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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1986

[Docket Number: OSHA-2011-0841]

RIN 1218-AC58

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Seaman's Protection Act (SPA), As Amended.

AGENCY: Occupational Safety and Health Administration, Labor

ACTION: Interim final rule; request for comments

SUMMARY: This document provides the interim final text of regulations governing the employee protection (whistleblower) provisions of the Seaman's Protection Act ("SPA" or "the Act"), as amended by Section 611 of the Coast Guard Authorization Act of 2010. Section 611 transfers to the Occupational Safety and Health Administration ("OSHA" or "the Agency") the administration of the whistleblower protections previously enforced solely via a private right of action. This interim rule establishes procedures and time frames for the handling of retaliation complaints under SPA, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) on behalf of the Secretary of Labor (Secretary), and judicial review of the Secretary's final decision. In addition, this interim rule provides the Secretary's interpretation of the term "seaman" and addresses other interpretive issues raised by SPA.

DATES: This interim final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments on the interim final rule must be submitted (postmarked,

sent or received) on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments and additional materials by any of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal e-Rulemaking Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2011-0841, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. – 4:45 p.m., EST.

Instructions: All submissions must include the agency name and the OSHA docket number for this rulemaking (Docket No. OSHA–2011-0841). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (*e.g.*, copyrighted material) is not publicly available to read or download through the website. All

submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

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SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted SPA as Section 13 of the Coast Guard Authorization Act of 1984, Pub. L. No. 98-557, 98 Stat. 2860 (1984). SPA protected seamen from retaliation for reporting a violation of Subtitle II of Title 46 of the U.S. Code, which governs vessels and seamen, or a regulation promulgated under that Subtitle. S. Rep. No. 98-454, at 11 (1984). Congress passed SPA in response to *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983), in which the Fifth Circuit held that the whistleblower provision of the Occupational Safety and Health Act (OSH Act) did not cover a seaman who had been demoted and discharged from his position because he reported a possible safety violation to the U.S. Coast Guard. S. Rep. No. 98-454, at 12 (1984). This original version of SPA prohibited “[a]n owner, charterer, managing operator, agent, master, or individual in charge of a vessel” from retaliating against a seaman “because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that” a violation of Subtitle II had occurred. Pub. L. No. 98-557 § 13(a), 98 Stat. at 2863. It permitted

seamen to bring actions in U.S. district courts seeking relief for alleged retaliation in violation of the Act. *Id.* § 13(a), 98 Stat. at 2863-64.

In 2002, Congress amended SPA. Section 428 of the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. at 2064 (2002), altered both the protections afforded and remedies permitted by the Act. First, Congress removed the specific list of actors who were prohibited from retaliating against seamen and replaced that text with “[a] person.” Pub. L. No. 107-295 § 428(a), 116 Stat. at 2127. Second, Congress expanded the existing description of protected activity to include reports to “the Coast Guard or other appropriate Federal agency or department,” rather than only to the Coast Guard, and violations “of a maritime safety law or regulation prescribed under that law or regulation,” rather than only of Subtitle II and its accompanying regulations. *Id.* Third, Congress added a second type of protected activity; a seaman who “refused to perform duties ordered by the seaman’s employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public” was granted protection from retaliation. *Id.* The new text clarified that, “[t]o qualify for protection against the seaman’s employer under paragraph (1)(B), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.” *Id.* The amended statute further explained that “The circumstances causing a seaman’s apprehension of serious injury under paragraph (1)(B) must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman’s employer.” Pub. L. No. 107-295 § 428, 116 Stat. at 2127.

Congress made additional changes to the Act, including those that led OSHA to initiate this rulemaking, on October 15, 2010. Section 611 of the Coast Guard Authorization Act of

2010, Pub. L. No. 111-281, 124 Stat. at 2905 (2010), made further additions to the list of protected activities under SPA and fundamentally changed the remedies section of the Act.

Regarding protected activities, Section 611 added to subsection (a):

(C) the seaman testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(D) the seaman notified, or attempted to notify, the vessel owner or the Secretary [of the department in which the Coast Guard is operating¹] of a work-related personal injury or work-related illness of a seaman;

(E) the seaman cooperated with a safety investigation by the Secretary [of the department in which the Coast Guard is operating] or the National Transportation Safety Board;

(F) the seaman furnished information to the Secretary [of the department in which the Coast Guard is operating], the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(G) the seaman accurately reported hours of duty under this part.

Id. § 611(a), 124 Stat. at 2969.

Congress replaced section (b) of SPA, which had provided a private right of action to seamen and described relief a court could award, in its entirety. The new text provides:

¹ The text of 46 U.S.C. 2114 refers to “the Secretary,” defined for purposes of Part A of Subtitle II as “the Secretary of the department in which the Coast Guard is operating.” 46 U.S.C. 2101(34). The Coast Guard is currently part of the Department of Homeland Security.

(b) A seaman alleging discharge or discrimination in violation of subsection (a) of this section, or another person at the seaman's request, may file a complaint with respect to such allegation in the same manner as a complaint may be filed under subsection (b) of section 31105 of title 49. Such complaint shall be subject to the procedures, requirements, and rights described in that section, including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of that section, and the requirement to bring a civil action under subsection (d) of that section.

Id. Section 31105 of title 49 is the "Employee protections" provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105. STAA provides that initial complaints regarding retaliation under that statute are to be filed with and handled by the Secretary of Labor (Secretary), *see id.* § 31105(b)-(e), and the Secretary has delegated her authority in this regard to OSHA. *See* Secretary's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012). The Secretary has also delegated to OSHA her authority under SPA. *Id.* at 3913. Hearings on determinations by the Assistant Secretary for OSHA (Assistant Secretary) are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Department of Labor's Administrative Review Board (ARB). *See* Secretary's Order 1-2010, 75 FR 3924-01 (Jan. 25, 2010).

OSHA is promulgating this interim final rule to establish procedures for the handling of whistleblower complaints under SPA and address certain interpretative issues raised by the statute. To the extent possible within the bounds of applicable statutory language, these regulations are designed to be consistent with the procedures applied to claims under STAA, and the other whistleblower statutes administered by OSHA, including the Energy Reorganization

Act (ERA), 42 U.S.C. 5851, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A, and the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. 2087.

II. Summary of Statutory Procedures

As explained above, SPA adopts the process for filing a complaint established under subsection (b) of STAA. 46 U.S.C. 2114(b). It further incorporates the other “procedures, requirements, and rights described in” STAA, *id.*, described below. OSHA therefore understands SPA to incorporate STAA subsections (b) through (g). SPA’s text could cause confusion regarding which sections of STAA it adopts by referring, in some cases incorrectly,² to certain sections while not mentioning others.³ Those references follow the word “including,” however, with no suggestion that the subsequent list is meant to be exclusive, so OSHA will not treat it as such. OSHA does not read SPA as incorporating Sections (a), (h), (i), or (j) of STAA because those provisions are substantive and specific to STAA or agencies other than the

² Specifically, the Act’s adoption of STAA’s “procedures, requirements, and rights” is followed by the text “including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of [STAA], and the requirement to bring a civil action under subsection (d) of that section.” 46 U.S.C. 2114(b). But Section (c) addresses *de novo* review in the district court if the Secretary has not issued a final decision after 210 days; Section (d) addresses filing a petition for review after receiving an adverse order following a hearing; and Section (e) provides that “[i]f a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.” 49 U.S.C. 31105(c)-(e).

³ Section (f) declares that STAA does not preempt any other federal or state law safeguarding against retaliation; Section (g) declares that STAA does not diminish any legal rights of any employee, nor may the rights of the Section be waived; Section (h) prohibits the disclosure by the Secretary of Transportation or the Secretary of Homeland Security of the identity of an employee who provides information about an alleged violation of the statute except, under certain circumstances, to the Attorney General; Section (i) creates a process for reporting security problems to the Department of Homeland Security; and Section (j) defines the term “employee” for purposes of STAA. 49 U.S.C. 31105(f)-(j).

Department of Labor rather than describing “procedures, requirements, and rights.” The statutory procedures applicable to SPA claims are summarized below.

Filing of SPA Complaints.

A seaman, or another person at the seaman’s request, alleging a violation of SPA, may file a complaint with the Secretary not later than 180 days after the alleged retaliation.

Legal Burdens of Proof for SPA Complaints.

Section (b)(1) of STAA states that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b), which contains whistleblower protections for employees in the aviation industry. 49 U.S.C. 31105(b)(1). Accordingly, these burdens of proof also govern SPA whistleblower complaints.

Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); *see Vieques Air Link, Inc. v. Dep’t of Labor*, 437 F.3d 102, 108-09 (1st Cir. 2006) (per curiam) (burdens of proof under AIR21); *see also Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (explaining that because it incorporates the burdens of proof set forth in AIR21, STAA requires only a showing that the protected activity was a contributing factor, not a but-for cause, of the adverse action.).

Written Notice of Complaint and Findings.

Under Section (b) of STAA, upon receipt of the complaint, the Secretary must provide written notice of the filing of the complaint to the person or persons alleged in the complaint to have violated the Act (“respondent”). 49 U.S.C. 31105(b).

Within 60 days of receipt of the complaint, the Secretary must conduct an investigation of the allegations, decide whether it is reasonable to believe the complaint has merit, and provide written notification to the complainant and the respondent of the investigative findings.

Remedies.

If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the findings a preliminary order for the relief provided for under Section (b)(3) of STAA, 49 U.S.C. 31105(b)(3). This order shall require the respondent to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; and pay compensatory damages, including back pay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. Additionally, if the Secretary issues a preliminary order and the complainant so requests, the Secretary may assess against the respondent the costs, including attorney fees, reasonably incurred by the complainant in bringing the complaint. Punitive damages of up to \$250,000.00 are also available.

Hearings.

Section (b) of STAA also provides for hearings. Specifically, the complainant and the respondent have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, it is to be conducted expeditiously. The Secretary shall issue a final order within 120 days after the conclusion of any hearing. The final order may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the

Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding.

De Novo Review.

Section (c) of STAA provides for de novo review of a whistleblower claim by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of a complaint and the delay is not due to the complainant's bad faith. 49 U.S.C. 31105(c). The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

Judicial Review.

Section (d) of STAA provides that within 60 days of the issuance of the Secretary's final order following a hearing, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. 49 U.S.C. 31105(d).

Civil Actions to Enforce.

Section (e) of STAA provides that if a person fails to comply with an order issued by the Secretary under Section (b), the Secretary of Labor "shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." 49 U.S.C. 31105(e).

Preemption.

Section (f) of STAA clarifies that nothing in the statute preempts or diminishes any other safeguards against discrimination provided by Federal or State law. 49 U.S.C. 31105(f).

Employee Rights.

Section (g) of STAA states that nothing in STAA shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. 49 U.S.C. 31105(g). It further states that rights and remedies under 49 U.S.C. 31105 “may not be waived by any agreement, policy, form, or condition of employment.”

III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of SPA and of STAA.

Throughout the regulatory text, OSHA has used the term “retaliate” rather than “discharge or in any manner discriminate,” the phrase that appears in the text of SPA. The use of “retaliate,” which also appears in the regulations implementing STAA, the ERA, SOX, and CPSIA, is not intended to have a substantive effect. It simply reflects that claims brought under these whistleblower provisions, whether alleging discharge or some other form of discrimination, are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee’s protected activity rather than as a result of an employee’s characteristics (such as race, gender, or religion).

Subpart A – Complaints, Investigations, Findings, and Preliminary Orders

Section 1986.100 Purpose and scope.

This section describes the purpose of the regulations implementing SPA’s whistleblower provision and provides an overview of the procedures contained in the regulations.

Section 1986.101 Definitions.

This section includes general definitions applicable to SPA’s whistleblower provision. Most of the definitions are of terms common to whistleblower statutes and are defined here as they are elsewhere. Some terms call for additional explanation.

SPA prohibits retaliation by a “person.” Title 1 of the U.S. Code provides the definition of this term because there is no indication in the statute that any other meaning applies. Accordingly, “person ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. 1. This list, as indicated by the word “include,” is not exhaustive. *See Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“[T]he term ‘including’ is not one of all embracing definition, but connotes simply an illustrative application of the general principle.” (citation omitted)). Paragraph (j) accordingly defines “person” as “one or more individuals or other entities, including but not limited to corporations, companies, associations, firms, partnerships, societies, and joint stock companies.”

SPA protects seamen when they make certain reports and notifications. 46 U.S.C. 2114(a)(1)(A), (D), (G). Paragraphs (h) and (k) define “report” and “notify” both to include “any oral or written communications of a violation.” This interpretation of the statute is consistent with a plain reading of the statutory text and best fulfills the purposes of SPA. *See Gaffney v. Riverboat Servs. of Ind.*, 451 F.3d 424, 445-46 (7th Cir. 2006) (explaining that to interpret SPA’s reference to a “report” as requiring a formal complaint “would narrow the statute in a manner that Congress clearly avoided, and, in the process, would frustrate the clear purpose of the provision”). It is also consistent with the legislative history of the statute, which indicates that Congress meant SPA to respond to *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983), a case in which a seaman had told the Coast Guard about an unsafe condition by telephone. S. Rep. No.

98-454, at 11; *Donovan*, 720 F.2d at 825; *see also Gaffney*, 451 F.3d at 446 (reasoning that SPA’s legislative history, “coupled with Congress’ decision not to define ‘report’ in the statute or in the course of discussing *Donovan* in the relevant legislative history,” indicates that SPA “does not require a formal complaint, or even a written statement, as a prerequisite to statutory whistleblower protection”); *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the provision of the Fair Labor Standards Act that prohibits employers from retaliating against an employee because such employee has “filed any complaint” protects oral complaints).

In addition, SPA protects seaman complaints and testimony related to “maritime safety law[s] or regulation[s].” Paragraph (g) defines this term as including “any statute or regulation regarding health or safety that applies to any person or equipment on a vessel.” This definition clarifies the meaning of this term in two respects. First, though the statutory text refers to “safety” the Secretary finds that Congress did not intend to exclude regulations that address health hazards; rather, it is apparent that no such distinction was intended. *Compare* 46 U.S.C. 2114(a)(1)(B) (protecting seamen when they refuse to perform a duty that would result in a serious injury) *with id.* (a)(2) (clarifying that circumstances that would justify a refusal to work under (a)(1)(B) are those that present a “real danger of injury or serious impairment of health”); *see also id.* (a)(1)(D) (protecting reports of injuries and illnesses). The definition makes clear that laws or regulations addressing either maritime safety or health are included.

Second, because working conditions on vessels can be subject to regulation from multiple jurisdictions, the Secretary interprets “maritime safety law or regulation” to include all regulations regarding health or safety that apply to any person or equipment on a vessel under the circumstances at issue. The statute or regulation need not exclusively or explicitly serve the

purpose of protecting the safety of seamen, or promoting safety on vessels, to fall within the meaning of this provision of SPA.

Section 2214(a)(1)(D) of SPA protects a seaman's notification of the "vessel owner" of injuries and illnesses. This would include all notifications to agents of the owner, such as the vessel's master. *See* 2 Robert Force & Martin J. Norris, *The Law of Seamen* § 25-1 (5th ed. 2003). Other parties that may fall within the meaning of "vessel owner" include an owner pro hac vice, operator, or charter or bare boat charterer. *See* 33 U.S.C. 902(21) (defining, for purposes of the LHWCA, the entities liable for negligence of a vessel); *see also Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1041 (5th Cir. 1983) (referring to this list of entities as "the broad definition of 'vessel owner' under 33 U.S.C. § 902(21)"). Paragraph (q) defines "vessel owner" as including "all of the agents of the owner, including the vessel's master."

SPA protects "a seaman" from retaliation, but it does not include a definition of "seaman." The Senate Report that accompanied the original, 1984 version of SPA indicates that SPA was originally intended to provide a remedy for workers whose whistleblower rights under 11(c) might be not be available in a jurisdiction that follows *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983).⁴ *See* S. Rep. No. 98-454, at 11-12 (1984). The Senate Report also provides specific insight as to the definition of "seaman," stating that "the Committee intends the term 'seaman' to be interpreted broadly, to include any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States." *Id.* at 11.

OSHA considered three basic approaches for defining the term "seaman": (a) mirroring the one established by the Jones Act, 46 U.S.C. 30104, which reflects general maritime law; (b) as a "gap filler" available only where workers arguably lack coverage because of 4(b)(1)

⁴ Nothing in this preamble should be read to suggest that OSHA agrees with the holding or rationale of *Texaco*.

preemption under *Texaco*; or (c) using the broader definition of “seaman” suggested by the legislative history of SPA discussed above.

First, OSHA rejected adopting a definition of “seaman” for SPA that mirrors the one established by case law under the Jones Act. The Jones Act provides that a “seaman” injured in the course of employment may bring a civil action against his or her employer, 46 U.S.C. 30104, but like SPA, the Jones Act does not define the term “seaman.” Looking to general maritime law, the Supreme Court has defined the term as including those who have an employment-related connection to a vessel in navigation that contributes to the function of the vessel or to the accomplishment of its mission, even if the employment does not aid in navigation or contribute to the transportation of the vessel, *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). Importantly, the Supreme Court views the term seaman as excluding land-based workers; that is, a seaman “must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature.” *Chandris v. Latsis*, 515 U.S. 347, 368 (1995).

However, OSHA is concerned that the Jones Act definition of “seaman” is more restrictive than the definition as clarified in the legislative history of the SPA. As a result, certain workers who are employed on vessels in significant ways, but who are not Jones Act seaman, would not be protected under the Jones Act definition. For example, certain riverboat pilots spend substantial time aboard a vessel in furtherance of its purpose, but do not have a connection to a particular vessel or group of vessels, so they have been found not to be covered under the Jones Act. *See Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, *aff’d after remand*, 947 F.2d 1290 (5th Cir. 1991); *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 376, 379 (E.D. La. 1997). Moreover, there is at least a possibility that under the *Texaco* analysis, a court would find

that such pilots also lack 11(c) rights when reporting safety violations aboard vessels on which they are working.

OSHA also notes that SPA and the Jones Act are fundamentally different types of statutes that need not be squarely consistent in their coverage. The Jones Act provides that particular workers, after being injured, are entitled to recover by civil action against their employers. SPA, on the other hand, is prophylactic and remedial in nature and intended to prevent injuries before they happen by protecting reports of safety violations, which suggests a broader definition is appropriate.

Second, OSHA rejected the approach of defining “seaman” as applying only to workers who arguably are not covered by 11(c). The legislative history shows that Congress originally passed the SPA in response to *Texaco*: “This section responds to *Donavan v. Texaco*, (720 F.2d 825 (5th Cir. 1983)) in which a seaman was demoted and ultimately discharged from his job for reporting a possible safety violation to the Coast Guard. . . [This section] establishes a new legal remedy for seamen, to protect them against discriminatory action due to their reporting a violation of Subtitle II to the Coast Guard. The Amendment creates a private right of action similar but not identical to that in OSH Act Section 11(c).” S. Rep. No. 98-454, at 11-12 (1984). But the legislative history in 2010 suggests a broader definition for “seaman” workers also who may be covered by 11(c). On a more practical level, OSHA could not fashion a clear definition of “seaman” that squarely fills the gap arguably left by *Texaco* without requiring agency investigators to conduct a complex case-by-case analysis of whether each SPA complainant is exempt from the OSH Act under the rationale of *Texaco*, a holding with which the Department does not agree.

Thus, the interim final rule adopts the third option – the broader definition of seaman as clarified in the legislative history of SPA. The first sentence of paragraph (m) incorporates the language of the Senate report to define “seaman.” As indicated in the report, and consistent with the remedial purposes of whistleblower statutes like SPA, OSHA intends that the regulatory language be construed broadly. *See Whirlpool Corporation v. Marshall*, 445 U.S. 1, 13 (1980); *Bechtel Const. Co. v Sec’y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995). Workers who are seamen for purposes of the Jones Act or general maritime law, *see, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995), are covered by the definition, as are land-based workers, if they are “engaged or employed . . . on board a vessel” for some part of their duties. *See* H. Rep. No. 111-303, pt. 1, at 119 (2009) (noting that SPA extends protections to “maritime workers”).

Finally, paragraph (m) includes an additional sentence indicating that former seaman and applicants are included in the definition. Such language is included in the definition of “employee” in the regulations governing other OSHA-administered whistleblower protection laws, such as STAA (49 CFR 1978.101(h)), the National Transit Systems Security Act and the Federal Railroad Safety Act (29 CFR 1982.101(d)), SOX (29 CFR 1980.101(g)), and the OSH Act (29 CFR 1977.5(b)). This interpretation is consistent with the Supreme Court’s reading of the term “employee” in 42 U.S.C. 2000e-3a, the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, to include former employees. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Among the Court’s reasons for this interpretation were the lack of temporal modifiers for the term “employee”; the reinstatement remedy, which only applies to former employees; and the remedial purpose of preventing workers from being deterred from whistleblowing because of a fear of blacklisting. These reasons apply equally to SPA and the other whistleblower provisions enforced by OSHA.

OSHA encourages interested parties to submit comments on the issues discussed above in the definition of “seaman,” any potential alternative definitions they wish OSHA to consider in the final rule, and any information they have about the practical effects of using various alternative definitions. The definition of “seaman” adopted in these regulations is based on and limited to SPA. Nothing should be inferred from the above discussion or the regulatory text about the meaning of “seaman” under the OSH Act or any other statute administered by the Department of Labor.

“Citizen of the United States,” a term used in the definition of “seaman,” is not defined in the 1984 Senate report. The definition of this term in paragraph (d) of the regulation is based on two sources: the definition applicable to individuals given in 46 U.S.C. 104 and the definition of “entities deemed citizens of the United States” in 46 U.S.C. 50501. These provisions are from the same title of the U.S. Code as SPA, and deal with similar subject matter. They are roughly similar to definitions of citizen of the United States used in other similar contexts. *See* 49 U.S.C. 42121(a)(2) (definition applicable to AIR21); 46 U.S.C. 12103(b) (ownership of vessels eligible to receive a certificate of documentation from the United States). Paragraph (d) of the regulation combines the text of 46 U.S.C. 104 and 50501, with two changes. First, the regulation adds the text “or other entity” to the list of business forms that can meet the definition. This change reflects the development of new business forms, such as limited liability companies, in recent years. Second, it deletes the language for section 50501 requiring that at least 75 percent of the interest in a corporation, partnership, or association be owned by citizens of the United States where the vessel is operating “in the coastwise trade.” 46 U.S.C. 50501(a); *see also* 46 U.S.C. 50501(d) (providing four criteria for determining whether 75 percent of the interest in a corporation is owned by citizens of the United States). There is no basis for distinguishing

between vessels on this basis in implementing SPA; the purposes of this whistleblower statute are wholly unrelated to the locations between which the vessel travels. Accordingly, this language has been omitted.

Paragraph (p) defines “vessel,” a term used in the definition of seaman and that also arises in SPA itself. This definition is taken from Title 46 of the U.S. Code and “includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 46 U.S.C. 115; *see also* 1 U.S.C. 3; *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496-97 (2005) (analyzing the meaning of the term “vessel,” as defined by 1 U.S.C. 3, and concluding that “a ‘vessel’ is a watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment,” and thus excludes ships “taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport”).

Section 1986.102 Obligations and prohibited acts.

This section describes the activities that are protected under SPA and the conduct that is prohibited in response to any protected activities. These protected activities are set out in the statute, as described above. Consistent with OSHA’s interpretation of other anti-retaliation provisions, the prohibited conduct includes any form of retaliation, including, but not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman. Section 1986.102 tracks the language of the statute in defining the categories of protected activity.

As with other whistleblower statutes, SPA’s provisions describing protected activity are to be read broadly. *See, e.g., Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 20-21 (1st Cir. 1998) (expansively construing language in STAA to facilitate achieving the policy goals

of encouraging corporate compliance with safety laws and employee reports of violations of those laws); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 932-33 (11th Cir. 1995) (“[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws.”); *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (discussing the “broad remedial purpose” of the whistleblower provision in the Clean Water Act in expansively interpreting a term in that statute). Indeed, SPA’s prohibition of discharging or “in any manner” discriminating against seamen indicates Congress’s intent that the provision have broad application. *See NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (determining that language in the National Labor Relations Act should be read broadly because “the presence of the preceding words ‘to discharge or otherwise discriminate’ reveals, we think, particularly by the word ‘otherwise,’ an intent on the part of Congress to afford broad rather than narrow protection to the employee”); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782-83 (D.C. Cir. 1974) (relying on *Scrivener* in reasoning that the words “in any other way discriminate” in the Mine Safety Act support a broad reading of that Act’s protections for miners). Likewise, the statement in the Senate Report regarding SPA that the term “seaman” is to be “interpreted broadly” further supports the premise that Congress did not intend that SPA be construed narrowly. S. Rep. No. 98-454, at 11 (1984).

OSHA therefore will interpret each of the seven types of protected activity listed in the Act broadly. Moreover, while SPA, unlike other whistleblower statutes, does not contain a provision directly protecting all internal complaints by seamen to their superiors, many such complaints are covered under the seven specific categories listed in the Act. Protection of internal complaints is important because it “leverage[es] the government’s limited enforcement resources” by encouraging employees to report substandard working conditions to their

employers. *Clean Harbors*, 146 F.3d at 19-20. Such protections promote the resolution of violations without drawn-out litigation, and the “failure to protect internal complaints may have the perverse result of encouraging employers to fire employees who believe they have been treated illegally before they file a formal complaint.” *Minor v. Bostwick Laboratories, Inc.*, 669 F.3d 428, 437 (4th Cir. 2012). In addition, in the maritime context, a seaman on a vessel at sea may not be able to contact the authorities to correct a dangerous condition, and his or her only recourse will be to seek correction from the ship’s officers. Because internal complaints are an important part of keeping a workplace safe, OSHA will give a broad construction to the Act’s language to ensure that internal complaints are protected as fully as possible.

The statute first prohibits retaliation because “the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.” 46 U.S.C. 2114(a)(1)(A). One way an employer will know that a seaman “is about to report” the violation is when the seaman has made an internal complaint and there are circumstances from which a reasonable person would understand that the seaman will likely report the violation if the violation is not cured. These circumstances might arise from the internal report itself (e.g., “I will contact the authorities if it is not fixed”), the seaman’s history of reporting similar violations to authorities, or other similar considerations. Further, given that a seaman may be at sea for extended periods without access to ways of reporting a violation, a significant time may elapse between the time the employer learns of the seaman’s intent to report and the time the report can actually be made. OSHA will read the phrase “about to report” broadly to protect the seaman in such a circumstance.

The Act also protects the seaman against discrimination when “the seaman has refused to perform duties ordered by the seaman’s employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public.” 46 U.S.C. 2114(a)(1)(B). To qualify for this protection, the seaman “must have sought from the employer, and been unable to obtain, correction of the unsafe condition.” 46 U.S.C. 2114(a)(3). Although not stated explicitly, in the Secretary’s view, the reasonable implication of the statutory language is that the seaman’s preliminary act of seeking correction of the condition is itself protected activity. That is, a seaman who asks his or her employer to correct a condition he reasonably believes would result in serious injury and suffers retaliation because of that request before the occasion to refuse to perform the unsafe work arises is protected by the Act. Although the literal terms of the Act could be read to leave the request for correction required yet unprotected, courts reject “absurd result[s].” *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239, 243 (4th Cir. 2009) (“Courts will not ... adopt a ‘literal’ construction of a statute if such interpretation would thwart the statute’s obvious purpose or lead to an ‘absurd result.’” [quoting *Chesapeake Ranch Water Co. v. Board of Comm’rs of Calvert County*, 401 F.3d 274, 280 (4th Cir. 2005)]). The Agency’s interpretation is embodied in the last sentence of section 1986.102(c): “Any seaman who requests such a correction shall be protected against retaliation because of the request.”

SPA provides protection to certain other types of internal communications. It covers the situation where “the seaman notified, or attempted to notify, the vessel owner or the Secretary [of the department in which in Coast Guard is operating] of a work-related personal injury or work-related illness of a seaman.” 46 U.S.C. 2114(a)(1)(D). As noted above, this covers oral, written and electronic communications to any agent of the vessel’s owner. SPA also disallows

retaliation because “the seaman accurately reported hours of duty under this part.” 46 U.S.C. 2114(a)(1)(G). In keeping with the discussion above, this language too should be interpreted in favor of broad protection for seamen should a question of its meaning arise.

Finally, consistent with the broad interpretation of the statute as discussed above, OSHA believes that most reports required by the U.S. Coast Guard under 46 CFR parts 4.04 and 4.05 are protected by SPA.

Section 1986.103 Filing of retaliation complaints.

This section describes the process for filing a complaint alleging retaliation in violation of SPA. The procedures described are consistent with those governing complaints under STAA as well as other whistleblower statutes OSHA administers.

Under paragraph (a), complaints may be filed by a seaman or, with the seaman’s consent, by any person on the seaman’s behalf. Paragraph (b) provides that complaints filed under SPA need not be in any particular form; they may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. Paragraph (c) explains with whom in OSHA complaints may be filed.

Paragraph (d) addresses timeliness. To be timely, a complaint must be filed within 180 days of the occurrence of the alleged violation. Under Supreme Court precedent, a violation occurs when the retaliatory decision has been both “made and communicated to” the complainant. *Del. State College v. Ricks*, 449 U.S. 250, 258 (1980). In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision. *EEOC v. United Parcel Serv.*, 249 F.3d 557, 561-62 (6th Cir. 2001). However, the time for filing a complaint may be tolled for reasons warranted by applicable case law. A complaint will be considered filed on the date of postmark, facsimile transmittal,

electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office. The regulatory text indicates that filing deadlines may be tolled based on principles developed in applicable case law. *See, e.g., Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1423-29 (10th Cir. 1984).

Paragraph (e), which is consistent with provisions implementing other OSHA whistleblower programs, describes the relationship between section 11(c) complaints and SPA whistleblower complaints. Section 11(c) of the OSH Act, 29 U.S.C. 660(c), generally prohibits employers from retaliating against employees for filing safety or health complaints or otherwise initiating or participating in proceedings under the OSH Act. Some of the activity protected by SPA, including maritime safety complaints and work refusals, may also be covered under section 11(c), though the geographic limits of section 4(a) of the OSH Act, 29 U.S.C. 653(a), which are applicable to section 11(c), do not apply to SPA.⁵ Paragraph (e) states that SPA whistleblower complaints that also allege facts constituting an 11(c) violation will be deemed to have been filed under both statutes. Similarly, section 11(c) complaints that allege facts constituting a violation of SPA will also be deemed to have been filed under both laws. In these cases, normal procedures and timeliness requirements under the respective statutes and regulations will apply.

OSHA notes that a complaint of retaliation filed with OSHA under SPA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Sylvester v. Parexel Int'l, Inc.*, No. 07-123, 2011 WL 2165854, at *9-10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards).

⁵ SPA contains no geographic limit; its scope is limited only by the definition of “seaman.”

Rather, the complaint filed with OSHA under this section simply alerts the Agency to the existence of the alleged retaliation and the complainant's desire that the Agency investigate the complaint. Upon the filing of a complaint with OSHA, the Assistant Secretary is to determine whether "the complaint, supplemented as appropriate by interviews of the complainant" alleges "the existence of facts and evidence to make a prima facie showing." 29 CFR 1986.104(e). As explained in section 1986.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. *See* 49 U.S.C. 42121(b)(2), 29 CFR 1986.104(e).

Section 1986.104 Investigation.

This section describes the procedures that apply to the investigation of complaints under SPA. Paragraph (a) of this section outlines the procedures for notifying the parties and the U.S. Coast Guard of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) explains that the Agency will share respondent's submissions with the complainant, with redactions in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws as necessary, and will permit the complainant to respond to those submissions. The Agency expects that sharing information with complainants will assist OSHA in conducting full and fair investigations and the Assistant Secretary in thoroughly assessing defenses raised by respondents. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) sets forth the applicable burdens of proof. As discussed above, SPA adopts the relevant provisions of STAA, which in turn adopts the burden of proof of AIR21. A complainant must make an initial prima facie showing that protected activity was “a contributing factor” in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. *See Ferguson v. New Prime, Inc.*, No. 10-75, 2011 WL 4343278, at *3 (ARB Aug. 31, 2011); *Clarke v. Navajo Express*, No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011). The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same framework now found in STAA and therefore SPA, served a “gatekeeping function” that “stemm[ed] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under SPA and not investigate (or cease investigating) if either: (1) the complainant fails to meet the prima facie showing that the protected activity was a contributing factor in the adverse action; or

(2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Paragraph (f) describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (requiring OSHA to give a STAA respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement).

Section 1986.105 Issuance of findings and preliminary orders.

This section provides that, within 60 days of the filing of a complaint and on the basis of information obtained in the investigation, the Assistant Secretary will issue written findings regarding whether there is reasonable cause to believe that the complaint has merit. If the Assistant Secretary concludes that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including: a requirement that the person take affirmative action to abate the violation; reinstatement to the seaman's former position; compensatory damages including back pay with interest and damages such as litigation costs; and, if the Assistant Secretary so chooses, punitive damages up to \$250,000. Affirmative action to abate the violation includes a variety of measures, such as posting notices about SPA orders and rights, as well as expungement of adverse comments in a personnel record. See Scott v. Roadway Express, Inc., No. 01-065, 2003 WL 21269144, at *1-2 (ARB May 29, 2003) (posting notices of STAA orders and rights); Pollock v. Continental Express, Nos. 07-073, 08-051, 2010 WL 1776974, at *9 (ARB Apr. 7, 2010) (expungement of adverse references).

The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. *Smith v. Lake City Enterprises, Inc.*, Nos. 09-033, 08-091, 2010 WL 3910346, at *8 (ARB Sept. 24, 2010) (holding that an employer who violated STAA was to compensate the complainant with “front pay” when reinstatement was not possible). Such front pay or economic reinstatement is also employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). *See, e.g., Sec’y of Labor ex rel. York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at *1 (ALJ June 26, 2001). Front pay has been recognized as a possible remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. *See, e.g., Hagman v. Washington Mutual Bank*, ALJ No. 2005-SOX-73, 2006 WL 6105301, at *32 (Dec. 19, 2006) (noting that while reinstatement is the “preferred and presumptive remedy” under Sarbanes-Oxley, “[f]ront pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee’s medical condition that is causally related to her employer’s retaliatory action . . . ; (2) manifest hostility between the parties . . . ; (3) the fact that claimant’s former position no longer exists . . . ; or (4) the fact that employer is no longer in

business at the time of the decision”); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001) (noting circumstances in which front pay may be available in lieu of reinstatement but ordering reinstatement), *aff’d sub nom. Hobby v. USDOL*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished); *Brown v. Lockheed Martin Corp.*, ALJ No. 2008-SOX-49, 2010 WL 2054426, at *55 -56 (Jan. 15, 2010) (same). Congress intended that seamen be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of SPA. When OSHA finds a violation, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the seaman. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the seaman continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating a seaman should the employer ultimately prevail in the whistleblower adjudication.

In ordering interest on back pay, the Secretary has determined that, instead of computing the interest due by compounding quarterly the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points, interest will be compounded daily. The Secretary believes that daily compounding of interest better achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations

Board. See Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 356 NLRB No. 8, 2010 WL 4318371, at *3-4 (2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

Subpart B – Litigation

Section 1986.106 Objections to the findings and the preliminary order and request for a hearing.

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record and the OSHA official who issued the findings, the failure to serve copies of the objections on the other parties of record does not affect the ALJ's jurisdiction to hear and decide the merits of the case. See Shirani v. Calvert Cliffs Nuclear Power Plant, Inc., No. 04-101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005).

A respondent may file a motion to stay OSHA's preliminary order of reinstatement with the Office of Administrative Law Judges. However, a stay will be granted only on the basis of exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement would be appropriate only where the respondent can establish the necessary criteria for a stay, *i.e.*, the respondent would suffer irreparable injury; the

respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

Section 1986.107 Hearings.

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR Part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. If both the complainant and respondent object to the findings and/or order of the Assistant Secretary, an ALJ will conduct a single, consolidated hearing. This section states that ALJs have broad power to limit discovery in order to expedite the hearing. This furthers an important goal of SPA—to have unlawfully terminated seamen reinstated as quickly as possible.

This section explains that formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. This is consistent with the Administrative Procedure Act, which provides at 5 U.S.C. 556(d): “Any oral or documentary evidence may be received, but the Agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence....” See also Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705-06 (1948) (administrative agencies not restricted by rigid rules of evidence). Furthermore, it is inappropriate to apply the technical rules of evidence in Part 18 because the Secretary anticipates that complainants will often appear *pro se*, as is the case with other whistleblower statutes the Department of Labor administers. Also, hearsay evidence is often appropriate in whistleblower cases, as there often is no relevant evidence other than hearsay to prove discriminatory intent. ALJs have the responsibility to determine the

appropriate weight to be given to such evidence. For these reasons the interests of determining all of the relevant facts are best served by not having strict evidentiary rules.

Section 1986.108 Role of Federal agencies.

Paragraph (a)(1) of this section explains that the Assistant Secretary, represented by an attorney from the appropriate Regional Solicitor's office, ordinarily will be the prosecuting party in cases in which the respondent objects to the findings or the preliminary reinstatement order. This has been the practice under STAA, from which the SPA's procedures are drawn, and the public interest generally requires the Assistant Secretary's participation in such matters. The case reports show that there has been relatively little litigation under SPA to date, and OSHA believes that relatively few private attorneys have developed adequate expertise in representing SPA whistleblower complainants.

Where the complainant, but not the respondent, objects to the findings or order, the regulations retain the Assistant Secretary's discretion to participate as a party or amicus curiae at any stage of the proceedings, including the right to petition for review of an ALJ decision.

Paragraph (a)(2) clarifies that if the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1), he or she may, upon written notice to the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ will issue appropriate orders to regulate the course of future proceedings.

Paragraph (a)(3) provides that copies of documents in all cases must be sent to all parties, or if represented by counsel, to them. If the Assistant Secretary is participating in the proceeding, copies of documents must be sent to the Regional Solicitor's office representing the Assistant Secretary.

Paragraph (b) states that the U.S. Coast Guard, if interested in a proceeding, also may participate as amicus curiae at any time in the proceeding. This paragraph also permits the U.S. Coast Guard to request copies of all documents, regardless of whether it is participating in the case.

Section 1986.109 Decisions and orders of the administrative law judge.

This section sets forth, in paragraph (a), the requirements for the content of the decision and order of the ALJ. Paragraphs (a) and (b) state the standards for finding a violation under SPA and for precluding such a finding.

Specifically, the complainant must show that the protected activity was a “contributing factor” in the adverse action alleged in the complaint. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Clarke, supra*, at *3. The complainant (a term that, in this paragraph, refers to the Assistant Secretary if he or she is the prosecuting party) can succeed by providing either direct or indirect proof of contribution. Direct evidence is evidence that conclusively connects the protected activity and the adverse action and does not rely upon inference. If the complainant does not produce direct evidence, he or she must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that a motive prohibited by SPA was the true reason for the adverse action. One type of indirect, also known as circumstantial, evidence is evidence that discredits the respondent’s proffered reasons for the adverse action, demonstrating instead that they were pretext for retaliation. *Id.* Another type of circumstantial evidence is temporal proximity between the protected activity and the adverse action. *Ferguson, supra*, at *2. The respondent may avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. Clear and convincing evidence is

evidence indicating that the thing to be proved is highly probably or reasonably certain. *Clarke, supra*, at *3.

Paragraph (c) provides that the Assistant Secretary's determinations about when to proceed with an investigation and when to dismiss a complaint without an investigation or without a complete investigation are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. If there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if warranted by the facts and circumstances.

Paragraph (d)(1) describes the remedies that the ALJ may order and provides that interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. (See the earlier discussion of 1986.105.) In addition, paragraph (d)(2) in this section requires the ALJ to issue an order denying the complaint if he or she determines that the respondent has not violated SPA.

Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the ARB.

Section 1986.110 Decisions and orders of the Administrative Review Board.

Paragraph (a) sets forth rules regarding seeking review of an ALJ's decision with the ARB. Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. In addition to being sent to the ARB, the petition is to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

Consistent with the procedures for petitions for review under other OSHA-administered whistleblower laws, paragraph (b) of this section indicates that the ARB has discretion to accept or reject review in SPA whistleblower cases. Congress intended these whistleblower cases to be expedited, as reflected by the provision in STAA, which applies to SPA, providing for a hearing de novo in district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint. Making review of SPA whistleblower cases discretionary may assist in furthering that goal. As noted in paragraph (a) of this section, the parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary.

When the ARB accepts a petition for review, the ARB will review the ALJ's factual determinations under the substantial evidence standard. If a timely petition for review is filed

with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. In exceptional circumstances, however, the ARB may grant a motion to stay an ALJ's order of reinstatement. A stay of a preliminary order of reinstatement is appropriate only where the respondent can establish the necessary criteria for a stay, i.e., the respondent will suffer irreparable injury; the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

Paragraph (c) incorporates the statutory requirement that the Secretary's final decision be issued within 120 days of the conclusion of the hearing. The hearing is deemed concluded 14 days after the date of the ALJ's decision unless a motion for reconsideration has been filed with the ALJ, in which case the hearing is concluded on the date the motion for reconsideration is ruled upon or 14 days after a new ALJ decision is issued. This paragraph further provides for the ARB's decision in all cases to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

Paragraph (d) describes the remedies the ARB can award if it concludes that the respondent has violated SPA. (See the earlier discussion of remedies at 1986.105 and .109.) Under paragraph (e), if the ARB determines that the respondent has not violated the law, it will issue an order denying the complaint.

Subpart C – Miscellaneous Provisions

Section 1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.

This section provides procedures and time periods for the withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

Paragraph (a) permits a complainant to withdraw, orally or in writing, his or her complaint to the Assistant Secretary, at any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order. The Assistant Secretary will confirm in writing the complainant's desire to withdraw and will determine whether to approve the withdrawal. If approved, the Assistant Secretary will notify all parties if the withdrawal is approved. Complaints that are withdrawn pursuant to settlement agreements prior to the filing of objections must be approved in accordance with the settlement approval procedures in paragraph (d). The complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

Under paragraph (b), the Assistant Secretary may withdraw his or her findings and/or preliminary order at any time before the expiration of the 30-day objection period described in section 1986.106, if no objection has yet been filed. The Assistant Secretary may substitute new findings and/or a preliminary order, and the date of receipt of the substituted findings and/or order will begin a new 30-day objection period.

Paragraph (c) addresses situations in which parties seek to withdraw either objections to the Assistant Secretary's findings and/or preliminary order or petitions for review of ALJ decisions. A party may withdraw its objections to the Assistant Secretary's findings and/or preliminary order at any time before the findings and/or preliminary order become final by filing a written withdrawal with the ALJ. Similarly, if a case is on review with the ARB, a party may

withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, depending on where the case is pending, will determine whether to approve the withdrawal of the objections or the petition for review. Paragraph (c) clarifies that if the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or preliminary order, and there are no other pending objections, the Assistant Secretary's findings and/or preliminary order will become the final order of the Secretary. Likewise, if the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. Finally, paragraph (c) provides that if objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d).

Paragraph (d)(1) states that a case may be settled at the investigative stage if the Assistant Secretary, the complainant, and the respondent agree. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties. Paragraph (d)(2) permits a case to be settled, if the participating parties agree and the ALJ before whom the case is pending approves, at any time after the filing of objections to the Assistant Secretary's findings and/or preliminary order. Similarly, if the case is before the ARB, the ARB may approve a settlement between the participating parties.

Under paragraph (e), settlements approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to 49 U.S.C. 31105(e), as incorporated by 46 U.S.C. 2114(b).

Section 1986.112 Judicial review.

This section describes the statutory provisions for judicial review of decisions of the Secretary. Paragraph (a) provides that within 60 days of the issuance of a final order under sections 1986.109 or 1986.110, a person adversely affected or aggrieved by such order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. Paragraph (b) states that a final order will not be subject to judicial review in any criminal or other civil proceeding. Paragraph (c) requires that, in cases where judicial review is sought, the ARB or ALJ, as the case may be, submit the record of proceedings to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

Section 1986.113 Judicial enforcement.

This section provides that the Secretary may obtain judicial enforcement of orders, including orders approving settlement agreements, by filing a civil action seeking such enforcement in the United States district court for the district in which the violation occurred.

Section 1986.114 District court jurisdiction of retaliation complaints under SPA.

This section allows a complainant to bring an action in district court for de novo review of the allegations contained in the complaint filed with OSHA if there has been no final decision of the Secretary and 210 days have passed since the filing of that complaint and the delay was not due to the complainant's bad faith. This section reflects the Secretary's position that it would not be reasonable to construe the statute to permit a complainant to initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the administrative complaint. In the Secretary's view, the purpose of the "kick out" provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the

Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals.

Paragraph (b) of this section requires complainants to provide file-stamped copies of their complaint within seven days after filing a complaint in district court to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. A copy of the complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. This provision is necessary to notify the Agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

Section 1986.115 Special circumstances; waiver of rules.

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and three days notice to the parties, waive any rule or issue such orders as justice or the administration of SPA's whistleblower provision requires.

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1986.103) which was previously reviewed as a statutory requirement of the Seaman's Protection Act (46 U.S.C. 2114) and approved for use by the Office of Management and Budget ("OMB"), and was assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act

of 1995, Pub. L. 104-13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

V. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section, since it provides procedures for the handling of retaliation complaints. Therefore, publication in the *Federal Register* of a notice of proposed rulemaking and request for comments are not required for these regulations. Although this is a procedural rule not subject to the notice and comment procedures of the APA, the Agency is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the Agency receives and reviews the public’s comments.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the *Federal Register* is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this interim final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995;

Executive Order 13132

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Section 3(f)(4) of Executive Order 12866, as reaffirmed by Executive Order 13563, because it is not likely to result in a rule that may: (1) Have an annual effect on the

economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

The rule is procedural and interpretative in nature, and it is expected to have a negligible economic impact. For this reason, and the fact that no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.* Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of SPA. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

List of Subjects in 29 CFR Part 1986

Administrative practice and procedure, Employment, Investigations, Marine safety, Reporting and Recordkeeping requirements, Safety, Seamen, Transportation, Whistleblowing.

Authority and Signature.

This document was prepared under the direction and control of David Michaels, PhD, MPH,
Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, D.C. on January 31, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble, 29 CFR part 1986 is added to read as follows:

PART 1986 – PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SEAMAN’S PROTECTION ACT (SPA), AS AMENDED.

Subpart A – Complaints, Investigations, Findings, and Preliminary Orders

- 1986.100 Purpose and scope.
- 1986.101 Definitions.
- 1986.102 Obligations and prohibited acts.
- 1986.103 Filing of retaliation complaints.
- 1986.104 Investigation.
- 1986.105 Issuance of findings and preliminary orders.

Subpart B – Litigation

- 1986.106 Objections to the findings and the preliminary order and request for a hearing.
- 1986.107 Hearings.

1986.108 Role of Federal agencies.
1986.109 Decisions and orders of the administrative law judge.
1986.110 Decisions and orders of the Administrative Review Board.

Subpart C – Miscellaneous Provisions

1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.
1986.112 Judicial review.
1986.113 Judicial enforcement.
1986.114 District court jurisdiction of retaliation complaints under SPA.
1986.115 Special circumstances; waiver of rules.

Authority: 46 U.S.C. 2114; 49 U.S.C. 31105; Secretary’s Order 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary’s Order 1-2010 (Jan. 15, 2010), 75 FR 3924-01 (Jan. 25, 2010).

Subpart A – Complaints, Investigations, Findings, and Preliminary Orders

§ 1986.100 Purpose and scope.

(a) This part sets forth the procedures for, and interpretations of, the Seaman’s Protection Act (SPA), 46 U.S.C. 2114, as amended, which protects a seaman from retaliation because the seaman has engaged in protected activity pertaining to compliance with maritime safety laws and accompanying regulations. SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105.

(b) This part establishes procedures pursuant to the statutory provisions set forth above for the expeditious handling of retaliation complaints filed by seamen or persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings, litigation before administrative law judges (ALJs), post-hearing

administrative review, withdrawals and settlements, and judicial review and enforcement. In addition, these rules provide the Secretary's interpretations on certain statutory issues.

§ 1986.101 Definitions.

As used in this part:

(a) *Act* means the Seaman's Protection Act (SPA), 46 U.S.C. 2114, as amended.

(b) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

(c) *Business days* means days other than Saturdays, Sundays, and Federal holidays.

(d) *Citizen of the United States* means:

(1) An individual who is a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22)) or a corporation, partnership, association, or other business entity if the controlling interest is owned by citizens of the United States. The controlling interest in a corporation is owned by citizens of the United States if:

(i) Title to the majority of the stock in the corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of a person not a citizen of the United States;

(ii) The majority of the voting power in the corporation is vested in citizens of the United States;

(iii) There is no contract or understanding by which the majority of the voting power in the corporation may be exercised, directly or indirectly, in behalf of a person not a citizen of the United States; and

(iv) There is no other means by which control of the corporation is given to or permitted to be exercised by a person not a citizen of the United States.

(2) Furthermore, a corporation is only a citizen of the United States if:

(i) It is incorporated under the laws of the United States or a State;

(ii) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and

(iii) No more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.

(e) Complainant means the seaman who filed a SPA whistleblower complaint or on whose behalf a complaint was filed.

(f) Cooperated means any assistance or participation with an investigation, at any stage of the investigation, and regardless of the outcome of the investigation.

(g) Maritime safety law or regulation includes any statute or regulation regarding health or safety that applies to any person or equipment on a vessel.

(h) Notify or notified includes any oral or written communications.

(i) OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

(j) Person means one or more individuals or other entities, including but not limited to corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(k) Report or reported means any oral or written communications.

(l) Respondent means the person alleged to have violated 46 U.S.C. 2114.

(m) Seaman means any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States. The term includes an individual formerly performing the work described above or an applicant for such work.

(n) Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

(o) State means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(p) Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(q) Vessel owner includes all of the agents of the owner, including the vessel's master.

(r) Any future amendments to SPA that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

§ 1986.102 Obligations and prohibited acts.

(a) A person may not retaliate against any seaman because the seaman:

(1) In good faith reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;

(2) Refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public;

(3) Testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(4) Notified, or attempted to notify, the vessel owner or the Secretary of the department in which the Coast Guard is operating of a work-related personal injury or work-related illness of a seaman;

(5) Cooperated with a safety investigation by the Secretary of the department in which the Coast Guard is operating or the National Transportation Safety Board;

(6) Furnished information to the Secretary of the department in which the Coast Guard is operating, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(7) Accurately reported hours of duty under part A of subtitle II of title 46 of the United States Code.

(b) Retaliation means any discrimination against a seaman including, but is not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman.

(c) For purposes of paragraph (a)(2) of this section, the circumstances causing a seaman's apprehension of serious injury must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman's employer. To qualify for protection based on activity described in paragraph (a)(2) of this section, the seaman must have sought from the employer, and been unable to obtain, correction of the unsafe condition. Any seaman who requests such a correction shall be protected against retaliation because of the request.

§ 1986.103 Filing of retaliation complaints.

(a) *Who may file.* A seaman who believes that he or she has been retaliated against by a person in violation of SPA may file, or have filed by any person on the seaman's behalf, a complaint alleging such retaliation.

(b) Nature of filing. No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a seaman is unable to file a complaint in English, OSHA will accept the complaint in any other language.

(c) Place of filing. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the seaman resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address:

<http://www.osha.gov>

(d) Time for filing. Not later than 180 days after an alleged violation occurs, a seaman who believes that he or she has been retaliated against in violation of SPA may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(e) Relationship to section 11(c) complaints. A complaint filed under SPA alleging facts that would also constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both SPA and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would also constitute a violation of SPA will be deemed to be a complaint filed under both SPA and section 11(c). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

§ 1986.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of the respondent's rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the U.S. Coast Guard.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the Agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the Agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Agency will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

- (i) The seaman engaged in a protected activity;
- (ii) The respondent knew or suspected that the seaman engaged in the protected activity;
- (iii) The seaman suffered an adverse action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the seaman engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1986.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present

legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

§ 1986.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the respondent retaliated against the complainant in violation of SPA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief. Such order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order may also require the respondent to pay punitive damages of up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party

is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or the order and to request a hearing. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and the preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and request for a hearing have been timely filed as provided at § 1986.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B – Litigation

§ 1986.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1986.105(c). The objections and request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S.

Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, and the OSHA official who issued the findings.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1986.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated, and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1986.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. In any case in which the respondent objects to the findings or the preliminary order, the Assistant Secretary ordinarily will be the prosecuting party. In any other cases, at the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as amicus curiae at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) If the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1) of this section, he or she may, upon written notice to the ALJ or the Administrative Review Board, as the case may be, and the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ or the Administrative Review Board, as the case may be, will issue appropriate orders to regulate the course of future proceedings.

(3) Copies of documents in all cases shall be sent to all parties, or if they are represented by counsel, to the latter. In cases in which the Assistant Secretary is a party, copies of the documents shall be sent to the Regional Solicitor's Office representing the Assistant Secretary.

(b) The U.S. Coast Guard, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at its discretion. At the request of the U.S. Coast Guard, copies of all documents in a case must be sent to that agency, whether or not that agency is participating in the proceeding.

§ 1986.109 Decisions and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1986.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation, reinstatement

of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The ALJ decision will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the decision for review.

§ 1986.110 Decisions and orders of the Administrative Review Board.

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the

date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief

Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary and on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees the complainant may have incurred); and payment of punitive damages up to \$250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.

Subpart C – Miscellaneous Provisions

§ 1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is

withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or a preliminary order at any time before the expiration of the 30-day objection period described in § 1986.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or preliminary order become final, a party may withdraw objections to the Assistant Secretary's findings and/or preliminary order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) Investigative settlements. At any time after the filing of a SPA complaint and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a

settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary's consent and achieves the consent of all three parties.

(2) Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ or by the ARB, if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in a United States district court pursuant to 49 U.S.C. 31105(e), as incorporated by 46 U.S.C. 2114(b).

§ 1986.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1986.109 and 1986.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB, or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§ 1986.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order, including one approving a settlement agreement issued under SPA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1986.114 District court jurisdiction of retaliation complaints under SPA.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. The action shall, at the request of either party to such action, be tried by the court with a jury.

(b) Within seven days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

§ 1986.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue such orders as justice or the administration of SPA requires.

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