

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

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UNITED STATES COAST GUARD  
Complainant

vs.

RICHARD ALBERT CHESBROUGH  
Respondent

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Docket Number 2011-0224  
Enforcement Activity No. 4006949

**DECISION AND ORDER**  
**Issued: July 25, 2012**

**By Administrative Law Judge:**  
**Honorable George J. Jordan**

**Appearances:**

**LT Rule, Kimberly D.**  
**Sector Columbia River**  
**For the Coast Guard**

**RICHARD ALBERT CHESBROUGH, Pro se**  
**For the Respondent**

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### I. PRELIMINARY STATEMENT

This proceeding concerns the suspension or revocation of the Merchant Mariner License (“MML” or “License”) issued to Richard A. Chesbrough (“Respondent”) pursuant to pursuant to 46 U.S.C. § 7701 *et seq.* and United States Coast Guard (“Coast Guard”) regulations found at 46 C.F.R. Part 5. This proceeding is conducted under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard found at 33 C.F.R. Part 20.

## II. PROCEDURAL HISTORY

1. The Coast Guard initiated this proceeding on May 18, 2011 by filing a Complaint seeking a six (6) month outright suspension of Respondent's MML for misconduct and negligence plus an additional a twelve (12) month period of probation. If Respondent violated the conditions of probation, his license would be revoked.
2. The Coast Guard filed an Amended Complaint on May 18, 2011 amending the Respondent's License number and now seeking a twelve (12) month outright suspension of Respondent's MML for misconduct and negligence.
3. Specifically, the Coast Guard alleges that Respondent was acting under the authority of his license as Captain aboard the vessel WILLAMETTE QUEEN on April 12, 2011 when he committed misconduct by navigating the vessel from the Willamette Slough into the Willamette River in violation of the vessel's Certificate of Inspection. The Coast Guard also alleges Respondent committed negligence while acting under the authority of his license on April 12, 2011 by failing to check the River Gauge, navigating the vessel outside the conditions of its Terms of Inspection, and grounding the vessel at approximately 2030 hours at Mile 85 on the Willamette River.
4. The Complaint set forth the following factual allegations regarding the charge of misconduct:
  - a. Certificate of Inspection: one of the conditions of operation states: **WHEN THE RIVER GAUGE AT SALEM READS 11 FT OR MORE, THE VESSEL OPERATIONS IS LIMITED TO THE WILLAMETTE SLOUGH LOCATED BEHIND MINTO BROWNS ISLAND.**
  - b. Salem Gauge readings for April 12, 2011 time of grounding: 12.13 ft.
  - c. April 12, 2011, at approximately 1820 hrs, Sternwheeler WILLAMETTE QUEEN got underway in the Willamette Slough. Richard Chesbrough is the captain of the vessel and acting under the authority of his license.
  - d. Captain Chesbrough did not check the river gauge at Salem for river stage.

- e. Captain Chesbrough navigated the Sternwheeler WILLAMETTE QUEEN from the Willamette Slough into the Willamette River.
  - f. Captain Chesbrough violated the conditions of his Certificate of Inspection and is being charged with misconduct.
5. The Complaint set forth the following factual allegations regarding the charge of negligence:
- a. Certificate of Inspection: one of the conditions of operation states: WHEN THE RIVER GAUGE AT SALEM READS 11 FT OR MORE, THE VESSEL OPERATIONS IS LIMITED TO THE WILLAMETTE SLOUGH LOCATED BEHIND MINTO BROWNS ISLAND.
  - b. Salem Gauge readings for April 12, 2011 time of grounding: 12.13 ft.
  - c. April 12, 2011, at approximately 1820 hrs, Sternwheeler WILLAMETTE QUEEN got underway in the Willamette Slough. Richard Chesbrough is the captain of the vessel and acting under the authority of his license.
  - d. Captain Chesbrough did not check the river gauge at Salem for river stage.
  - e. Captain Chesbrough navigated the WILLAMETTE QUEEN into the Willamette River. By doing this, Captain Chesbrough operated the WILLAMETTE QUEEN outside the conditions of his Certificate of Inspection.
  - f. Captain Chesbrough grounded the WILLAMETTE QUEEN at approximately 2030 hrs at Mile 85 on the Willamette River.
  - g. Captain Chesbrough acted negligently in the safe navigation of the WILLAMETTE QUEEN.
6. Respondent filed an Answer on June 7, 2011 in which he admitted all jurisdictional allegations contained in the Complaint but denied certain factual allegations relating to the negligence and misconduct charges. He requested a hearing before an Administrative Law Judge.
7. On June 7, 2011, the Chief Administrative Law Judge assigned this case to me for adjudication.
8. The parties participated in a telephonic prehearing conference on July 13, 2011, during which time preliminary matters were discussed and a hearing date was set.

9. The hearing took place in Portland, Oregon on September 20, 2011 at the U.S. District Court Building. 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 C.F.R. Part 20.
10. CPO James J. Collins of Sector Columbia River appeared on behalf of the Coast Guard at the hearing. Respondent appeared *pro se*.
11. At the hearing, four (4) witnesses testified for the Coast Guard and five (5) witnesses, including Respondent, testified for Respondent. The Coast Guard offered 19 exhibits, of which Exhibits 1 through 15, 18, and 19 were admitted into evidence.<sup>1</sup> Respondent provided a binder containing 29 exhibits, of which Exhibits C, D, E, I, J, K, L, M, R, and U were introduced at the hearing and admitted into evidence. A list of witnesses and exhibits is attached to this decision as Appendix II.
12. At the hearing I issued a ruling holding the record open for the production of one piece of evidence, Activity Report 3985848, as the response period had not run as of the date of the hearing.
13. On October 24, 2011, I issued a Post Hearing Memorandum and Scheduling Order. As Activity Report 3985848 had not been produced as of that date, I ordered the Coast Guard to provide my office with notice as to the status of the report by November 9, 2011. I also ordered the parties to advise my office whether they wished to file proposed findings of fact and conclusions of law after the status of the report was determined.
14. Respondent informed my office that he received the report on November 14, 2011.

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<sup>1</sup> Coast Guard Exhibits 16 and 17 were printouts of Commandant Decisions on Appeal which the Coast Guard felt were relevant to this case. At the hearing, I explained that I would take these cases under consideration, but would not admit them as exhibits. The same is true for Respondent's Exhibits X through AA. (Tr. 152.)

15. On December 28, 2011 I issued a Post-Hearing Memorandum and Scheduling Order closing the record and ordering the parties to file proposed findings of fact and conclusions of law by January 30, 2012.
16. Both the Coast Guard and Respondent filed proposed findings of fact and conclusions of law. The Coast Guard's brief was filed on January 11, 2012. Respondent's brief was filed on January 30, 2012. The Respondent's brief was broken into several parts including (1) Proposed Findings of Fact<sup>2</sup>, (2) Clarification of Facts in the Activity Report, (3) Proposed Conclusions of Law , (4) Arguments Regarding Sanctions and (5) a copy of a letter to Coast Guard Headquarters dated October 14, 2011 concerning findings in several Marine Casualty Investigations. I did not consider the October 14, 2011 letter or its attachments as relevant to these proceedings.
17. On February 7, 2012, the Coast Guard moved to file a rebuttal to Respondent's post-hearing brief. The Coast Guard filed its rebuttal brief on February 17, 2012, before the response period had elapsed and before I had issued any ruling on the February 7 motion. Respondent did not file any objections to the response brief within the prescribed ten days.
18. I have considered the relevant portions of this response as argument. The parts of the rebuttal brief that concern the October 14, 2011 letter were not considered because they are not considered relevant to the misconduct and negligence alleged.
19. On February 20, 2012, Respondent made a status inquiry to my office, asking what was occurring in his case and whether the Coast Guard's rebuttal brief was allowed into the record. My staff responded to Respondent's inquiry on February 24, 2012, advising him that his case is active and under consideration. As it did not appear that Respondent had

sent a copy of his inquiry to the Coast Guard, my staff included a copy of the document in the response, which was sent to all parties involved.

My staff responded in an email dated February 24, 2012 by advising Respondent that generally, the party with the burden of proof -- in this case, the Coast Guard -- has the right to present rebuttal argument regarding any issues raised in closing argument but not previously addressed by the agency in its closing argument. If either party then wishes to make further argument or counter-argument, that party must make a motion and demonstrate good cause.

20. They further advised that I had not yet ruled on the Coast Guard's initial motion to file a rebuttal, nor had I determined whether or to what extent the rebuttal documents filed on February 17 would be considered in preparing the decision. No further filings on this issue were received. My rulings as to allowing rebuttal and the extent of consideration are stated above.

21. On April 6, 2012, Respondent filed a motion to dismiss on the grounds that the Coast Guard withheld documents responsive to his Freedom of Information Act ("FOIA") request related to the incident. The Coast Guard responded with objections on April 10, 2012. I denied Respondent's motion on June 14, 2012.

### **III. FINDINGS OF FACT**

The following Findings of Fact and Conclusions of Law are based on the observations of the appearance and demeanor of the witnesses who testified at the hearing and upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

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<sup>2</sup> Respondent's submission commingled proposed findings of fact with argument. To the extent possible, I have separated out the factual assertions and indicated that they are either adopted or rejected in the appropriate section of

The issues before me are (1) whether Respondent committed misconduct by operating outside the conditions of the vessel's Certificate of Inspection ("COI") and (2) whether Respondent was negligent in grounding the vessel while operating outside the conditions of the vessel's COI. If I find either allegation proved, I must then decide an appropriate sanction under the circumstances. 46 C.F.R. §§ 5.567-5.569.

My findings of fact are as follows:

1. At all relevant times herein, Respondent was the holder of Merchant Mariner's License 1215480. (Complaint; Tr. 34.)
2. The WILLAMETTE QUEEN is owned by Barbara Chesbrough through her company CBVB Associates Inc., and is operated by Sternwheeler Excursions. (Tr. 112; CG EX 2.)
3. The WILLAMETTE QUEEN is a small passenger vessel that regularly operates in the Willamette River, Oregon. Its gross tonnage is 62 tons and net tonnage is 50 tons. The length is 64.8 feet, breadth is 24.0 feet, and depth is 6.0 feet. (CG EX 15.)
4. The vessel is a sternwheeler of four hundred twenty-five horsepower. (Tr. 155-56.) It has split paddles which turn independently, as well as a separately powered bow thruster and stern thruster. (Tr. 145-46.)
5. The hull is constructed of fiberglass, and the bottom of the vessel is made from one-and-one-half-inch thick fiberglass and is designed to run aground for passengers to embark or disembark. (Tr. 152.)
6. Respondent was hired as the master of the WILLAMETTE QUEEN in 1998 and has been the vessel's primary master since that time. (Tr. 112-113.)
7. Respondent was acting as master of the WILLAMETTE QUEEN on April 12, 2011. (Tr. 102, 107, 124, 152-53.)

8. Small passenger vessels are subject to safety inspections by the U. S. Coast Guard under 46 U.S.C. § 3301. A small passenger vessel is a vessel of less than 100 gross tons that carries 150 or fewer passengers or has overnight accommodations for 49 or fewer passengers, and carries more than six passengers, including at least one for hire. 46 C.F.R. § 176.110.
9. The WILLAMETTE QUEEN is a small passenger vessel subject to inspection. (Tr. 36; CG EX .)
10. The WILLAMETTE QUEEN was carrying more than six passengers, including at least one for hire, on April 12, 2011. (Tr. 99.)
11. Vessels subject to inspection may not be operated without having on board a COI issued pursuant to 46 U.S.C. § 3309. 46 U.S.C. § 3311. During the term of a vessel's certificate of, inspection, the vessel must be in compliance with its conditions, unless relieved by a suspension or an exemption granted under section 46 U.S.C. § 3306(e). 46 U.S.C. § 3313.
12. The WILLAMETTE QUEEN was required to have its COI posted where passengers could see it and to abide by the conditions stated therein whenever it was in operation with six or more passengers aboard. (Tr. 36, 43.)
13. The WILLAMETTE QUEEN's COI contains three conditions, the second of which states: "When the river gauge at Salem reads 11 foot or 22 more the vessel's operation is limited to the 23 Willamette Slough located behind Minto-Brown's Island." (Tr. 38, 153; CG EX 2.)
14. The above-stated condition was added to the WILLAMETTE QUEEN's COI on November 27, 2009. (Tr. 40.) This occurred after the boat was grounded on November 8, 2009 while under the control of another master. (Tr. 45-46, 52, 114.) The rationale for the condition was that the vessel is underpowered for the current when the river is high, making operation at higher levels hazardous. (Tr. 39, 143, 146; CG EX 1.)

15. Respondent was aware of the November 27, 2009 amendment to the WILLAMETTE QUEEN's COI. (Tr. 41).
16. The vessel's owner has formally challenged the amendment to the COI, but did not do so within 30 days of the change. (Tr. 134-35).
17. The Willamette River Gauge at Salem is located at river mile 84.16. Its purpose is to determine the stage of the river, allowing the flow of the river to be calculated. (Tr. 62.)  
A comparison of readings from this and other gauges gives hourly river levels and discharge rates and allows for calibration of the gauges. (Tr.63-64; CG EX 4, 5, 6, 7, 8.)
18. The Willamette River Gauge at Salem is accurate to 0.02 feet and is calibrated every six to eight weeks. (Tr. 64-65.) It was accurate on April 12, 2012. (Tr. 78.)
19. The Willamette River Gauge readings are available on the internet and are updated hourly. Readings may also be published in newspapers. (Tr. 67.)
20. On April 12, 2011, Respondent checked the current issue of the Statesman Journal to determine river stage. (Tr. 116, 153-54.) The height reported in that newspaper was 12.1 feet. (Tr. 116, 153; CG EX 9; R EX J.)
21. The river stage reported in the Statesman Journal is not the most current information, but is drawn from the prior day's readings. (Tr. 122-23; R EX K)
22. The hourly updates from the Willamette River Gauge at Salem show that the river height was 12.02 feet on April 12, 2012 at 1800 hours and 11.94 feet at 1900 hours. (Tr. 78; CG EX 8.)
23. The Statesman Journal indicated the river had dropped 0.67 feet in the previous 24 hours. (CG EX 9; R EX J.)
24. The WILLAMETTE QUEEN was scheduled to transport passengers on a dinner cruise on the evening of April 12, 2011. The vessel regularly undertakes such excursions. (Tr. 138-39.)

25. When the river level is such that the vessel is restricted to the Willamette Slough, Respondent makes two passes of the slough during the evening cruise. (Tr. 138.)
26. Between 1815 and 1830 hours on April 12, 2011, with Respondent in command, the vessel departed its dock at Riverfront Park. (Tr. 99, 136; CG EX 12.)
27. At least eight paying passengers were on board the WILLAMETTE QUEEN at that time. (Tr. 99.) The report of the incident states that the total number of people aboard was thirteen. (CG EX 12.)
28. The vessel, under Respondent's control, proceeded up the Willamette Slough for approximately one mile, then turned back to make another pass. (Tr. 137.)
29. A gravel bar exists at Pringle Creek, at the entrance to the Willamette Slough. (Tr. 58.)
30. The second time the vessel passed Pringle Creek on April 12, 2011, gravel could be felt hitting the bottom of the boat. (Tr. 106, 117, 125 137.)
31. At no point on April 12, 2011 did the vessel stop or become hung up on the Pringle Creek gravel bar. (Tr. 100, 111, 123, 125.)
32. Respondent was unable to get a reading from the vessel's depth meter, indicating the water under the boat was very shallow. (Tr. 124-25, 137.)
33. Respondent and the vessel's owner believed the pilings at the Wallace Marine Boat Ramp only show when the river level is above 11 feet. (Tr. 118, 139-40.)
34. Respondent could see the pilings at the Wallace Marine Boat Ramp during the WILLAMETTE QUEEN's excursion on April 11, 2011. (Tr. 118, 139.)
35. The pilings at the Wallace Marine Boat Ramp are not marked for determining river depth and do not provide any official depth measurements. (Tr. 67, 163.)
36. At approximately 1915 hours Respondent, believing the river must have dropped below 11 feet, maneuvered the vessel from the Willamette River Slough into the Willamette River. (Tr. 140, 147.)

37. Respondent made his decision to enter the Willamette River based on visual cues, the sound and feel of gravel against the bottom of the boat, and a consultation with the vessel's owner, but neither Respondent nor the owner checked the real-time Salem River Gauge readings prior to entering the Willamette River. (Tr. 118, 121-22, 139-40.)
38. The area of the river where the WILLAMETTE QUEEN operated is not charted. (Tr. 92, 157.) No navigational aids have been placed in the river. (Tr. 31-32, 92, 94, 144, 149, 157.)
39. The stretch of the Willamette River from mile 84.5 to mile 86 is shallow. A large rock/gravel bar, known as the Traglio Bar, extends off the east bank at approximately mile 85. (Tr. 82; R EX C, D, and E.)
40. The Traglio Bar has grown over time. (Tr. 82, 86.) It shifted and changed shape during the winter of 2010-2011. (Tr. 23-24, 26-27, 30, 91-92.)
41. Respondent was aware of the Traglio Bar and its tendency to shoal off and change shape over time. (Tr. 141, 148-49, 154.)
42. Respondent customarily relied on visual markers, such as the Rosemont Avenue Underpass, to determine where his turnaround point should be. (Tr. 140-41, 145.)
43. Respondent had not piloted the WILLAMETTE QUEEN outside the Willamette Slough for several months prior to the April 12, 2012 excursion. (Tr. 133.)
44. Respondent had not surveyed the river to determine whether the condition of the gravel/rock bar had changed or new hazards had developed since the previous year. (Tr. 133.)
45. When Respondent saw the visual markers he customarily relied on, he attempted to turn the WILLAMETTE QUEEN around for the return trip. (Tr. 141.)
46. At approximately 2000 hours on April 12, 2011, darkness had fallen. (Tr. 110.)

47. At approximately 2000 hours on April 12, 2011, the WILLAMETTE QUEEN grounded on the Traglio Bar at approximately mile 85 in the Willamette River. (Tr. 101, 110, 118, CG EX 12.)
48. The Coast Guard and the marine patrol were immediately notified of the grounding. (Tr. 124.)
49. No one on board the WILLAMETTE QUEEN at the time of the grounding was injured. (Tr. 102.)
50. The WILLAMETTE QUEEN's passengers were safely transported to shore by a City of Salem Fire Department boat. (Tr. 101.)
51. The WILLAMETTE QUEEN remained grounded for approximately three days, until the Army Corps of Engineers released water to raise the river level. (Tr. 128.)
52. A subsequent underwater inspection conducted by the Coast Guard showed no damage to the bottom of the WILLAMETTE QUEEN. (Tr. 128.)

#### **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 United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner's License.
3. On April 12, 2011, Respondent was acting under the authority of his MML as the captain of the small inspected passenger vessel WILLAMETTE QUEEN.
4. On April 12, 2011, the water level in the Willamette River was above 11 feet, as measured at the Salem River Gauge.

5. The Certificate of Inspection for the WILLAMETTE QUEEN restricts the vessel to the Willamette Slough when the river is above 11 feet, as measured at the Salem River Gauge.
6. On April 12, 2011, Respondent maneuvered the WILLAMETTE QUEEN into the Willamette River in violation of the COI.
7. The factual allegation of “misconduct” against Respondent for operating the WILLAMETTE QUEEN in violation of its conditions of inspection is found PROVED by a preponderance of the evidence.
8. On April 12, 2011, while in command of the WILLAMETTE QUEEN, Respondent grounded the vessel at approximately Mile 85 in the Willamette River.
9. Respondent navigated the WILLAMETTE QUEEN into an area where it was not permitted to be under the conditions of its COI, and the grounding occurred in this area.
10. The factual allegation of “negligence” for causing a marine casualty by grounding the WILLAMETTE QUEEN while operating outside the vessel’s COI is found PROVED by a preponderance of the evidence.

## **V. DISCUSSION**

### **A. Principles of Law**

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof when seeking suspension or revocation of a merchant mariner’s credentials. In order to prevail, the Coast Guard must prove the violations by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). This “requires the trier of fact ‘to believe that the existence of a fact is

more probable than its nonexistence . . .” before finding in favor of the party bearing the burden of proof. Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)).

In this case, the Coast Guard alleged that (1) Respondent committed misconduct by operating a vessel outside the conditions listed on its inspection certificate, and that (2) Respondent was negligent in grounding that vessel while operating it outside the conditions of its inspection and sought a twelve-month suspension of Respondent’s MML. The Coast Guard had the burden of proving each of these allegations by reliable, credible, and probative evidence showing that it was more likely than not that Respondent had committed the violations.

“Federal agencies are not bound by the strict rules of evidence that govern jury trials. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) citing Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Instead, the Administrative Procedure Act governs the admissibility of evidence before executive agencies and permits the trier of fact to receive any documentary or oral evidence. See 5 U.S.C. § 556(d); Gallagher, 953 F.2d 1214; Sorenson, 684 F.2d 683. Only irrelevant, immaterial or unduly repetitious evidence need be excluded. Id. “Under this standard, in order to be admissible for consideration in an administrative proceeding, the evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence.” Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007). However, relevant evidence admissible under the Federal Rules of Evidence is generally admissible in administrative proceedings, as well.

## **B. Jurisdiction**

In both misconduct and negligence cases, jurisdiction is established only if the misconduct and/or negligence occurred while the mariner was acting under the authority of his

merchant mariner credential. 46 U.S.C. § 7703; see also Appeal Decisions 2615 (DALE) (2000) (misconduct), 2204 (PIERCE) (1980) (negligence). The conditions under which a mariner is acting under the authority of a Coast Guard-issued credential or endorsement are found at 46 C.F.R. § 5.57.

A mariner is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is: (1) required by law or regulation; or (2) required by an employer as a condition for employment. 46 C.F.R. § 5.57(a). Additionally, a mariner who is engaged in official matters regarding the credential or endorsement may be acting under the authority of such credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a suspension or revocation hearing. 46 C.F.R. § 5.57(b).

While Respondent admitted to the jurisdictional elements of the Complaint, the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (stating that, irrespective of Respondent's admission of charged offense, appeal must be granted where jurisdiction is not established).

The record clearly establishes that Respondent was the holder of a United States Coast Guard Merchant Mariner's License and that he was serving as Master at all times relevant to these allegations. The evidence establishes that the WILLAMETTE QUEEN is an inspected vessel in the service of Small Passenger Vessel and that its Certificate of Inspection requires that that the vessel's crew include a Master. 46 U.S.C. § 8902 requires that a "small passenger vessel shall be operated by an individual licensed by the Secretary to operate that type of vessel in the particular geographic area, under prescribed regulations." 46 C.F.R. § 15.415 requires that vessels subject to inspection under 46 U.S.C. § 3301 must, while on a voyage, be under the direction and control of an individual who holds an appropriate license or appropriate officer

endorsement on their MMC and that no vessel may be operated unless it has in its service and on board, the complement required by the certificate of inspection. An “individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner credential, unless the individual holds all credentials required ...” 46 C.F.R. § 15.401.

In this case, the weight of the evidence clearly establishes that Respondent was the holder of an MML and that he was acting as the master of the WILLAMETTE QUEEN during its excursion on April 12, 2011, as required by law and regulation. Therefore, I find that he was acting under the authority of that license all times relevant to these allegations and, accordingly, find that jurisdiction is established pursuant to § 5.57(a)(1).

### **C. Misconduct**

The Coast Guard has charged Respondent with misconduct, which is defined in the regulations as follows:

*Misconduct* is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

46 C.F.R. § 5.27. The basis of this charge is that Respondent operated the vessel WILLAMETTE QUEEN in violation of the conditions listed on its COI.

#### **1. Operation Subject to a Certificate of Inspection**

United States law requires certain vessels to undergo safety inspections conducted by the U.S. Coast Guard. 46 U.S.C. § 3301. Small passenger vessels, meaning those of less than 100 gross tons that carry 150 or fewer passengers<sup>3</sup> or have overnight accommodations for 49 or fewer

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<sup>3</sup> *Passenger* means an individual carried on a vessel, except:

passengers, are included in the categories of inspected vessels if they carry more than six passengers, including at least one for hire.<sup>4</sup> Id.; 46 C.F.R. § 175.110. The WILLAMETTE QUEEN is subject to inspection and was issued a Certificate of Inspection on October 29, 2007. (CG EX 2.) This COI was amended on November 27, 2009 to restrict the vessel's route of operation when the Salem River Gauge reads 11 feet or more. (Tr. 38, 40, 153; CG EX 2.) The current COI expires on October 29, 2012. (CG EX 2.)

The Certificate of Inspection issued to a vessel describes the vessel, the route(s) that it may travel, the minimum manning requirements, the survival and rescue craft carried, the minimum fire extinguishing equipment and lifejackets required to be carried, the maximum number of passengers and total persons that may be carried, the number of passengers the vessel may carry in overnight accommodation spaces, the name of the owner and managing operator, any equivalencies accepted or authorized by the Commandant or any Officer in Charge, Marine Inspection (OCMI) in accordance with §175.540 or §175.550 of this chapter, and such other conditions of operations as may be determined by the cognizant OCMI.  
46 C.F.R. § 176.103.

Vessels must comply with any conditions listed on the COI, unless relieved by a suspension or an exemption granted under section 46 U.S.C. § 3306(e). 46 U.S.C. § 3313. They must also carry on board a COI issued pursuant to 46 U.S.C. § 3309 while in operation. 46 U.S.C. § 3311. A mariner who operates a vessel in violation of these laws commits misconduct. See, e.g., Appeals Decisions 715 (ROLL) (1953) (misconduct proved where vessel's master (1) operated under an expired COI and (2) operated with only two mates when the COI required three); 2286

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(1) The owner or an individual representative of the owner, or in the case of a vessel under charter, an individual charterer or individual representative of the charterer;  
(2) The master; or  
(3) A member of the crew engaged in the business of the vessel who has not contributed consideration for carriage and who is paid for on board services.  
46 U.S.C. § 175.400.

<sup>4</sup> *Passenger for hire* means a passenger for whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel. 46 U.S.C. § 175.400

(SPRAGUE) (1982) (misconduct proved against Chief Engineer who failed to report boiler failure to the Coast Guard, as required by the COI; specific intent to violate the COI was not required); 2308 (GRAY) (1983) (carrying the COI on board during operation is a strict requirement, and having been misled about the existence of a valid COI is not a defense to misconduct where the master knew the COI was not on board); c.f. 2438 (TURNER) (1986) (Coast Guard failed to define “operation” as used in the COI’s conditions, therefore could not prove the conditions had been violated).

In particular, in Appeal Decision 2299 (BLACKWELL) (1983), the Commandant affirmed a finding of Misconduct for operating beyond the scope of the route authorized on the vessel's Certificate of Inspection. “Appellant's vessel was required to possess a valid Certificate of Inspection. The Certificate set forth a limited operating area. Appellant exceeded that limit.” The appellant knew of the limits contained in the Certificate and attempted to extend the limits by requesting an amended Certificate. The Commandant noted that at his hearing “Appellant presented evidence to show that his vessel had been inspected in response to his request for an extension of route and that his employee was assured that an amendment would be issued. The amendment was prepared but was never issued. The reason for the non-issuance is not known nor is it material. Without a properly issued amendment, Appellant was precluded from operating.”

The WILLAMETTE QUEEN’s was required to comply with the conditions listed on its Certificate of Inspection at any time it operated with at least six passengers, including at least one paying passenger, aboard. 46 C.F.R. § 176.100(b). On April 12, 2012, there were thirteen people on board the vessel, including Respondent, the vessel’s owner, a crew member, and at least eight paying passengers. (CG EX 12; Tr. 99.) There was no evidence that the WILLAMETTE QUEEN has been granted a suspension or exemption from its COI. I find that

the WILLAMETTE QUEEN was bound by law to operate in accordance with the conditions listed on its COI during its April 12, 2011 excursion.

## **2. Whether Respondent's Actions Constituted Misconduct**

Respondent testified that he believed the river level had dropped enough on April 12, 2011 that he could operate the WILLAMETTE QUEEN in the Willamette River in compliance with the conditions of the vessel's COI. (Tr. 140, 147.) He based this belief on the fact that the river levels had dropped significantly over the past few days; the water in the Willamette Slough was becoming very shallow as the excursion went on; and the pilings at the Wallace Marine Boat Ramp were visible. (Tr. 124-25, 137, 139-40.) However, the restriction in the COI is based on the reading on the official Salem River Gauge and not local observations. Respondent never verified that the official gauge reading at the Salem River Gauge was under 11 feet prior to navigating into the Willamette River. (Tr. 121-22, 139-40.) As specific intent to violate the COI is not required for a charge of misconduct to be proved, see Appeal Decision 2286 (SPRAGUE), Respondent's arguments do not constitute a valid defense to the charge.

Respondent advanced an argument that the Salem River Gauge was not providing accurate readings. He submitted two exhibits, R EX L and M, which provided data but no explanation of how the data was derived or what its implications were. He also questioned Keith Overton, a witness and the field office chief for the Portland office of the U.S. Geological Survey, about the accuracy of the gauge. (Tr. 68-77.) However, Mr. Overton repeatedly testified that the gauge was within the allowable range of accuracy at all times relevant to this case. (Tr. 64-65, 68, 72-73.) The weight of the evidence is that the readings from the Salem River Gauge were within the acceptable range of accuracy on April 12, 2011; Respondent has not shown that the gauge was giving false readings that would affect his vessel's ability to operate in the main stem of the Willamette River that day.

Respondent has also raised the argument that the conditions of the amended COI are arbitrary and unfairly restrict his ability to operate. (Tr. 114-16, 143.) This issue is not properly before me, and I have not given it weight in reaching my decision. Pursuant to 46 C.F.R. § 175.560, “[a]ny person directly affected by a decision or action taken under this subchapter, by or on behalf of the Coast Guard, may appeal therefrom in accordance with [46 C.F.R.] §1.03...” Further, a request for an amended Certificate of Inspection may be made pursuant to 46 C.F.R. § 176.120. The vessel’s owner did not timely challenge the amendments to the COI or request an amendment, thus the vessel is bound by the existing conditions until such time as the COI is amended again or a new COI is issued. Appeal Decision 2299 (BLACKWELL).

### **3. Conclusions as to Misconduct**

The evidence clearly establishes that Respondent was the master of the WILLAMETTE QUEEN on April 12, 2011 and that he was responsible for determining the vessel’s route. In consultation with the vessel’s owner, Respondent decided to navigate the WILLAMETTE QUEEN into the Willamette River without first determining that this action was permitted by the COI. The evidence also establishes that the water level in the Willamette River was at all relevant times above 12 feet, whereas the vessel was not permitted to operate in the main stem of the river unless the water level was below 11 feet. I find the preponderance of the evidence establishes that Respondent operated the WILLAMETTE QUEEN in violation of its COI on April 12, 2012. I therefore find the factual allegation of misconduct PROVED.

#### **D. Negligence**

The Coast Guard has charged Respondent with negligence, which is defined in the regulations as follows:

*Negligence* is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

46 C.F.R. § 5.29.

The basis for this charge is that, while operating the WILLAMETTE QUEEN in violation of its COI, Respondent grounded the vessel. The Coast Guard has established by a preponderance of the evidence that Respondent held a Coast Guard-issued MML and that he was acting under the authority of that license on April 12, 2011. The third element necessary to sustain the negligence charge is proof by a preponderance of the evidence that Respondent acted in a manner contrary to that of a reasonable person in the same circumstances, or failed to act where a reasonable person in the same circumstances would have done. In order to prove the charge of negligence, it is necessary to prove that Respondent's "conduct in some manner failed to conform to the standard of care required of the reasonably prudent master under the same circumstances confronted by Appellant. See Appeal Decision 2282 (LITTLEFIELD)". Appeal Decision 2381 (HARRIS) (1983).

Proof that the negligence caused damage is not required. Appeal Decisions 2277 (BANASHAK) (1982); 2412 (LOUVIERE) (1985); 2358 (BUISSET) (1984). In addition, the determination of liability, or whether the respondent's actions in fact caused the marine incident, is not the function of suspension and revocation actions and therefore is not an element of negligence. Appeal Decisions 2277 (BANASHAK) (1982); 2395 (LAMBERT) (1985); BUISSET, supra; 2261 (SAVOIE) (1981); 2174 (TINGLEY) (1980), aff'd sub nom. Commandant v. Tingley, NTSB Order EM-86 (1981).

Proximate cause, although needed to establish civil liability for damages, is not an element of negligence for the purposes of 46 C.F.R. §5.29. The purpose of this proceeding was not to establish fault for the grounding of the WILLAMETTE QUEEN, but rather to determine whether Respondent failed to conform to the standard of care required of the reasonably prudent master while operating the vessel. However, the fact of a marine incident may affect the sanction

imposed if the allegation is found proved. Appeal Decision 2639 (HAUCK) (2003) (quoting Appeal Decision 2415 (MARSHBURN) (1985)).

### **1. Application of the Rule of the Pennsylvania to This Proceeding**

As to Negligence, the Coast Guard alleges that Respondent committed negligence while acting under the authority of his license on April 12, 2011 by failing to check the River Gauge, navigating the vessel outside the conditions of its Certificate of Inspection, and grounding the vessel at approximately 2030 hours at Mile 85 on the Willamette River. At the hearing, the Coast Guard presented evidence of the fact of a grounding and also argued the presumption of negligence.

A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. See Appeal Decision 2386 (LOUVIERE). As a result of the wording of the specification, I will first address the application of the Pennsylvania Rule to this proceeding. “The Pennsylvania Rule is a rule of causation. If a vessel collides with another following a violation of the statutory Navigation Rules, the causal connection between the violation and the collision is presumed without further proof. The Pennsylvania, 86 U.S. 125 (1873); Appeal Decision No. 866 (MAPP).” Appeal Decision 2358 (BUISSET) (1984). Over time, the rule has expanded from violations of navigation safety rules to other marine safety rules and is not limited to collisions. “Under the Rule of The Pennsylvania, a party who 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.’” U.S.v. Nassau Marine Corp., 778 F.2d 1111, 1116 (5<sup>th</sup> Cir. 1985) quoting The Pennsylvania, 86 U.S. 125, 136 (1873). The Rule “generally has been limited, at least in cases not involving collisions and allisions, to violations of statutes intended to prevent the injury that actually occurred.” Id.

While the causal connection of the Pennsylvania Rule is used to establish liability for negligence in a civil proceeding for damages, in suspension and revocation proceedings, it is not necessary to show that the negligence caused damage. See 46 CFR § 5.29. Rather, the issue is whether the conduct of the Respondent failed to conform to the standard of care required of a reasonably prudent mariner. The Commandant has held that the application of the Pennsylvania Rule added nothing to determining negligence, but also has noted that an Administrative Law Judge may properly apply the Pennsylvania Rule to establish the causal link between Appellant's negligence and the resulting collision or casualty as a matter in aggravation. See Appeal Decisions 2412 (LOUVIERE) (1985); BUISSET, supra; 2695 (AILSWORTH) (2011). The NTSB stated in Commandant v. Ailsworth, EM-211 (2012), that the “Vice Commandant correctly determined the [administrative] law judge only mentioned the Rule in the context of it being an aggravating factor.”

In this case, the restriction as to the vessel's route was to prevent operation in the river when the river was too high and the current too fast. This restriction was out of concern that the vessel was underpowered for such conditions, but was not designed to prevent groundings.

Accordingly, I find no presumption established by the violation of the COI.

## **2. Sufficiency of the Pleadings**

As noted above, a negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption. As noted above, paragraphs 1-5 in the factual allegation of negligence do not allege particular facts amounting to negligence. However, as discussed above, those allegations that he violated a safety rule may be considered as aggravating. Still, the remaining paragraphs of the allegation clearly allege that a grounding occurred while Respondent was operating the vessel.

The purpose of a Complaint in these proceedings is to provide the “legal and factual bases under which the Coast Guard is proceeding.” Appeal Decision 2655 (KILGROE) (2006). The Complaint is meant to “fulfill...a notice requirement” and the specifications contained therein provide notice to the charged party so that he has an adequate opportunity to prepare his defense. Appeal Decisions 2676 (PARKER) (2008). See also Appeal Decisions 2326 (MCDERMOTT) and 2630 (BAARSVIK). “The essential inquiry is the understanding of the parties as to whether the unpleaded [or improperly pleaded] issue was being contested.... ‘It must be clear that the parties understand exactly what the issues are when the proceedings are [held]. Actuality of notice there must be, but the actuality, not the technicality, must govern.’ Kirkland v. District of Columbia, 70 F.3d 629, 633 (D.C. Cir. 1995) (citations omitted)” Appeal Decision 2687 (HANSEN) (2010).

The negligence allegations in this Complaint are sufficient to provide notice to the Respondent so that he has an adequate opportunity to prepare his defense. As will be discussed more fully below, an allegation of a grounding is sufficient to allege negligence. LOUVIERE, supra. Accordingly, the record is clear that the presumption of negligence arising from the grounding was clearly noticed and litigated. Further, the record established that both parties cited numerous Appeal Decisions concerning the presumption of negligence in grounding as well as negligence in general, in addition to the Coast Guard’s argument that the vessel had no reason to be in the Willamette River because of the route restriction. Accordingly, I find that the negligence specification gave adequate notice of the legal and factual bases under which the Coast Guard was proceeding. I will be making specific findings as to the enumerated paragraphs in the Negligence allegation.

### 3. Presumption of Negligence

The Supreme Court has held that “[p]resumptions are permissible [in administrative hearings] unless they are unreasonable, arbitrary, or invidiously discriminatory.” Lavine v. Milne, 424 U.S. 577, 582 (1975). If the presumption being applied meets the articulated standard, then due process is satisfied. Appeal Decision 2560 (CLIFTON) (citing Chung v. Park, 514 F.2d 382, 387 (3rd Cir.), cert. denied, 423 U.S. 948 (1975)).

A well-established presumption adopted in admiralty and in Coast Guard suspension and revocation proceedings arises when proper evidence is presented of a vessel grounding. Mid-America Transp. Co., Inc. v. Nat’l Marine Svc., Inc., 497 F.2d 776 (8th Cir.1974), later appeal 526 F. 2d 629 (8th Cir. 1975), cert. denied 425 U.S. 937 (1976); Appeal Decisions 2409 (PLACZKIEWICZ); 2382 (NILSEN); 2211 (DUNCAN); 2173 (PIERCE), affd sub nom. Commandant v. Pierce, NTSB Order EM-81 (1980). In appropriate circumstances the presumption alone is sufficient to prove a case of negligence. Appeal Decisions 2211 (DUNCAN); 2597 (TIMMEL) (1998).

It has long been established that “the grounding of a vessel on a charted shoal, or where it has no business being, raises a rebuttable presumption of negligence against the person responsible for the vessel's navigation. Appeal Decision 2550 (RODRIQUEZ) (1993), citing Appeal Decisions 2465 (O'CONNELL) (1988); 2382 (NILSEN), aff'd. sub. nom. NTSB Order EM-126 (1985). The Commandant has also stated that the “presumption of negligence may apply to a vessel grounding where it can be shown that the person responsible for the vessel's navigation knew, or should have known of the obstruction.” Appeal Decision 2574 (JONES) (citing Appeal Decision 2409 (PLACZKIEWICZ); Penzoil Prod. Co. v. Offshore Express, Inc., 943 F.2d 1945 (5th Cir. 1991); Appeal Decision 2586 (GREEN) (1997). This is “because vessels under careful navigators do not run aground in the ordinary course of things.” Appeal Decision 1200

(RICHARDS) (1960). A respondent may rebut this presumption by persuasive evidence to the contrary. Appeal Decision 2302 (FRAPPIER) (1983).

Here, credible testimony established that the area of the Willamette River in which the WILLAMETTE QUEEN grounded was not charted; several witnesses agreed that no navigational charts are available and that operators use their knowledge of the area and visual cues to navigate the river. (Tr. 92, 157.) No other navigational aids, such as buoys, had been placed in the river to alert operators of river conditions. Therefore, the first situation under which the presumption of negligence may arise – a grounding on a charted shoal – is not satisfied in this case.

However, another situation under which the presumption arises is where a vessel grounds in a place where it has no business being. The ALJ must then determine whether the respondent has rebutted the presumption by credible evidence that the vessel was permitted to be in the area where the grounding occurred. See Appeal Decision 2628 (VILAS) (holding that, once the Coast Guard proved the vessel grounded in a place where it was not supposed to be, the ALJ was justified in invoking the presumption of negligence).

As previously discussed in this decision, the Coast Guard proved by a preponderance of the evidence that Respondent navigated the WILLAMETTE QUEEN into an area where it was not permitted to be by its Certificate of Inspection. Although the vessel could legally operate in the Willamette River when the water level was below 11 feet at the Salem River Gauge, the Coast Guard has established that the water level at the gauge at the time of the grounding was higher than 11 feet. Respondent was therefore prohibited by the vessel's COI from being in the area where the vessel grounded at the time the incident occurred.

I note that the facts of this case are somewhat counterintuitive: the purpose of the limitation on the WILLAMETTE QUEEN'S operation when the gauge was higher than 11 feet was to ensure safe operation in swift currents, and vessels do not ordinarily ground due to high

water. Thus, the purpose of the conditions on the COI was not necessarily to prevent the situation which occurred here. Nevertheless, the WILLAMETTE QUEEN still grounded in a place where it had no business being at that time, and if Respondent had followed the COI and not entered the Willamette River, the grounding would not have occurred. Consequently, I find the presumption of negligence is properly invoked here by the allegations. Since a stronger basis for the presumption exists on the evidence adduced at hearing, the violation of the COI will be treated as a matter in aggravation as discussed below.

In addition to the above, the presumption of negligence may also apply, even in uncharted waters, when a vessel grounds and “there is substantial evidence showing that the person responsible for the vessel's navigation either knew or should have known of the shoal area when the vessel grounded.” PLACZKIEWICZ, supra, citing Appeal Decision 2173 (PIERCE), aff'd sub. nom. Commandant v. Pierce, NTSB Order EM-81 (1980) and 2133 (SANDLIN), (1978). “[K]nowledge of an otherwise nonvisible object warrants imposition of presumed negligence against those operating the vessel who possessed this knowledge.” Delta Transload, Inc. v. M/V NAVIOS COMMANDER, 818 F.2d 445, 450 (5th Cir.1987). See also Penzoil Prod. Co., supra.

Here the evidence establishes that Respondent was aware of the existence of a shoal area along the stretch of the Willamette River from mile 84.5 to mile 86 and that a large rock/gravel bar, known as the Traglio Bar, extends off the east bank at approximately mile 85. Respondent testified that he was aware of the Traglio Bar and its tendency to shoal off and change shape over time. “In short, since Appellant knew of the shoal on which the vessel grounded, the presumption applies.” PLACZKIEWICZ, supra.

I have considered Appeal Decision 2574 (JONES) (1996), where the Commandant found that the presumption was not raised where the evidentiary record was inconclusive as to whether the Appellant should have known of the obstruction struck by his vessel. Unlike JONES, the

evidence in this matter established that the Respondent was well aware of the existence of the shoal area from mile 84.5 to mile 86 on the Willamette River.

Respondent may rebut the presumption of negligence by credible evidence that the WILLAMETTE QUEEN was permitted to be in the area where the grounding occurred or that the shoal where he grounded was unknown. He has not done so. Respondent argued that the river stage reported in the Statesman Journal was from the previous day and was therefore outdated, that he knew the river level had been dropping over the days preceding the grounding, and that he could see pilings at the Wallace Marine Boat Ramp which he had been informed were only visible when the river was under 11 feet. (Tr. 139-40).

Respondent's reliance on outdated information and visual cues does not establish that he was permitted to leave the Willamette Slough on the date in question. The only permissible means of determining whether he could operate in the Willamette River was the measurement at the Salem River Gauge at the time of operation; his decision to utilize other methods of determining river stage was at his own risk of violating the COI. Thus, he has not established by credible evidence that the vessel was in a place it was permitted to be when it grounded.

Likewise, Respondent has not established that the shoal on which the vessel grounded was unknown to him. Respondent testified that he was aware of the bar in the vicinity of mile 84.5 to mile 86 of the Willamette River and that this was his first voyage in that area for months. After observing that "the river was indeed continuing to drop," he nevertheless transited the area of a known shoal.

The Commandant has also held that a Respondent "faced with the presumption of negligence, must show that he acted prudently in the same manner expected of a reasonable [mariner] of the same experience, training, and local knowledge under the circumstances in order to successfully rebut the presumption. [Woods v. United States, 681 F.2d 988 \(5th Cir. 1982\).](#)" [Appeal Decision 2465 \(O'CONNELL\) \(1988\)](#), The Respondent has asserted that there was no

way he “could have known of the significant shift in location of this gravel bar in such a short period of time. Additionally, there are no navigational aids such as buoys or even charts for this stretch of river.” (Respondent’s Proposed Conclusions of Law). Respondent is very familiar with the area and aware of the existence of the bar. Due to the lack of charts, he navigates the area by “seaman’s eye” As discussed below, I do not find that he acted prudently in the same manner expected of a reasonable small passenger vessel operator of the same experience, training, and local knowledge under the circumstances. Accordingly, I therefore find Respondent’s evidence not sufficiently credible to rebut the presumption of negligence.

#### **4. Ordinary Negligence**

Even if the presumption of negligence did not apply, Respondent’s actions in this case demonstrate ordinary negligence. The record establishes that Respondent knew the Willamette River had a tendency to carry and deposit silt, thereby changing the shape of gravel bars over time. (Tr. 141, 148-49, 154.) The record also establishes that Respondent had not navigated the area of the river where the WILLAMETTE QUEEN grounded for several months prior to the incident, whether for reconnaissance purposes or as part of a regularly scheduled excursion. (Tr. 133.) Respondent knew the hazards in that stretch of the Willamette River were likely to have changed since he last navigated the vessel there, as he stated, “We had 212 days this past winter of flows over 20,000 cubic feet per second which as stated by the USGS is where severe erosion starts on river banks and the gravel bars. And it’s really been the worst year I’ve seen in my 13 years here on the river in terms of the amount of days we’ve had high flows.” (Tr. 144.) Moreover, Respondent was aware that the area was not charted and that visual markers were his primary method of determining where he was in the river. The Rosemont Avenue underpass was his visual cue the previous year to turn the boat around; he also used a depth sounder to hold to an eight-foot line. (Tr. 142, 140.) There was also testimony that darkness had fallen by the time

the vessel ran aground. (Tr. 110.) Nevertheless, Respondent chose to navigate the vessel into this section of the river.

The standard of care is well-known. An operator is under a continuing duty to know where his vessel is at all times, and he should be in possession of all other pertinent facts relating to the voyage. See Mid-America Transportation Co., 497 F.2d at 780; Appeal Decision 2416 (MOORE) (1986). In Appeal Decision 2370 (LEWIS), the Commandant also held that:

The master or operator of a vessel is expected to know the available information regarding the waterway that he is traversing and the characteristics of his vessel... Failure of a master or operator of a vessel to make proper use of such information with the result that he chooses to move his vessel when the state of the tide and weather make that dangerous is negligence. ...

In light of the evidence introduced into the record, I find that a prudent mariner under the same conditions would not have chosen to assume the risk of navigating a vessel in limited visibility conditions into waters with known hazards, which he had not recently traversed. Consequently I find that, even if no grounding had occurred, Respondent's action on April 12, 2011 of navigating the WILLAMETTE QUEEN out of the Willamette Slough and into the Willamette River in the vicinity of mile 84.5 to mile 86 where a large rock/gravel bar, known as the Traglio Bar existed without first determining what changes in the size, shape, and location of the bar had occurred since his last voyage in the area several months earlier, constituted negligence.

##### **5. Conclusions as to Negligence**

The numbered allegations 1-4 as to Negligence have already been found proved under the Misconduct Charge. Numbered allegation 5 that "Captain Chesbrough navigated the WILLAMETTE QUEEN into the Willamette River. By doing this, Captain Chesbrough operated the WILLAMETTE QUEEN outside the conditions of his Certificate of Inspection" has also been found proved under Misconduct. The violation of the Certificate of Inspection did not

directly contribute to the grounding and will be considered only in the context of it being an aggravating factor. See AILSWORTH, *supra*.

The presumption of negligence applies even though the Willamette River is uncharted because I find that there is substantial evidence showing that the person responsible for the vessel's navigation either knew or should have known of the shoal area where the vessel grounded. I find that presumption was not rebutted. Further, the evidence established that in addition to the presumption the Respondent was under a continuing duty to know where his vessel was at all times, and he should be in possession of all other pertinent facts relating to the voyage, and that a prudent mariner under the same conditions would not have chosen to assume the risk of navigating a vessel in limited visibility conditions into waters with known hazards, which he had not recently traversed. The factual allegation of negligence is therefore PROVED.

#### **E. Other Issues**

In its Proposed Findings of Fact, the Coast Guard alleges that Respondent grounded the WILLAMETTE QUEEN on the Pringle Creek gravel bar at approximately 1915 hours and failed to report the incident to the Coast Guard. However, the Coast Guard has not charged Respondent with failure to report a grounding. Thus, the question of whether a grounding in fact occurred at that time and whether Respondent subsequently failed to report it is not germane to the charges actually filed.

In GREEN, *supra*, the Appellant claimed that “he did not ground, but instead “merely ‘bumped’, touched and/or ‘whispered’ on the bottom” and that this is somehow distinguishable from a grounding. The Commandant stated as follows:

Although an exact definition of the verb “to ground” has not been required in my previous decisions, a grounding is generally defined as when a vessel contacts the bottom of the sea. *See Webster's Third New International Dictionary (1976)* (“to place on or cause to touch the bottom”); *The Marine Encyclopaedic Dictionary, Eric Sullivan, (5th Ed. 1996)* (“when a vessel contacts the bottom of the

sea or the ground”). Appellant does not dispute that his vessel touched the bottom of the ICW. The evidence indicates that the contact was sufficient enough to impair his forward progress and cause the Appellant to back down. [TR Vol. II at 30; D&O at 11]. The terms used by the Appellant to describe the grounding only describe the severity, not whether a grounding occurred.

Here the evidence is that, while gravel could be felt hitting the bottom of the boat; the vessel did not stop or become hung up on the Pringle Creek gravel bar. Moreover, the record does not clearly establish whether the vessel actually touched bottom or whether the gravel hitting the boat was stirred-up debris suspended in the water. (See Tr. 99-100, 106, 110, 111, 125-26, 137.) Accordingly, I do not find that grounding occurred there nor did a duty arise to notify the Coast Guard of a grounding.

## **VI. SANCTION**

In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a) (2). The Coast Guard has requested a sanction in this case of twelve (12) months suspension of Respondent’s MML. “The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.” 46 C.F.R. § 5.569(a).

### **A. Suggested Range of an Appropriate Order**

The proposed sanction in this case is premised on two separate allegations: misconduct for violating the vessel’s COI and negligence for causing the vessel to ground while operating in violation of the COI. In the Table entitled “Suggested Range of an Appropriate Order,” codified at 46 C.F.R. § 5.569, the suggested penalty range for misconduct for “Failure to comply with U.S. law or regulations” is 1-3 months suspension. The suggested range for negligence for “Negligently performing duties related to vessel navigation” is 2-6 months.

46 C.F.R. § 5.569(d) explains how an ALJ may apply the “Suggested Range of an Appropriate Order” Table, noting that:

The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for failure to obey a master’s written instructions. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

Longstanding Coast Guard law in the area of appropriate orders states that the order is in the discretion of the ALJ and the ALJ is not bound by the table. See 46 C.F.R. § 5.569(d). Other factors may be considered in fashioning an appropriate order. “An Administrative Law Judge has wide discretion to formulate an order adequate to deter the [a mariner’s] repetition of the violations he was found to have committed.” Appeal Decision 2475 (BOURDO) (1988).

#### **B. Factors Considered in Determining an Appropriate Order**

In determining an appropriate sanction, an ALJ may also consider the following factors: (1) Remedial actions which have been undertaken independently by Respondent; (2) The prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b). Where the sanction imposed is greater than the Table suggests is appropriate, the ALJ must clearly articulate the evidence supporting the upward deviation in order to justify an aggravated sanction. See Commandant v. Moore, NTSB Order No. EM-201 (2005); Commandant v. Ailsworth, NTSB Order No. EM-211 (2012).

Here, the Coast Guard argues that the Respondent’s actions violated the Certificate of Inspection and caused the grounding on the rock bar. As I have found both allegations proved, the most severe sanction the Table of Appropriate Orders would support is 9 months—3 for the

misconduct charge and 6 for the negligence charge. However, the Coast Guard has not introduced any evidence to support the aggravated sanction it seeks. The record contains no support for an increased sanction of 12 months.

I note, however, that Respondent has introduced several factors toward mitigation. He has held a MML for over thirty (30) years and no evidence was introduced that there were ever prior actions against his license. (Tr. 158.) During the grounding on April 12, 2011, no one on board the vessel was injured, and when the vessel was eventually freed from the gravel bar, the Coast Guard inspector found that it had sustained no damage. The vessel's owner also testified that she and Respondent are now using the real-time Salem River Gauge readings found online to plan their excursions, rather than relying on the outdated information printed in the Statesman Journal. (Tr. 120-21.)

### **C. Sanction as to the Misconduct Allegation**

As to Misconduct, I have found that Respondent operated a small passenger vessel with passengers aboard in violation of the Certificate of Inspection. "As is apparent on the face of the legislation, however, the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection. ... The safety of passengers ... and of the crew ... is the criterion. The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation." Huron Portland Cement Co. v. City of Detroit, Mich. 362 U.S. 440, 445.<sup>5</sup>

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<sup>5</sup> For many years Congress has maintained an extensive and comprehensive set of controls over ships and shipping. Federal inspection of steam vessels was first required in 1838, 5 Stat. 304, and the requirement has been continued ever since. 5 Stat. 626; 10 Stat. 61; 14 Stat. 227; 16 Stat. 440; 22 Stat. 346; 28 Stat. 699; 32 Stat. 34; 34 Stat. 68; 60 Stat. 1097; 73 Stat. 475. Steam vessels which carry passengers must pass inspection annually, 46 U.S.C. s 391(a), 46 U.S.C.A. s 391(a), and those which do not, every two years. 46 U.S.C. s 391(b), 46 U.S.C.A. s 391(b). Failure to meet the standards invoked by law results in revocation of the inspection certificate, or refusal to issue a new one, 46 U.S.C. s 391(d), 46 U.S.C.A. s 391(d). It is unlawful for a vessel to operate without **\*\*817** such a certificate. 46 U.S.C. s 390c(a), 46 U.S.C.A. s 390c(a). Huron Portland Cement Co. v. City of Detroit, Mich. 362 U.S. 440, 444 U.S. 1960.

Here the Respondent operated outside the scope of the route allowed in the Certificate of Inspection. Respondent has no apparent prior record of violations for Misconduct. The Respondent as Master is responsible for operating his vessel in accordance with the Certificate of Inspection. Part of the COI is the route the vessel is permitted to operate on.

Routes Permitted. (a) The area of operation for each vessel and any necessary operational limits are determined by the cognizant OCMI, and recorded on the vessel's Certificate of Inspection. Each area of operation, referred to as a route, is described on the Certificate of Inspection under the major headings [such as] Rivers, as applicable. Further limitations imposed or extensions granted are described by reference to bodies of waters, geographical points, distance from geographical points, distances from land, depths of channel, seasonal limitations, and similar factors.

46 C.F.R. 176.110. (a)

In determining those routes, the Coast Guard may consider the performance capabilities of the vessel based on design, scantlings, stability, subdivision, propulsion, speed, operating modes, maneuverability, and other characteristics. 46 C.F.R. § 176.110. (d)(2). Respondent was well aware of the limitations placed on the WILLAMETTE QUEEN.

Respondent argues that he believed that the river level was below 11 feet and that he was not operating in violation of the COI. His observations that supported this belief or wishful thinking that the river level was below 11 feet were based on local observations and not the requirements of the COI that clearly allowed operation only when the River Gauge at Salem read 11 feet or less. At the time, Respondent entered the River, he was not aware of the official gauge reading.

Respondent was aware of the reasons for the limitations. On April, 2011, he was also aware of the river conditions. Respondent argues that he had a Hobson's choice: stay in the slough and risk grounding or, based on his observations, go into the River where for the last few months he had been restricted from operating. The decision to undertake a voyage or stay at the dock is the responsibility of the Master, as is the decision whether the voyage should continue or

whether the vessel should return to the dock. Respondent's actions operating in violation of the COI potentially compromised the safety of the vessel and the passengers. Based on his observations Respondent believed that he was not intentionally violating the COI, however, as noted above, intent is not an element of the violation but can be an element in aggravation. The vessel's owner also testified that she and Respondent are now using the real-time Salem River Gauge readings found online to plan their excursions to prevent future violations.

I have considered Respondent's long history as the holder of an MML, as well as the impact of a long term suspension on the operation of the WILLAMETTE QUEEN and the livelihood of the Respondent and others employed by the WILLAMETTE QUEEN. I have determined that an order of a brief period of outright suspension (one month) plus an additional suspension of two months on eighteen months (18) probation is adequate to deter this mariner's repetition of the violations he was found to have committed. This period of probation is intended to cover the next two operating seasons for the WILLAMETTE QUEEN.

As a special condition of probation, if Respondent operates the WILLAMETTE QUEEN in violation of the Certificate of Inspection, the Coast Guard may seek to enforce the probation by filing a motion rather than a new Complaint. Respondent may file a response to any motion seeking to enforce the special conditions of probation.

Additionally, the general conditions of probation apply. The additional period of two (2) months of suspension on probation shall not be effective provided no charge under 46 U.S.C. 7703 or 7704, or any other navigation or vessel inspection law, is proved against the respondent for acts committed during the foregoing period of outright suspension or for acts committed within eighteen (18) months from the date of termination of the foregoing outright suspension. See *BOURDO*, supra/ Those violations must be brought by Complaint and will be enforced only after a finding of proved. However, upon a finding of proved ...,” the Administrative Law Judge must execute any outstanding order that has been remitted on probation. See Appeal

Decision 1766 (O'LEARY); Appeal Decision 1682 (AGUEDA).” Appeal Decision 2481 (CROWLEY) (1989). The Administrative Law Judge has the further discretion to revoke or suspend a Respondent’s credentials” independent of, and in addition to, the sanction remaining from the previous outstanding order.” Id.

#### **D. Sanction as to the Negligence Allegation**

As to Negligence, the Respondent was the person responsible for the navigation of the WILLAMETTE QUEEN and the grounding gave rise to a rebuttable presumption of negligence against because vessels under careful navigators do not run aground in the ordinary course of things. Further, I have found that Respondent’s actions in navigating the WILLAMETTE QUEEN at night in the vicinity of mile 84.5 to mile 86 of the Willamette River where a large rock/gravel bar existed without first determining what changes in the size, shape and location of the bar had occurred since his last voyage in the area several months earlier constituted negligence. In navigating the river, the Respondent was moving at a low speed and was familiar with the river generally but had not traversed the area of the bar for several months.

The facts found as to Negligence are different than those found as to Misconduct so a separate analysis will be conducted. As noted before, the suggested range for negligence for “Negligently performing duties related to vessel navigation” is 2-6 months. “The table contemplates that appropriate aggravating and mitigating factors be applied to those sanctions set forth in the table to arrive at the appropriate order in a given case. Appeal Decision 2628 (VILAS) (2002). “It has been argued that as to Negligence cases, the Administrative Law Judge's deliberations as to an appropriate order are restricted to consideration of evidence of a duty or obligation on the part of the respondent and evidence of a breach of this duty. The Commandant has stated that “[w]ith this, I agree, based on the holding in Commandant v. Wardell, NTSB Order EM-149. Evidence

of damages or injury, however, may be essential to the determination of the degree of duty a mariner owes in a given situation.” Appeal Decision 2539 (HARRISON) (1992).

“The precise degree of duty owed under a given set of circumstances is a function of several variables. These include the probability that injuries or damages will occur as the result of a certain act, the gravity of resulting injuries or damages, and the burden of taking adequate precautions to avoid the accident. Cf. Complaint of Paducah Towing Co., 692 F.2d 412 (6th Cir. 1982). Consequently, in arriving at a decision it may be inappropriate for the Administrative Law Judge to ignore and exclude from consideration the consequences and results of a negligent act.” HARRISON, *supra*.

First, the standard of care, which requires an operator to know where his vessel is at all times and possess all pertinent facts relating to the voyage, is well-known. I have found that Respondent’s actions constituted negligence because he operated at night in the vicinity of a large rock/gravel bar without first determining what changes in the size, shape and location of the bar had occurred since his last voyage in the area several months earlier. However, I note that he was very familiar with the general area and knew the nature of the bottom and the types of hazards present.

As noted above, damages can be considered as a factor in awarding an appropriate sanction. Aggravation is not defined in the regulations, but the amount of damage occurring in a grounding is an indication of the possible consequences involved in negligent maneuvering of the vessel, and may properly be considered as a matter in aggravation. This is not to say that the amount of damage is determinative of the proper order; it is merely one factor to consider.

Appeal Decision 2455 (WARDELL). In Appeal Decision 2515 (COUSINS) (1990), the Commandant held, “It is not unreasonable for the Administrative Law Judge to take into account the degree of danger into which the negligent omission or commission placed the vessel, her cargo, and especially her crew. Appeal Decision 1937 (BISHOP). The consequence, such as an

allision or collision, though unnecessary to support a decision finding negligence, may be an aggravating factor or the lack thereof may be a mitigating factor, and hence it may be proved whether or not it is alleged. Appeal Decision 2415 (WASHBURN). Appeal Decision 2129 (RENFRO). ... Where the danger is great, the greater should be the precaution. The Clarita [90 U.S. 1 (1874)].” Here, there was no damage to the WILLAMETTE QUEEN. The evidence supports the finding that the grounding occurred in or near rock/gravel bar an area in which the evidence also showed the bottom was known to be “soft.” The evidence also supports the finding that the passengers were not harmed. However, the vessel was stranded and could not be freed by the actions of its own engines. There was no significant hull damage. Under these circumstances, this case is one in which the lack of damage is a mitigating factor. VILAS, supra.

As noted above, the grounding occurred in a part of the river where, pursuant to the Certificate of Inspection, the WILLAMETTE QUEEN should not have been operating at the time. While this violation has been found not be a direct cause of the casualty, precedent permits it to be considered an aggravating factor. I have already determined the appropriate sanction for the Misconduct violation and since it does not relate directly to the danger of grounding, I will not consider it a major aggravating factor. However, the fact that Respondent was operating outside of the route permitted in the COI is sufficient aggravation to warrant that the order include outright suspension rather than on being entirely on probation.

I also considered and rejected requiring refresher training as a special condition of probation concerning Negligence. This Respondent’s operations with stern wheel propulsion in an uncharted river area do not lend themselves to the type of standard training that would be valuable in preventing further incidents. Rather, the probationary order discussed above as part of the Misconduct sanction would be more likely to deter subsequent incidents.

Here I have found that the while the standard of care was breached, the foreseeable and actual consequences were small. Overall, the mitigating circumstances as to Negligence are

greater than the aggravating circumstances. Therefore a downward departure from the table is appropriate. I have determined that an order of one month outright suspension is appropriate for the finding of Negligence.

#### **E. Conclusions as to Sanction**

The Coast Guard seeks twelve (12) months suspension for both violations and Respondent argues that such a suspension would be excessive. Both parties have cited to a number of decisions involving vessel groundings. The Coast Guard has cited Appeal Decision 2266 (BRENNER) (1981) (one month suspension, plus two months on twelve months probation); Appeal Decision 2284 (BRAHN) (1982) (admonition); Appeal Decision 2302 (FRAPPIER) (one month suspension on twelve months probation); and Appeal Decision 2373 (ODLOW) (1984) (two months suspension on six months probation). Respondent has cited ODLOW, FRAPPIER, and two ALJ decisions, USCG v Sanderson (), (two months outright suspension and four months suspended on twelve months probation) and USCG v Baarsvik (2000) (one month suspension on three months probation).

I have also considered the sanctions approved in Appeal Decisions 2601 (MCCARTHY) (1998) (revocation); 2586 GREEN (1996) (4 months outright suspension); 2501 (HAWKER) (1990) and 2500 (SUBCLEFF) (1990) (six months outright); VILAS, supra (Commandant modified sanction to six months suspension outright) and COUSINS, supra (nine months outright suspension). These decisions all involve either a higher degree of negligence or other factors warranting a significant sanction. In most, a less significant sanction than the Coast Guard seeks here was assessed against the respondent mariner. Without a serious prior record or a very high degree of negligence, significant aggravating factors would have to be established to warrant a twelve months suspension.

In light of the evidence presented, I find the aggravated sanction sought by the Coast Guard clearly inappropriate, and I find that the maximum penalty suggested in the Table is also not appropriate. I therefore assess a sanction of one (1) month outright suspension for the misconduct charge and one (1) month outright suspension for the negligence charge, for a total outright suspension of two (2) months.

In addition, to deter repetition of the violations, a period of eighteen (18) months probation is ordered. Violation of the conditions of probation will result in an additional two (2) month suspension.

As a special condition of probation, if Respondent operates the WILLAMETTE QUEEN in violation of the Certificate of Inspection, the Coast Guard may seek to enforce the probation by filing a motion rather than a new Complaint. Respondent may file a response to any motion seeking to enforce the special conditions of probation.

Additionally, the general conditions of probation apply. The additional period of two (2) months of suspension on probation will be enforced if a violation under 46 U.S.C. 7703 or 7704, or any other navigation or vessel inspection law, is proved against the respondent for acts committed during the period of outright suspension or for acts committed within eighteen (18) months from the date of termination of the outright suspension.

The period of probation will commence upon completion of the outright suspension. Respondent may continue to work under his license during probation, however, if another suspension and revocation charge is proved against Respondent or if probation requirements stated below are violated the Coast Guard may seek to enforce the two (2) month suspension.

**ORDER**

**IT IS HEREBY ORDERED** that the Allegations in the Complaint are found **PROVED**;  
and

**IT IS HEREBY FURTHER ORDERED** that Respondent's Mariner's License is  
**SUSPENDED OUTRIGHT** for **TWO (2) MONTHS**; the Respondent's Credentials are to be  
surrendered to the Coast Guard immediately; and

**IT IS HEREBY FURTHER ORDERED** that Respondent's Mariner's License is  
**SUSPENDED** for an additional **TWO (2) MONTHS**, remitted on **EIGHTEEN (18) MONTHS**  
**PROBATION**. In addition to the general conditions of probation, Respondent must not operate  
the WILLAMETTE QUEEN in violation of its Certificate of Inspection, during the period of  
probation. The period of probation will commence upon completion of the outright suspension.  
**SO ORDERED.**

**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 C.F.R. § 20.1001 – 20.1004.

**George J. Jordan**  
**US Coast Guard Administrative Law Judge**

Date: July 25, 2012

## APPENDIX I: APPEALS

### Procedural Rules for Appeals

#### **33 C.F.R. § 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

#### **33 C.F.R. § 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

#### **33 C.F.R. § 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    - (i) Basis for the appeal;
    - (ii) Reasons supporting the appeal; and
    - (iii) Relief requested in the appeal.
  - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
  - (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

### **33 C.F.R. § 20.1004 Decisions on appeal.**

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person

### **Additional Rules concerning Appeals from 46 C.F.R. Part 5**

### **46 C.F.R. § 5.701 Appeals in general.**

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

- (a) Whether each finding of fact rests on substantial evidence.
- (b) Whether each conclusion of law accords with applicable law, precedent, and public policy.
- (c) Whether the ALJ committed any abuses of discretion.
- (d) The ALJ's denial of a motion for his or her disqualification.

### **46 C.F.R. § 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary credential or endorsement.**

- (a) A person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in §5.59, may file a written request for a temporary credential or endorsement. This request must be submitted to the Administrative Law Judge who presided over the case or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.
- (b) Action on the request is taken by the ALJ unless the hearing transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.
- (c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved,

the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary credential or endorsement may be denied for that reason alone.

(d) All temporary credentials or endorsements will provide that they expire not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary credential expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.

(e) If the request for a temporary credential or endorsement is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.

(f) Copies of the temporary credential issued become a party of the record on appeal.

### **§ 5.713 Appeals to the National Transportation Safety Board.**

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of credentials or endorsements are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.

(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances.

Communications should be addressed to Commandant (CG-094), U.S. Coast Guard, 2100 2nd St. SW., Stop 7121, Washington, DC 20593-7121.

(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated of counsel.

### **§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary credential and/or endorsement pending appeal to National Transportation Safety Board.**

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Commandant's opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary credential and/or endorsement may be denied for that reason alone.

(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).

(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary credential and/or endorsement as specified in the stay order. This credential and/or endorsement is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

## **APPENDIX II: LIST OF WITNESSES AND EXHIBITS**

### **WITNESSES**

#### **For the Coast Guard**

Paul Thunberg, USCG Inspector  
Keith Overton, US Geological Survey  
Den Bender, Polk County Marine Patrol  
Jude Geist, City of Salem Parks Operation

#### **For the Respondent**

Brad Allen  
Ed Bowman  
Bruce Brownstein  
Barbara Chesbrough  
Richard A. Chesbrough, Respondent

### **EXHIBITS**

#### **For the Coast Guard**

- CG EX 1 Copy of CG 835 (work list) issued to and signed by Respondent on November 25, 2009
- CG EX 2 Copy of WILLAMETTE QUEEN Certificate of Inspection
- CG EX 3 Google Maps: Overview of WILLAMETTE QUEEN's dock and location of Salem River Gauge
- CG EX 4 Willamette River Gauge Readings at Salem for 4/10/2011-4/18/11, taken from National Weather Service website
- CG EX 5 Willamette River Provisional Gauge Readings from March 2011, provided by U.S. Geological Survey
- CG EX 6 Willamette River Provisional Gauge Readings from April 2011, provided by U.S. Geological Survey
- CG EX 7 Willamette River Provisional Gauge Readings from May 2011, provided by U.S. Geological Survey
- CG EX 8 Willamette River Hourly "Working" Gauge Readings from April 11-20, 2011, provided by U.S. Geological Survey
- CG EX 9 Copy of Statesman Journal page 6C, April 12, 2011, including Salem River Gauge readings
- CG EX 10 Google Maps: Rock bar in Willamette River in which WILLAMETTE QUEEN grounded on April 12, 2011
- CG EX 11 Google Maps: Rock bar in Willamette River in which WILLAMETTE QUEEN grounded on April 12, 2011 (closer view)
- CG EX 12 CG-2692 submitted by Respondent to the Coast Guard concerning the April 12, 2011 grounding

- CG EX 13 Pictures of WILLAMETTE QUEEN aground in the Willamette River on April 12, 2011
- CG EX 14 Pictures of Rock Bar Willamette River approximately mile 85
- CG EX 15 Certificate of Documentation – WILLAMETTE QUEEN
- CG EX 18 Visual aid

**For the Respondent**

- R EX C Aerial photographs of Minto-Brown Island, Willamette River, and Willamette Slough showing WILLAMETTE QUEEN’s home dock and approximate grounding area
- R EX D Aerial photograph of Willamette River
- R EX E Aerial photograph of Traglio Bar
- R EX I USGS Real-Time Water Data for Willamette River at Salem, April 7-14, 2011 and River Stage-Discharge Graph for Willamette River at Salem, April 4-22, 2011
- R EX J Copies of Statesman Journal pages showing Willamette River levels, April 9-12, 2011
- R EX K Email correspondence between Respondent and employees of the Statesman Journal concerning the paper’s river level data
- R EX L List of disparities in USGS readings at Salem Gauge compiled by Respondent
- R EX M USGS Real-Time Water Data for Willamette River at Salem, February 15, 2011-March 24, 2011 and March 29, 2011-April 25, 2011 with handwritten annotations
- R EX R Marine Operations Risk Guide
- R EX U Letter from Willamette Queen Excursions regarding activity report

## **APPENDIX III: PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Coast Guard's Proposed Findings of Fact**

1. WILLAMETTE QUEEN is a Small Passenger Vessel regulated under 46 C.F.R. Subchapter T.

*Adopted and incorporated.*

2. On November 25, 2009, the WILLAMETTE QUEEN's conditions of operation section on the COI was amended stating the following: "When the river gauge at Salem reads 11 feet or more, the vessels [sic] operation is limited to the Willamette Slough located behind Minto Browns Island."

*Adopted and incorporated.*

3. Captain Chesbrough was educated and aware of the condition of the river stage height on the vessel's COI.

*Adopted and incorporated.*

4. On April 12, 2011, prior to getting the WILLAMETTE QUEEN underway for the evening dinner cruise, Mr. Chesbrough checked the Willamette River Gauge height at Salem in the Statesman Journal.

*Adopted and incorporated.*

5. The Statesman Journal indicated the Willamette River Gauge at Salem was at a height of 12.1 feet.

*Adopted and incorporated.*

6. The WILLAMETTE QUEEN was captained by Mr. Richard Albert Chesbrough as required by law or regulation.

*Adopted and incorporated.*

7. Mr. Chesbrough is a holder of and was acting under the authority of Merchant Mariner License # 1215480.

*Adopted and incorporated.*

8. On April 12, 2011, at approximately 1820 hrs, the WILLAMETTE QUEEN departed its berth carrying passengers for hire and entered the Willamette Slough.

*Adopted and incorporated.*

9. At approximately 1900 hrs on April 12, 2011, Mr. Chesbrough grounded the WILLAMETTE QUEEN on the Pringle Creek Bar and did not report it to the Coast Guard.

*Rejected. The fact of grounding on Pringle Creek Bar is not supported by substantial evidence of record. See Discussion in D&O.*

10. On April 12, 2011 at 1900 hrs, the Willamette River Gauge reading was 11.94 feet.

*Adopted and incorporated.*

11. At approximately 1915 hrs, Mr. Chesbrough utilized a piling at Wallace Marine Boat Ramp to determine river stage instead of the Willamette River Gauge at Salem.

*Substantially adopted and incorporated.*

12. The piling at Wallace Marine Boat Ramp does not gauge the Willamette River stage.

*Adopted and incorporated.*

13. During the dinner cruise at approximately 1915 hours, on April 12, 2011, Mr. Chesbrough navigated the Willamette Queen from the Willamette Slough into the Willamette River.

*Adopted and incorporated.*

14. Upon entering the Willamette River, Mr. Chesbrough committed an act of mariner misconduct by operating the Willamette Queen outside a condition of the vessels [sic] COI.

*Adopted and incorporated.*

15. Mr. Chesbrough was well aware of rock bar located at approximately mile marker 85 in the Willamette River.

*Adopted and incorporated except as to rock bar. Decision found that the so-called Traglio Bar is a rock/gravel bar.*

16. Mr. Chesbrough was well aware the rock bar at approximately mile marker 85 can “grow.”

*Adopted and incorporated except as to rock bar. Decision found that the so-called Traglio Bar is a rock/gravel bar.*

17. Mr. Chesbrough grounded the Willamette Queen on a rock bar at approximately mile marker 85 in the Willamette River.

*Adopted and incorporated except as to rock bar. Decision found that the so-called Traglio Bar is a rock/gravel bar.*

18. Salem Gauge readings for the Willamette River on April 12, 2011 were above 11 feet at the time of grounding.

*Adopted and incorporated.*

### **Coast Guard’s Proposed Conclusions of Law**

On April 12, 2011, the Respondent had knowledge of the river stage and the restrictions on the vessels [sic] COI; and he made the decision to enter the river in violation of the COI. Based on the definition of Misconduct in 46CFR5.27 [sic], the respondent violated a formal duly established rule.

*Considered and Accepted*

On April 12, 2011, the Respondent knew of the rock bar located at approximately mile 85 in the Willamette River. The Respondent also knew the rock bar can and does grow and chose to navigate his vessel over the bar causing his vessel to ground.

*Considered and Accepted except as to rock bar. Decision found that the so-called Traglio Bar is a rock/gravel bar and that there was no damage to vessel as a result of the grounding.*

### **Respondent’s Proposed Findings of Fact**

1. On the morning of April 12, 2011 I checked the river guage [sic] reading as I do every morning in the Statesman Journal and noted that it was over 11' and thus I knew my route for that evenings [sic] cruise would be behind Minto-Brown Island.

*Adopted and incorporated*

2. With our 8 passengers aboard we proceeded behind the Island up the Willamette Slough but I noticed on our depth sounder that we just barely had enough clearance over the Pringle gravel bar as we entered the slough indicating to me that the water level must be still declining as it had been for the previous three days. This was further confirmed when upon exiting the slough we just grazed this same Pringle bar. This confirmed in my mind that indeed the river level must be dropping rapidly.

*Adopted and incorporated*

3. Another indication of the river level dropping below 11' was that I could see the tops of the dock pilings at Wallace Marine Park which for the past 11 years of my navigating this stretch of the river have always been under water and thus out of sight when river level exceeded 11'.

*Adopted and incorporated*

4. Knowing that the river guage [sic] level in the newspaper is actually the reading taken from the USGS guage [sic] report from the day before and thus about 30 hours earlier, coupled with knowing that the previous 3 days had shown significant drops in level it was indicative to me that the river was indeed continuing to drop. Ref. Exh. E-9, Pg. 85 line 18, 19.

*Adopted and incorporated*

5. Conferring with the vessel owner about my concerns about reentering the slough for the second hour of a two hour cruise in view of the grazing which was felt not only by her but also by our customers and crew as well plus the visability [sic] of the pilings, she too concurred that the river level must have dropped to below 11' as she testified Pg. 120 lines 4-11.

*Adopted and incorporated*

6. The owner and I agreed that the river level must be low enough (below 11') to allow us safe passage to proceed upstream on the main channel side of the island and we did so making a comfortable 4 knots at less than one-half throttle. *Adopted and incorporated* Understand that in this stretch of the river the current has always been slower on the east side and thus better progress can be made upstream in the higher water months of the year. In the summer months, the current is considerably less so either side of the river is fine for navigating upstream. *Adopted and incorporated* Both Mr. Bender and Mr. Allen testified that they generally navigate their boats on the west side where the current is stronger but two things are important to note here. First of all, recreational boaters are not on the river in the winter months. In fact, Mr. Bender only patrols the river from May – October when the water is much lower and the gravel bars are visible. Ref. pg. 81 lines 22-25. *Adopted and incorporated*. Secondly, their boats are small with large inboard engines that have little or no problems with current. *Adopted and incorporated* It has always been my procedure with the "Willamette Queen" to navigate upstream on the east side and downstream on the west side. *Adopted and incorporated* I know that Your Honor is familiar with the Mississippi River current conditions so I'm sure you've heard pilots use the phrase "Riding the Willows" which refers to the practice of navigating close to shore to take advantage of slower currents when traveling upstream. It is a common practice of riverboats on

all rivers. *Treated as argument. Evidence of common customs of navigation of riverboats was not in evidentiary record.*

7. Having traveled approximately one-half mile upstream from the northern tip of the island I spotted the Rosemont Dr. Underpass on Highway 22 on the west side of the river which is my guide post indicating my point for turning the vessel around to head back downstream. *Adopted and incorporated.* I was commencing my turn when the vessel slide [sic] up on the gravel bar. *Adopted and incorporated.* The cause of the grounding was definitely due to the fact that the gravel bar had grown tremendously over the high water winter months both northward and westward in the river. *Adopted in part and incorporated. Changes to the size and shape of the bar and Master's ignorance of changes and current location are found to be the major factors in the grounding.* Where I normally always turned around was now suddenly filled with gravel. *Adopted and incorporated.* Furthermore, the bar always had a very gradual upward slope giving ample warning of shallowing water. Now it was a straight drop off. This was my first trip upstream since the previous fall and there was no way I could of [sic] known of this significant movement of the bar and its changed shape. *Adopted and incorporated as to fact of first trip since previous fall. Rejected as to no way Respondent could have known of changes to bar.* Aerial photo Exhibits D and E clearly show this change just over this past winter. Mr. Allen testified that he estimated the growth of this gravel bar to be at least 30% over the winter months Ref pg 27 line 15-15 and pg. 30 lines 7-8. *Adopted and incorporated.*

8. The entire Upper Willamette River from Newberg to Eugene, a distance of 135 miles, has no navigational aids of any type. Furthermore, there are no nautical charts for this entire stretch of river as well. This was confirmed by both Mr. Allen and Mr. Bender from questions by Judge Jordan. Ref pg. 24 lines 8-25 ; pg 31 line 24-25 and pg. 32 lines 1-4.  
*Adopted and incorporated.*

9. It was after dark and thus impossible to see this new growth of the Traglio Bar but by the next morning it was clearly visible and what was also evident was that the river level was still dropping significantly as evident in the photo taken by the Coast Guard early morning on April 13th of the water level well below our waterline. Ref. CG Activity Report # 3985848 photo of starboard side water line. *Adopted and incorporated.* What is interesting and puzzling is that the photo definitely shows a drop of about a foot in river level but the statistical sheets of river levels at the guage [sic] in this same report shows a slight drop of only 2" for this same period. Ref pg 2. This certainly confirms that readings at the guage [sic] do not automatically mean that these same changes in readings will be the same in other parts of the river and especially in tributaries off the main stem such as the Willamette Slough and Pringle Creek. Mr. Overton in his testimony alluded to larger stage fluctuations in small periods of time off main channel areas Ref pg 76 lines 5-7 Though at first denying that you could get large up and/or down river level changes in a short time span in the Willamette Ref pg 76 lines 1-4, Mr. Overton soon changed his mind agreeing that it was both possible and very likely Ref. pg. 77 line 23. What all this indicates is that the significant drop in river level we were experiencing at Pringle Creek and the Willamette Slough was not being reflected at the Salem guage [sic] location on the main stem. *The proposed fact that there are differences in river levels than the level reflected at the Salem gauge is accepted and incorporated. The rest of this statement is treated as argument. The relevance of differences in the river gauge and the depth of the river level is of little relevance to*

*the allegation of Misconduct as to violating the COI. The fact of variances in river depth from the gauge is of relevance to safe navigation of the river and to the allegation of Negligence.*

### **Respondent's Proposed Conclusions of Law**

On the allegation of misconduct it is my position that there was never any intention by either myself or the vessel owner to violate our COI. All information available to us at the time indicated a continuing drop in river level to below 11' and I was confident in my decision as a prudent and reasonable mariner to not return up the slough and risk navigating over the Pringle gravel bar that we had just grazed. So in the interest of safety for both our vessel and her passengers and crew it was decided after consulting with the owner to instead navigate upstream in the main stem. The mitigating circumstances were significant and convincing at the time. so [sic] I truly did not believe I was violating our COI.

*Considered and rejected in part. Specific intent is not an element of misconduct. Lack of specific intent to violate the COI may be considered in mitigation but not as a defense to the violation.*

It is my understanding that the presumption of negligence can be overcome if evidence is produced to reasonably explain how the grounding occurred. I believe that the evidence I introduced plus witness testimony from knowledgeable [sic] and experienced river boaters did explain the circumstances which caused the grounding. There was no way I could have known of the significant shift in location of this gravel bar in such a short period of time. Additionally, there are no navigational aids such as buoys or even charts for this stretch of river. This grounding was not caused by any negligent action on my part. It was simply unforeseeable and unknown to me the extent to which this gravel bar had encroached into my normal navigation route.

*Considered and rejected. The grounding of a vessel on a charted shoal, or where it has no business being, raises a rebuttable presumption of negligence against the person responsible for the vessel's navigation. The standard for rebuttal of the presumption is not as stated by Respondent. A party may rebut the presumption of negligence by credible evidence that the vessel was permitted to be in the area where the grounding occurred or that the shoal where he grounded was unknown. See D&O for discussion.*