

land and their maritime related job performance. The Coast Guard disagrees. An individual's record of alcohol or drug-related, or other motor vehicle offenses as specified in sections 205(a)(3) (A) and (B) of the NDR Act of 1982, indicates that the individual may have a disregard for his or her own safety or the safety of others and therefore may not be suitable for maritime employment. The Conference Report on OPA 90 (H.R. Conf. Rep. No. 101-653) explains that alcohol impairment may have played a role in the Exxon Valdez incident. Motor vehicle offenses involving the abuse of alcohol and drugs may evince possible unsafe vessel operations. Congressional intent, as presented in the Conference Report on OPA 90, was to provide an additional tool in an effort to promote a drug- and alcohol-free workplace in maritime industry. Also, the Coast Guard concluded that applicants who have been convicted of violent criminal offenses or serious property offenses may pose a threat to ship personnel, passengers, the marine environment, and the safe operation of the ship. The Coast Guard may increase ship safety by denying seafarer's documents to individuals who demonstrate a lack of concern for safety through a record of criminal or motor vehicle offenses.

3. The National Driver Register

Two comments indicated that the Coast Guard is only able to review information from the National Driver Register three years prior to the check. The comments noted that the information from an NDR file check would not cover the full 5 years between document renewal. The NDR Act prohibits the Coast Guard from gaining access to information more than three years old, unless the information is about a revocation or suspension of driving privileges still in effect (49 U.S.C. 30305(b)(5)).

One comment suggested that NDR checks may be a federalism issue, since most driving offenses are state offenses. The Coast Guard is among the authorized agencies granted access to the NDR. The NDR Act establishes guidelines for obtaining information from the NDR for the purposes of evaluating individuals who hold, or are applying for a license or certificate of registry under 46 U.S.C. 7101, or a merchant mariner's document under 46 U.S.C. 7302 (49 U.S.C. 30305(b)(5)).

One comment requested clarification of "racing on the highways." According to the National Highway Traffic Safety Administration, racing on the highways means formal or informal contest racing on a public highway.

Another comment stated that if the NDR is a voluntary system, the Coast Guard may not be able to check information from non-participating states. Since all of the states and the District of Columbia are participants in the NDR program, the Coast Guard can conduct checks on any individual in the United States with motor vehicle driving record information.

One comment noted a decision rendered on April 5, 1995, by the United States Circuit Court for the Fourth Circuit in a case entitled, *American Trucking Associations Inc. v. Federal Highway Administration*. In that case, the court's decision was based on the fact that off-duty alcohol use is generally not relevant criteria in determining eligibility for employment. In its decision, the court was interpreting the Omnibus Transportation Employee Testing Act of 1991 (Pub. L. 102-143), which applied to the Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, and the Federal Transit Administration, but not to the Coast Guard. This case involved preemployment testing requirements for alcohol use. This final rule is under separate authority and does not involve the preemployment testing of individuals for alcohol.

The Coast Guard is providing information to applicants who wish to conduct an NDR file check for their personal use. The NDR allows individuals to request a file check in accordance with the Federal Privacy Act of 1974 (Pub. L. 93-579). New sections 10.201(i)(4) and 12.02-4(d)(4) describe the procedures to follow to receive the results of a NDR file check. The information in a personal NDR file check is intended for use by the applicant only, and may not be used in the licensing and certification process.

The Coast Guard concluded the term "NDR listed convictions" needed further clarification. The final rule adds a definition for "NDR listed convictions" to its list of definitions in § 10.103 and § 12.01-6. The new definition will reflect the convictions in 49 U.S.C. 30304(a)(3)(A) and (B) which are authorized by the National Highway Safety Transportation Administration to be used by the Coast Guard to evaluate applicants for merchant mariner's documents.

In the NPRM, § 10.201(b) and § 12.02-4(a) did not discuss individuals with NDR convictions due to the addiction or abuse of alcohol. The Coast Guard added a statement to § 10.201(b) and § 12.02-4(a) to ensure individuals with such NDR convictions furnish satisfactory evidence of suitability for

service in the merchant mariner to be eligible for a license, COR, or a merchant mariner's document.

4. Past Offenses

Several comments recommended implementing these regulations in a prospective manner, where the Coast Guard would only consider offenses occurring after the effective date of the regulations. These comments stated that, in the past, many mariners have not challenged false charges due to their work schedule and the threat of loss of employment. The regulations allow mariners ample opportunity to provide the OCMI with evidence of suitability for service in the merchant marine, and to explain the circumstances of an offense. If the application is denied, an appeal process and reconsideration are available.

A few comments suggested that mariners would have altered their behavior if they had prior knowledge of the effect of off-duty conduct on employment. In the past, the Coast Guard has been conducting criminal record review for original applications for licenses and CORs, and under existing practice conducts a criminal record review of original applicants for MMDs. Applicants are already accountable for past behavior when they apply for their original documents. The Coast Guard is expanding its requirements to include spot-checks of individuals applying for a raise in grade of a license, COR, or MMD; an endorsement on a MMD with a new expiration date; and a renewal of a license, COR, or MMD. The NDR checks were created to identify vessel personnel with motor vehicle offenses related to the use of alcohol and drugs or the unsafe operation of a motor vehicle. The Coast Guard determined that the certification and licensing of persons involved with the abuse of these substances or the unsafe operation of a motor vehicle may lead to unsafe vessel operations.

Some comments discussed the Coast Guard's consideration of charges against mariners that have been stricken from the record through remediation or compensation and how this defeats public policy and discourages individuals from participating in remediation or compensation. As stated in the definition of "conviction" provided in this final rule, a later expungement of the conviction will not negate a conviction unless it is proved to the OCMI that the expungement is based upon a showing that the court's earlier conviction was in error. The Coast Guard concluded that consideration of all convictions is