operations. (Tr. 159-66; Gov’t Ex. 20). The damage to barge SL-119 is documented by Government Exhibit 11. The Coast Guard also presented evidence

that the discharge of the cargo into the navigable waters of the United States constituted environmental harm. (Tr. 178-189).

Following the administrative hearing on June 9, 2009, Respondent was allowed to retain his MML. There are three (3) violations proven in this matter. The suggested range of orders contained in 46 CFR Part 5 (table 5.569) indicates a potential sanction of 2-6 months suspension for negligence. The table also includes a possible range of suspension of 12-24 months for a violation of a regulation using an example recommendation for failure to comply with drug or alcohol testing, so there is no specific guidance for the violations alleged in Charge II and IV.

It is within the duties of the undersigned to order any of a variety of sanctions. See 46 CFR 5.569; see also Appeal Decision 2569 (TAYLOR) (1995); see also Appeal Decision 2680 (MCCARTY)(2006). However, the undersigned is not bound by 46 CFR 5.569 or the average order table. (Id.). Consideration of mitigating or aggravating factors and evidence may justify a lower or higher sanction than the range suggested in the average order table. 46 CFR 5.569(d). Although the violations arise from the same marine casualty, they are separate offenses and required proof of separate elements. Additionally, there is evidence that in addition to being bound to know the law and regulations as a licensed mariner, Respondent knew of his obligation to immediately notify the Coast Guard of a marine casualty and disregarded this obligation until after the barge sank and the situation could not be ignored. This raises a serious question of his fitness to hold a Coast Guard license.

In this case the damage caused through the sinking of the barge, discharge of its cargo into the river, and impact on the Honeywell facility, along with Respondent's failure to take action to notify the Coast Guard for assistance, presents substantial aggravation evidence. The evidence of a reckless driving conviction presented under 33 CFR 20.1315 shows further lack of judgment. The sinking of barge SL-119 resulted in significant property damage rather than the extensive loss of life in the Amtrak Ltd. Incident, but the serious nature of failing to provide

timely notice of a marine casualty to the Coast Guard to provide an opportunity for a response cannot be minimized. In addition to the facts and circumstances surrounding the three (3) charged violations that were proven, Respondent has also shown a pattern of non-compliance with legal obligations. Even though the charge of misconduct was found not proven under the limited circumstances of this case, the facts show Respondent failed to appear twice as directed by a subpoena. Additionally, the evidence shows he was clearly aware of the requirement to provide notice under 46 CFR 4.05-1 from his discussion with LT Lane. While the negligence that resulted in the sinking of the barge along with the aggravation evidence showing extensive damage to the barge and the impact on the Honeywell facility caused by the sinking as discussed above justifies a substantial suspension, the additional violations regarding a knowing failure to timely report a marine casualty presents a critical concern for maritime safety. The 1994 change to the regulations highlighted the importance of the immediate notice requirement to provide an opportunity for a response to marine casualties. In view of the record as a whole, including all of the testimony and the exhibits admitted at the hearing, the evidence establishes that in keeping with the interests of maritime safety as provided in 46 CFR 5.5, the appropriate sanction in this matter is that Respondent's mariner credentials shall be REVOKED.

WHEREFORE,

**VI. ORDER**

**IT IS HEREBY ORDERED** that the Merchant Mariner's License and all other credentials issued by the U.S. Coast Guard to William Dea Ailsworth are **REVOKED**.

**IT IS HEREBY FURTHER ORDERED THAT** that Respondent must immediately surrender your Merchant Mariner License and any other Coast Guard issued credentials to the Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, VA 23510. If you knowingly continue to use your documents, you may be subject to criminal prosecution.

**PLEASE TAKE NOTICE** that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004.

(Attachment C).

Done and dated August 31, 2009  
At Norfolk, VA

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**Michael J Devine**  
**US Coast Guard Administrative Law Judge**

Date: August 31, 2009

**VII. ATTACHMENT A****WITNESS AND EXHIBIT LISTS****WITNESS LISTS****COAST GUARD WITNESS**

Gov't Witness 1	LT Patrick Burkett
Gov't Witness 2	LTJG Saladin Shelton
Gov't Witness 3	Sharon Hayes
Gov't Witness 4	Arthur Dean
Gov't Witness 5	Herman Schlimmer
Gov't Witness 6	Robert Strickland
Gov't Witness 7	David P. Bushey
Gov't Witness 8	Kyle Ivar Winter
Gov't Witness 9	LT Jon Lane

**RESPONDENT WITNESS**

Resp't Witness 1	William Dea Ailsworth
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**EXHIBIT LIST****COAST GUARD EXHIBITS**

Gov't Ex. 1	A copy of the CG-2692 submitted on 1/23/09 by Mr. Ailsworth.
Gov't Ex. 2	A copy of CG-2692 submitted on 2/26/09 by Mr. Ailsworth.
Gov't Ex. 3	A copy of the Subpoena that was served to Mr. Ailsworth on 2/24/09.
Gov't Ex. 4	A copy of the Norfolk Federal Building, Suite 700 visitors log from 2/23/09 to 3/10/09.

- Gov't Ex. 5 A copy of the National Response Center Incident report # 894590.
- Gov't Ex. 6 A copy of a spreadsheet exported from MISLE that shows what notifications were made to the Sector Hampton Roads Command Center from 1/10/09 to 1/12/09.
- Gov't Ex. 7 Withdrawn.
- Gov't Ex. 8 Withdrawn.
- Gov't Ex. 9 Withdrawn.
- Gov't Ex. 10 Withdrawn.
- Gov't Ex. 11 A copy of the Survey Report No. BAL-4200/CIK for the SL-119 requested by ACE Insurance.
- Gov't Ex. 12 Not Admitted.
- Gov't Ex. 13 Not Admitted.
- Gov't Ex. 14 Withdrawn.
- Gov't Ex. 15 Admitted for limited purpose.
- Gov't Ex. 16 Withdrawn.
- Gov't Ex. 17 Withdrawn.
- Gov't Ex. 18 A copy of LTJG John Lane's statement regarding a previous marine casualty that took place on 11/11/04 involving the JACQUILINE A and Mr. William Ailsworth.
- Gov't Ex. 19 Withdrawn.
- Gov't Ex. 20 A statement from Honeywell regarding costs and inconvenience incurred by Honeywell due to the sunken SL-119.
- Gov't Ex. 21 Joint Stipulations

**OFFICIAL NOTICE AT THE REQUEST OF THE COAST GUARD  
OF COMMANDANT DECISIONS ON APPEAL**

1. Appeal Decision 2597 (TIMMEL) (1998)
2. Appeal Decision 557 (HOYT) (1952)
3. Appeal Decision 592 (DELK) (1952)
4. Appeal Decision 2063 (CORNELIUS) (1976)
5. Appeal Decision 2639 (HAUCK) (2003)
6. Appeal Decision 2520 (DAVIS) (1991)
7. Appeal Decision 2321 (HARRIS) (1983)

**RESPONDENT EXHIBITS**

- |              |                             |
|--------------|-----------------------------|
| Resp't Ex. A | Marine Operations Log Sheet |
| Resp't Ex. B | Tonnage document            |
| Resp't Ex. C | Repair record package       |
| Resp't Ex. D | Sea-Land accounting report  |

## **VIII. ATTACHMENT B**

### **RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **a. COAST GUARD'S PROPOSED FINDINGS OF FACT:**

##### **Jurisdictional Facts**

1. William D. Ailsworth ("Respondent"), under the counsel of Michael L. Donner, Sr., Esq, admitted in the Answer to the Second Amended Complaint of *USCG v. William D. Ailsworth*, Docket Number 2009-0085, dated May 19, 2009, Jurisdictional Allegations 1-4. The admitted allegations include: (1) that the Respondent's address is P.O. Box 217, Deltaville, VA 23043; (2) that the Respondent holds Merchant Mariner's License (MML)1108442; and (3) that the Respondent was acting under the authority of MML 1108442, on January 10, 2009, while serving as Master aboard the vessel JACQUELINE A as required by law or regulation. The applicable law or regulation, 46 C.F.R. 15.610 and 46 U.S.C. 8904, require that a towing vessel that is at least 26 feet be operated by a licensed master. Complaint dtd April 28, 2009 for Docket # 2009-0085.  
**ACCEPTED**, as provided in the Decision and Order.
  
2. Respondent did not specifically admit or deny, in the Answer dated May 9, 2009, Jurisdictional Allegation 5, that the Respondent acted under the authority of MML 1108442 on February 27, 2009, by serving as Master aboard the JACQUELINE A as required by law or regulation. The applicable regulation is 46 C.F.R. 5.57(b) which states that a person is considered to be acting under the authority of the license while engaged in official matters regarding the license. Mr. William D. Ailsworth was engaged in official matters on February 27, 2009, in that he was commanded to appear at the Norfolk Federal Building, Suite 700, Norfolk, VA 23510 on that day. During discussion of preliminary matters at the hearing, Respondent, admitted jurisdictional allegation 5. Complaint dtd April 28, 2009 for Docket # 2009-0085, (Tr. at 9).  
**ACCEPTED**, as provided in the Decision and Order.

##### **Substantive Facts**

3. Respondent, admitted in the Answer to the Second Amended Complaint of *USCG v. William D. Ailsworth*, Docket Number 2009-0085, dated May 19, 2009, Factual Allegations – Negligence 1,2,3,5 and denied 4.  
**ACCEPTED**, as provided in the Decision and Order. The Respondent contested allegation 4 regarding negligence on the merits.

4. On January 12, 2009, the Respondent took the beached SL-119 in tow, as witnessed by Ms. Sharon Hayes, a Class A Operator at Honeywell facility, and pulled the SL-119 off of the beach at the Honeywell facility in Hopewell, VA. (Tr. at 101).  
**ACCEPTED**, as provided in the Decision and Order.
  
5. The SL-119 was the responsibility of Mr. William D. Ailsworth, after loading. (Tr.at 156).  
**NEITHER ACCEPTED NOR REJECTED**, as provided in the Decision and Order.
  
6. On January 10, 2009, there was a noticeable list of the SL-119. (Tr. at 124).  
**ACCEPTED**, as provided in the Decision and Order.
  
7. The respondent, William D. Ailsworth was aware of the compromised seaworthiness of the SL-119 (Tr. at 132, 172, 281, 282, 285, 287)  
**NEITHER ACCEPTED NOR REJECTED**. The basis for findings on the charges of negligence and violation of law or regulations are discussed in the Decision and Order.
  
8. The respondent, William D. Ailsworth chose to move the SL-119 from its stable beached position without any outside recommendations. (Tr. at 147, 161, 165, 287)  
**NEITHER ACCEPTED NOR REJECTED**. The basis for findings on the charges of negligence and violation of law or regulations are discussed in the Decision and Order.
  
9. On January 12, 2009, the Respondent failed to diagnose or remedy the cause of listing prior to pulling the barge off the beach. (Tr. at 172, 281, 285).  
**ACCEPTED**, as provided in the Decision and Order.
  
10. Respondent, admitted in the Answer to the Second Amended Complaint of *USCG v. William D. Ailsworth*, Docket Number 2009-0085, dated May 19, 2009, Factual Allegations – Violation of law or regulation 1, 3 and denied 2.  
**ACCEPTED**, as provided in the Decision and Order.

11. The SL-119 sank at the Honeywell facility in Hopewell, VA on January 12, 2009 while under the direct control of Respondent, the Master of the towing vessel, JACQUELINE A. Answer dtd May 19, 2009 for Docket # 2009-0085.  
**ACCEPTED**, as provided in the Decision and Order.
  
12. 46 C.F.R. 4.05-10(a) requires that the owner, agent, master operator or person in charge file a written report within 5 days of any marine casualty required to be reported under 46 C.F.R. 4.05-1. The flooding of the SL-119 was an occurrence that materially and adversely affected the vessel's seaworthiness or fitness for route and is required to be reported under 46 C.F.R. 4.05-1.  
**ACCEPTED**, as provided in the Decision and Order.
  
13. No written report was received of the flooding or sinking of the SL-119 until January 23, 2009, 11 days after the sinking of the SL-119, when Respondent submitted an incomplete Report of Marine Accident, Injury or Death, CG-2692, to Sector Hampton Roads, Investigations Division. This report was signed and dated on January 23, 2009 by Mr. William D. Ailsworth. CG Ex. 1.  
**ACCEPTED**, as provided in the Decision and Order.
  
14. The following blocks of the CG-2692 submitted by Respondent on January 23, 2009 were incomplete in that no information was entered in to these blocks: Section I General Information, blocks 25(a)-(d) and Section IV Description of Casualty, blocks 44, 45 and 46. CG Ex. 1.  
**NEITHER ACCEPTED NOR REJECTED.** The basis for findings on the charges of violation of law or regulations are discussed in the Decision and Order.
  
15. The Respondent, under the counsel of Michael L. Donner, Sr., Esq, submitted a completed CG-2692, Report of Marine Casualty, Injury or Death on January 26, 2009, 14 days after the sinking of the SL-119. CG Ex. 2.  
**NEITHER ACCEPTED NOR REJECTED.** The basis for findings on the charges of violation of law or regulations are discussed in the Decision and Order.

16. The Respondent, under the counsel of Michael L. Donner, Sr., Esq, admitted in the Answer to the Second Amended Complaint of *USCG v. William D. Ailsworth*, Docket Number 2009-0085, dated May 19, 2009, Factual Allegations – Misconduct 1,2 and denied 3, 4.  
**ACCEPTED**, as provided in the Decision and Order.
  
17. A subpoena was duly issued by LTJG Maria Wiener, a designated Investigating Officer, and signed by the Respondent on February 24, 2009. The subpoena commanded Respondent to appear at the Norfolk Federal Building, 200 Granby Street, Suite 700, Norfolk, VA, on Friday, February 27, 2009 at 10:00 a.m. Respondent was also commanded to bring MML 1108442 and other documents pertaining to the sinking of the SL-119 on January 12, 2009. CG Ex. 3.  
**ACCEPTED IN PART**, as provided in the Decision and Order.
  
18. Respondent failed to appear on February 27, 2009 in accordance with the subpoena issued on February 24, 2009. (Tr. at 60, 286).  
**ACCEPTED IN PART**, as provided in the Decision and Order.
  
19. A verbal arrangement was made between LTJG Maria Wiener and Mr. Michael Donner to change the date of meeting to March 4, 2009, after Respondent failed to appear on February 27, 2009 in accordance with the issued subpoena. (Tr. at 61,62).  
**ACCEPTED IN PART**, as provided in the Decision and Order.
  
20. Respondent failed to appear on March 4, 2009 in accordance with the phone conversation with LTJG Maria Wiener that adjusted the subpoena date. (Tr. at 62).  
**ACCEPTED IN PART**, as provided in the Decision and Order.
  
21. The Respondent, under the counsel of Michael L. Donner, Sr., Esq, admitted in the Answer to the Second Amended Complaint of *USCG v. William D. Ailsworth*, Docket Number 2009-0085, dated May 19, 2009, Factual Allegations – Violation of law or regulation 1 and denied 2.  
**ACCEPTED**, as provided in the Decision and Order.

22. Respondent knew of the SL-119's compromised seaworthiness, as he recognized a starboard list of the vessel and pumped water out of flooding voids on January 10, 2009. (Tr. at 238). **NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.
23. The flooding of the SL-119 was an occurrence that materially and adversely affected the vessel's seaworthiness or fitness for route and is required to be reported under 46 C.F.R. 4.05-1 immediately after addressing resultant safety concerns. **ACCEPTED**, as provided in the Decision and Order.
24. Respondent did not make any notifications of the SL-119's compromised seaworthiness until after it sank on January 12, 2009, 2 days after the Respondent first recognized the compromised seaworthiness. CG Ex. 5, (Tr. at 81, 84). **ACCEPTED**, as provided in the Decision and Order.

#### Facts in Aggravation

25. Report No. BAL – 4200/CIK shows the poor material condition of the SL-119. CG Ex. 11 **ACCEPTED IN PART.** Limited use of this exhibit is addressed in the Decision and Order.
26. Verbal testimony and written statement from LT Jon Lane, the investigating officer for the marine casualty investigation conducted on the grounding of the SL-7809 on November 11, 2004, of which Respondent was the master, shows that Respondent was previously informed of the requirements in 46 C.F.R. 4.05-1 and 46 C.F.R. 4.05-10 to make an immediate notification of a reportable marine casualty and to submit a CG-2692, Report of Marine Accident, Injury or Death within 5 days. (Tr. at 95) Respondent neglected to meet the reporting requirements during the November 2004 investigation. CG Ex. 18, (Tr. at 95) **ACCEPTED IN PART**, Limited use of this exhibit is addressed in the Decision and Order.
27. According to Kyle Winter, Deputy Regional Director of the Virginia Department of Environmental Quality, the ammonium sulfate that was released in to the James River as a result of the SL-119 sinking had a negative effect on the James River. The ammonium sulfate that was released in to the James River dissolved in to ammonium ions and sulfate ions. This oxidation process consumes dissolved oxygen which limits the oxygen available

for living organisms. Additionally, the ammonium sulfate could increase the growth of algae, causing algal blooms. Algal blooms block sunlight to submerged aquatic vegetation, limiting their growth. Algal blooms also consume additional oxygen during decomposition, further starving the river's inhabitants of oxygen. Kyle Winter was unable to assess the direct impact of the SL-119 sinking on the watershed, however he testified to the known negative effects of releasing ammonium sulfate in to a body of water. (Tr. at 178, 179, 180) **ACCEPTED IN PART**, as discussed in the Decision and Order.

28. The sinking of the SL-119 had a negative economic impact on the Honeywell facility. The sinking of the SL-119 cost the Honeywell facility \$778,467.13, not including the expected \$187,000.00 it will cost Honeywell to re-mobilize dredging operations that had to be halted until the SL-119 was removed from the river bottom. CG Ex. 20, (Tr. at 161, 187) **ACCEPTED**, as discussed in the Decision and Order.

29. Respondent has been convicted of two Driving Under the Influence (DUI) charges in Virginia on January 29, 2002 and June 27, 2005. These two convictions have led to the revocation of his Virginia's Driver's license. CG Ex. 12. **REJECTED**, as discussed in the Decision and Order.

30. The Circuit Court of the City of Richmond ordered a Capias for the Defendant's arrest on May 31, 2007. This Capias is still outstanding. CG Ex. 15 **ACCEPTED IN PART**. Limited use of this exhibit is addressed in the Decision and Order.

31. As per 46 C.F.R. 10.201(i) even though Respondent's DUI convictions are more than three years old, they can be considered by the Officer in Charge of Marine Inspection for renewal or issuance because they relate to a current Driver's License suspension or revocation. **NEITHER ACCEPTED NOR REJECTED**. License renewal is not a matter before this court.

32. According to 46 C.F.R. Table 10.201(i) "Guidelines for Evaluating Applicant's for Licenses and Certificates of Registry Who Have National Driver Registry(NDR) Motor Vehicle Convictions Involving Dangerous Drugs or Alcohol" Respondent's application for renewal of his MML will not be processed while his Driver's License is still suspended or revoked.

**NEITHER ACCEPTED NOR REJECTED.** License renewal is not a matter before this court.

33. Mr. William D. Ailsworth's MML 1108442 expires October 19, 2009.  
**NEITHER ACCEPTED NOR REJECTED.**

34. Mr. William D. Ailsworth has not currently started enrollment for a Transportation Worker Identification Credential(TWIC). The deadline for TWIC enrollment was April 15, 2009. Navigation and Vessel Inspection Circular 03-07 (NVIC 03-07), Coast Guard Headquarters.  
**NEITHER ACCEPTED NOR REJECTED.** TWIC enrollment is not a matter before this court.

**b. COAST GUARD'S PROPOSED CONCLUSIONS OF LAW:**

1. At all times relevant, Respondent was acting under the authority of issued U.S. Merchant Marine Officer license, No. 1108442.  
**ACCEPTED**, as discussed in the Decision and Order.
2. There was not a proposed conclusion of law numbered "2" in the Coast Guard's post hearing brief.
3. The Coast Guard retains jurisdiction over Respondent's credentials for these 46 C.F.R. Part 5 proceedings.  
**ACCEPTED.** The findings regarding jurisdiction are addressed in the Decision and Order.
4. Respondent negligently failed to act as a prudent mariner, by moving the SL-119, with known compromised seaworthiness, away from shore where it was securely beached, allowing it to sink.  
**ACCEPTED**, as discussed in the Decision and Order.

5. Respondent committed an act in violation of law or regulation by not submitting a CG-2692, Report of Marine Casualty, Injury or Death within 5 days of the SL-119 sinking on January 12, 2009.  
**ACCEPTED**, as discussed in the Decision and Order.
  
6. Respondent committed an act of misconduct by failing to appear on February 27, 2009 in accordance with the subpoena issued on February 24, 2009 under the authority of 46 U.S.C. 7705. When the date of appearance was adjusted for the Respondent's convenience to March 4, 2009, respondent again failed to appear.  
**REJECTED**, as discussed in the Decision and Order.
  
7. Respondent committed an act in violation of law or regulation by not notifying the Coast Guard of the SL-119's compromised seaworthiness immediately after addressing resultant safety concerns.  
**ACCEPTED**, as discussed in the Decision and Order.

**c. RESPONDENT'S PROPOSED FINDINGS OF FACT:**

**A. Facts Related to the Overloading and Sinking of the Barge SL-119:**

1. On Friday, January 9, 2009, Captain William D. Ailsworth ("Ailsworth") departed ANA shipyard on the Western Branch of the Elizabeth River. Ailsworth was the master of the tug Jacqueline A, pushing two barges, the SL-118 and the SL-119. He planned to push the barges up the James River to a loading facility to load them with ammonium sulfate fertilizer. (Transcript, Ailsworth's Testimony, p. 217).  
**ACCEPTED IN PART**, as discussed in the Decision and Order.
  
2. Prior to getting underway with the SL-118 and the SL-119 (on or about January 7 or 8, 2009), Ailsworth performed a visual inspection of the compartments of the SL-118 and SL-119. He shone a flashlight into the voids of both barges, and he saw no water. He sealed the voids back up prior to getting underway; It had been "several years" since Ailsworth had had to take any action to pump out any water because of any leaks on the SL-119. (Transcript, Ailsworth's Testimony, pp. 217, 219-220).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

3. Ailsworth delivered the SL-118 and SL-119 at the loading pier of the Honeywell facility at approximately 1830 on Friday, January 9, 2009. (Transcript, Ailsworth's Testimony, p. 220).

**ACCEPTED IN PART,** as discussed in the Decision and Order.

4. Ailsworth pushed the barges side-by side to the south end of the loading pier. He then moored the SL-118 and the SL-119 to the south side of the loading pier, stern-to-stern. (Transcript, Ailsworth's Testimony, p. 221). With the barges in that stern-to-stern orientation, Ailsworth began (at approximately 1915 on Friday, January 9, 2009) loading the fertilizer (ammonium sulfate) onto the barges, loading the SL-118 first. (Transcript, Ailsworth's Testimony, p. 221-222).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

5. At the Honeywell loading pier, the loading of the SL-118 and SL-119 was accomplished by a Honeywell employee operating in the "gantry." The gantry operator is physically located about 30 feet up in the air, and Ailsworth stayed in contact with him via a radio that Honeywell provided. The communications with the "swing shift" gantry operator were "great"; Ailsworth had no communications problems at all with this swing shift gantry operator. The SL-118's center was completely loaded and the SL-119's center was almost completely loaded when the midshift gantry operator relieved the swing shift gantry operator at 2300 on Friday, January 9, 2009. (Transcript, Ailsworth's Testimony, p. 222-224).

**NEITHER ACCEPTED NOR REJECTED.**

6. Ailsworth began to have immediate communications problems with the midshift gantry operator. When that gantry operator went to "top off" the SL-119's center loading section, it took "two or three" minutes for Ailsworth to raise the operator on the radio to tell him to stop loading product – Ailsworth has to call him on his radio "four or five times." This "overloading" cost Ailsworth an additional "hour and a half" of work leveling the product in amidships in the SL-119 because the ammonium sulfate would have "[gone] up all on the hatches" . . . where it would, when wet, "eat a hole right through anything. (Transcript, Ailsworth's Testimony, p. 224-225).

**NEITHER ACCEPTED NOR REJECTED.**

7. After this slight mishap loading the center of the SL-119, Ailsworth continued to load the bow and stern of the SL-118 and the SL-119. The SL-118 was finally loaded without incident. At approximately 0330 on January 10, 2009 (Saturday morning), Ailsworth began to finish up the loading process on the SL-119. (Transcript, Ailsworth's Testimony, p. 229).

**NEITHER ACCEPTED NOR REJECTED.**

8. By this time in the morning, as the SL-119 loading process continued, Ailsworth's communications with the gantry operator were not getting any better. He was having a difficult time raising the gantry operator on his walkie-talkie. Honeywell provided Ailsworth another radio to use. Ailsworth was loading the SL-119 by draft, aiming to secure the loading operation when the SL-119's draft read 10 feet. (Transcript, Ailsworth's Testimony, pp. 230-231). By the time that the gantry operator cut off the loading of ammonium sulfate into the SL-119 at approximately 0600 on January 10, 2009, Ailsworth had been calling the gantry operator on the radio "three to four times" over the space of "12 minutes" telling him to secure loading product on the SL-119. This 12 minute overrun resulted in approximately 60 extra tons of ammonium sulfate loaded onto the SL-119. (Transcript, Ailsworth's Testimony, p. 231). *See also* Defendant's Exhibits 1 and 2 (showing that over 2000 tons of ammonium sulfate was loaded on the SL-119).

**NEITHER ACCEPTED NOR REJECTED.**

9. Ailsworth saw that the SL-119 was obviously overloaded immediately after the loading operation. He had been aiming for a draft of 10 feet. At the end of the loading evolution, the SL-119 was drawing 11 feet 6 inches on the port side and 11 feet 4 inches on the starboard side. The normal loaded draft for the SL-119 was 10 feet. So, after Honeywell finished loading the barge, the SL-119 was down almost a foot and a half from its fully-loaded draft, and it had a slight list to port. (Transcript, Ailsworth's Testimony, p. 231-232).

**NEITHER ACCEPTED NOR REJECTED.**

10. Ailsworth knew that the SL-119 was too overloaded "to be taken up the Delaware" to its unloading destination. (Transcript, Ailsworth's Testimony, p. 233). Recall, however, that the SL-119 loading operation was secured at 0600 on Saturday, January 10, 2009. At 0700, Honeywell was expecting another ship at the loading pier, and a Honeywell employee "forced" Ailsworth to move the SL-118 and the SL-119 so that that new ship would come in to load. Ailsworth tied up the Jacqueline A to the bow of the SL-119 and moved the SL-119 alongside and outboard the SL-118, both still on the south side of the pier. Ailsworth then, with the SL-119 outboard and the SL-118 inboard, pushed the two

barges around to the north side of the pier. He tied up the SL-118 and the SL-119 outboard another barge that was tied up on the north side of the pier. Alongside the north side of the Honeywell pier the three barges, tied up side by side, inboard to outboard, were: (a) the ATC ALLY 200; (b) the SL-118; and (c) the SL-119. Ailsworth got the SL-118 and the SL-119 tied up on the north side of the Honeywell pier at approximately 0800 on Saturday, January 10, 2009. The SL-119's stern was facing west, towards the shore. (Transcript, Ailsworth's Testimony, p. 232-235).

**ACCEPTED IN PART**, as discussed in the Decision and Order.

11. Though Ailsworth thought the SL-119 was too overloaded for its trip up the Delaware River, at 0800 on Saturday, January 10, 2009, the SL-119 was not *in extremis*. (Transcript, Ailsworth's Testimony, p. 235-236). It was not until noon, Saturday, January 10, 2009, that Ailsworth noticed that the SL-119 had settled "about an inch, inch and a half" since 0800. (Transcript, Ailsworth's Testimony, p. 236).

**REJECTED IN PART.** Whether the barge may have been overloaded does not present a defense to negligence by Respondent and the *extremis* doctrine does not apply in this matter as discussed in the Decision and Order.

12. Responding to the draft change, Ailsworth opened up the SL-119's Number 4 compartment and noticed "three or four inches of water" in that compartment. He hooked up a  $\frac{3}{4}$  inch electric pump and began pumping the compartment out. This dewatering of the SL-119's Number 4 compartment, at noon on January 10, 2009, was the first time that Ailsworth had to dewater the SL-119 since arriving at the Honeywell pier 18 hours before. (Transcript, Ailsworth's Testimony, p. 237-238).

**NEITHER ACCEPTED NOR REJECTED.**

13. The  $\frac{3}{4}$  pump initially kept up with the leak into the SL-119's Number 4 compartment. After "a couple, two and a half hours", Ailsworth had pumped the water out of SL-119's Number 4 compartment. Ailsworth checked SL-119's Number 3 compartment and its stern compartment, and he found no leak in either at this time. (Transcript, Ailsworth's Testimony, pp. 239-240).

**NEITHER ACCEPTED NOR REJECTED.**

14. At some point later in the afternoon on Saturday, January 10, 2009, after dewatering the SL-119's Number 4 compartment and inspecting its Number 3 and stern compartments, Ailsworth noticed that the SL-119 was continuing to settle. Ailsworth determined that water was now coming into the SL-119's Number 2 compartment. He used a 2-inch

pump to pump out the SL-119's Number 2 compartment. (Transcript, Ailsworth's Testimony, p. 241). Ailsworth could not tell where the water in SL-119's Number 2 compartment was coming from. The first time he dewatered the SL-119's Number 2 compartment, he was able to pump the water down sufficiently. It was now Saturday, January 10, 2009 "evening . . . still daylight." (Transcript, Ailsworth's Testimony, p. 241-242). Honeywell's area leader, Herman Schlimmer, was aware as early as Saturday evening that Ailsworth had a problem that was "causing a sever list" on the SL-119, and Schlimmer did nothing to help. (Transcript, Schlimmer's Testimony, p. 150).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

15. Ailsworth spent the night of January 10-11, 2009 monitoring the SL-119's condition. On Sunday, January 11, 2009, at 0500, Ailsworth noticed that "the draft was down even more than what it was previously that Saturday"; he "opened up 4 again" and found about 6 inches of water in that compartment and "went where the Number 2 compartment was" and found approximately 6 feet of water. (Transcript, Ailsworth's Testimony, p. 242-243).

**NEITHER ACCEPTED NOR REJECTED.**

16. Ailsworth recognized at this point that the SL-119 was *in extremis*. (Transcript, Ailsworth's Testimony, p. 243, ll.16-19). By 0900, January 11, 2009, the SL-119's deck was about level with the waterline, the water inrush had gained on the pumps, and Ailsworth determined that his dewatering pumps could not keep up with the flooding. It was at this point that Ailsworth decided to push the SL-119 up against the shore. He "eased" the SL-119 aground against the shore; the shore was covered by a wall of rip-rap that extended down completely into the water. Ailsworth did not feel any "slide" when the SL-119 grounded, but rather he felt the SL-119 come to an "abrupt stop." There is no direct testimony about the condition of the bottom where the SL-119 went ashore, but Ailsworth testified that he did not feel the SL-119 slide into the bottom, as it might have had it been a soft bottom at the grounding point. (Transcript, Ailsworth's Testimony, p.249).

**REJECTED IN PART.** The findings regarding the charges are addressed in the Decision and Order. The *extremis* doctrine does not apply in this case as discussed in the Decision and Order.

17. When Ailsworth grounded the SL-119, it lay diagonally from the Honeywell loading pier. Its stern was against the shore, approximately 45 feet from the base of the pier. Ailsworth pushed the SL-119's bow against the pier and tied the SL-119's bow to the pier with two separate lines. The SL-119's bow was tied to the north side of

Honeywell's pier, forward of where the ATC ALLY 200 and the SL-118 remained tied up. (Transcript, Ailsworth's Testimony, p. 243).

**NEITHER ACCEPTED NOR REJECTED.**

18. It was Ailsworth's judgment that running the barge around the way that he did left the SL-119 in "the safest condition" that he could have put the barge in given the flooding conditions he encountered early Sunday morning, January 11, 2009. (Transcript, Ailsworth's Testimony, p. 243).

**NEITHER ACCEPTED NOR REJECTED.**

19. After the SL-119 was grounded, Ailsworth "constantly check[ed] the compartments." He continually dewatered the SL-119 with his pumps. He kept up this constant dewatering until the tide rose. When the tide rose, Ailsworth had to secure the compartment hatches because the tide and the wind caused water to rise up on the SL-119's deck. If the decks were underwater, Ailsworth had to seal up the hatches to keep water from pouring in over the decks. (Transcript, Ailsworth's Testimony, p. 252-255).

**NEITHER ACCEPTED NOR REJECTED.**

20. With the SL-119 aground, the first high tide came in "Sunday night": January 11, 2009. The second high tide came in Monday morning, January 12, 2009. The SL-119 was settling further: when the height of the second high tide hit, the river's water level had risen "almost over top of a [4.5 foot high] coaming" surrounding the hatches on the SL-119. This was a two-foot higher level than the highest level of the first (Sunday night) tide. (Transcript, Ailsworth's Testimony, p. 256). Ailsworth determined that he had to "do something" because the SL-119 was in "imminent danger of sinking." (Transcript, Ailsworth's Testimony, p. 256).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

21. Ailsworth decided that he had to unload the excess ammonium sulfate off of the SL-119 to keep it from sinking at the pier. Honeywell did not have on site a piece of equipment that could have unloaded the SL-119; so to unload the SL-119 Ailsworth needed to bring in extra equipment. (Transcript, Sharon Hayes, p.117). Ailsworth finally got an excavation contractor's number from Mr. Schlimmer around 0730 that morning, who had finally bestirred himself from his office and walked down to the loading pier. (Transcript, Schlimmer's Testimony, p. 155). Ailsworth had contacted "the fellow that owns the excavator company" (apparently a "Mr. Snead") and had arranged for Mr.

Snead to meet him at the pier at 0900 with the excavator on Monday, January 13, 2009. Ailsworth was expecting Honeywell (through Mr. Herb Schlimmer) to have provided, on the pier at 0900 on Monday, January 13, 2009 the dump trucks into which Mr. Snead's excavator could have unloaded the excess ammonium sulfate. As the final part of the unloading plan, Ailsworth had to push the SL-119 flush against the Honeywell pier and have the SL-119 there ready for offloading at 0900, when the unloading assets arrived. (Transcript, Ailsworth's Testimony, p.256-257).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

22. Pulling the SL-119 from its grounded position and moving it against the pier was a precondition for Ailsworth being able to unload the SL-119 at all on Monday, January 12, 2009. With the stern of the SL-119 aground approximately 45 feet from the end of Honeywell' pier, an excavator's boom could not reach the SL-119 to unload it. Ailsworth was told that he would have to "put the [SL-119] alongside the pier so he [the excavator] could get down there right next to the barge with the excavator in order to get the product off." (Transcript, Ailsworth's Testimony, p. 255). Honeywell was going to provide the dump trucks into which the excavator could offload the excess ammonium sulfate. (Transcript, Ailsworth's Testimony, p. 254-255).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

23. Ailsworth's testimony as to why the SL-119 HAD to be lightened at this point was as succinct an explanation as could have been given:

[The SL-119] was going down, and each tide that came in, it got higher up on the coamings of the barge. So in order to get something up, you have to take weight off of it so the barge will come up out of the water.

(Transcript, Ailsworth's Testimony, p. 257, ll.15-20).

In other words, the SL-119 was sinking this Monday morning as it rested aground at the Honeywell pier. If Ailsworth had NOT pulled the SL-119 from the shore and attempted to get it to the pier, then the SL-119 would have sunk even with its stern aground against the beach.

**REJECTED,** as discussed in the Decision and Order.

24. The un-grounding/mooring evolution got underway at approximately 0845 on Monday, January 12, 2009. Ailsworth waited ""until the last possible minute" to begin because "the guy [excavator operator] was supposed to show up at 9" on the pier. (Transcript, Ailsworth's Testimony, p. 259, ll.23-25). The Jacqueline A was tied up at the bow end of

the SL-119. Ailsworth had a “push boat”, the TAR BAY, come up alongside the SL-119 approximately one-half way between the SL-119’s amidships and the SL-119’s stern. Ailsworth slacked the bow lines that attached the SL-119 to Honeywell’s pier and simultaneously the TAR BAY pushed the SL-119’s stern against the pier. Ailsworth then remade up the SL-119’s bowlines to the pier and tied in the SL-119’s stern. It was 0900, Monday, January 12, 2009. The SL-119 was now in position to begin offloading. (Transcript, Ailsworth’s Testimony, p.259-260).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

25. The SL-119 was in position to begin unloading, but neither the excavator operator nor the dump trucks had shown up to offload the ammonium sulfate. (Transcript, Ailsworth’s Testimony, p.261, ll. 3-7). There was nothing left for Ailsworth to do. The barge sank at the pier at 0935 on January 12, 2009.

**ACCEPTED IN PART AND REJECTED IN PART.** The findings regarding the charges are addressed in the Decision and Order. The Respondent’s characterization of his actions is rejected.

**B. Facts Related to Ailsworth’s Attempt to Obtain a Survey of Potential Damage Caused by the Grounding Before Moving the SL-119 to the Pier:**

26. Ailsworth grounded the barge on Sunday morning, January 11, 2009, at approximately 0900. Ailsworth called Dave Bushey, owner of Commonwealth Pro-Dive several times after grounding the SL-119 on Sunday morning. He started calling Bushy “several times” “around noontime” that Sunday; Ailsworth’s father began calling Bushy at this time as well. (Transcript, Ailsworth’s Testimony, p.263-264). Ailsworth finally received a call back from Bushy “about 4:00” p.m. (Transcript, Ailsworth’s Testimony, p.263).

**ACCEPTED,** as discussed in the Decision and Order.

27. Ailsworth told Bushy that “he was taking on water” on the SL-119. (Transcript, Bushy’s Testimony, p.171). While Ailsworth told Bushy that his pumps were “staying with it”, Ailsworth told Bushy that Ailsworth “needed another pump.” (Transcript, Bushy’s Testimony, p.171-172). Ailsworth told Bushy that “[Ailsworth] needed to have [Bushy] go under and take a look at [the SL-119] and have it pumped out and see if I could repair it.” (Transcript, Bushy’s Testimony, p.171-172).

**ACCEPTED,** as discussed in the Decision and Order.

28. Bushy said that he would have some of his employees there “the next morning.” Bushy told Ailsworth on Sunday that he could not dive on the SL-119 “until the next day and

then take a look at it.” Ailsworth told Bushy to “bring [Bushy’s] guys up the next day with pumps.” (Transcript, Bushy’s Testimony, p.172).

**ACCEPTED**, as discussed in the Decision and Order.

29. Just like Honeywell with their dump trucks; just like Snead with his excavator; just like everyone that Ailsworth called on for help on this weekend, Bushy’s “guys” arrived too late on Monday. When Bushy’s people got there, “it was too late [; . . .] the [SL-119] had sank [sic]. (Transcript, Bushy’s Testimony, p.172).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order. The Respondent’s characterization of the facts is not accepted.

### **C. Facts Related to Ailsworth’s Communications with the USCG during the sinking of the SL-119:**

30. On Monday, January 12, 2009, at 0930, Ailsworth reported the sinking of the SL-119 to the USCG’s National Response Center. USCG Exhibit No. 6, Notification No. 344360. The NRC report was then made to the USCG Command Duty Officer of Sector Hampton Roads on that same Monday morning at approximately 10:12 a.m. (Transcript, LTJG Shelton’s Testimony, p.81). A report to the CDO of Sector Hampton Roads was, in effect, a report to Sector Hampton Roads. (Transcript, LTJG Shelton’s Testimony, p.85). Thus, almost simultaneously with the sinking of the SL-119, Ailsworth had informed the USCG NRC of the sinking; and by no later than 45 minutes after the actual sinking of the SL-119, the USCG Sector Hampton Roads had actual knowledge of the sinking of the SL-119.

**ACCEPTED IN PART AND REJECTED IN PART.** The findings regarding the charges are addressed in the Decision and Order.

### **Facts Related to Ailsworth’s Submitting a Form USCG-2692:**

31. Ailsworth submitted a USCG Form 2692 Report of Marine Accident, Injury, or Death to the USCG on January 23, 2009. (Transcript, LT Burkett, p.52). *See also* USCG Exhibit No.1. Ailsworth submitted a second USCG Form 2692 Report of Marine Accident, Injury, or Death to the USCG, by counsel, on February 26, 2009. (Transcript, LT Burkett, p.54). *See also* USCG Exhibit No.2.

**ACCEPTED IN PART**, as discussed in the Decision and Order.

32. The USCG had actual knowledge of the SL-119’s sinking from Ailsworth’s report to the USCG NRC as of 0930 on January 12, 2009.

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

**Facts Related to Ailsworth's Responding to the USCG February 24, 2009 subpoena and the March 4, 2009 subpoena:**

33. Ailsworth was personally served by the USCG with a subpoena dated February 24, 2009, commanding him to appear on February 27, 2009 with certain at the Federal Building in Norfolk. USCG Exhibit 3. (Transcript, LT Burkett, p.54). Ailsworth had retained counsel by February 27, 2009, and counsel advised Ailsworth not to appear for the USCG examination without counsel present; counsel advised Ailsworth that counsel would contact the USCG and set another day for the meeting. (Transcript, Ailsworth's testimony, p.287). The USCG's witness, obviously, did not know of this particular conversation between Ailsworth and his counsel; he could testify only that he "could not recall what was [sic] the exact circumstances surrounding why [Ailsworth] couldn't make it [on February 27]." (Transcript, LT Burkett's Testimony, p.61).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order.

34. Counsel arranged with the USCG to continue Ailsworth's meeting to March 4, 2009. On that date, counsel for Ailsworth was sick and unable to attend the meeting. (Transcript, LT Burkett's Testimony, p.61-62); (Transcript, Ailsworth's Testimony, p.273-74).

**NEITHER ACCEPTED NOR REJECTED.** The findings regarding the charges are addressed in the Decision and Order. Whether counsel was sick or not does not provide an excuse to fail to appear as required by a subpoena.