

REGISTRATION REPORT

**Monday
September 11, 1989**

Part IV

Department of the Treasury

Customs Service

19 CFR Parts 162 and 171

**Seizure of Property for Possession of
Controlled Substances; Final Rule**

Department of Justice

**Office of the Attorney General
Drug Enforcement Administration**

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**Anti-Drug Abuse Act of 1988; Expedited
Forfeiture Procedures for Certain
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Final Rule**

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 162 and 171

(T.D. 89-88)

Seizure of Property for Possession of Controlled Substances

AGENCY: U.S. Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide certain expedited procedures when property is seized due to violations involving the possession of personal use quantities of controlled substances. The procedures comply with the requirements of the Anti-Drug Abuse Act of 1988. The regulations set forth procedures allowing an owner or interested party whose property was seized due to a violation involving possession of a personal use quantity of a controlled substance to have the property returned promptly if he can establish his innocence. The regulations also require, when a violation involving the possession of personal use quantities of a controlled substance is committed on a commercial fishing industry vessel that is proceeding to or from a fishing area or intermediate port of call or is actively engaged in fishing operations, summons to appear be issued in lieu of seizure of the vessel. These regulations have been prepared in conjunction with the Attorney General and the Secretary of Transportation; regulations from these Departments on this subject area also appear in today's Federal Register.

EFFECTIVE DATE: October 11, 1989.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Regulatory Procedures and Penalties Division, (202) 566-8317.

SUPPLEMENTARY INFORMATION:

Background

Section 6079 of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690, title VI) (the Act) requires the Attorney General and the Secretary of the Treasury to prescribe regulations to minimize the adverse impact caused by prolonged detention of property seized for civil forfeiture for violations involving the possession of personal use quantities of a controlled substance pursuant to section 598 of the Tariff Act of 1930 (19 U.S.C. 1595a(a)), section 511(a) of the Controlled Substance Act (21 U.S.C. 881(a)), or section 2 of the Act of August 9, 1939 (53 Stat. 1291; 49 U.S.C. App. 782). Pursuant to section 6079, such seized property shall be promptly

returned where an owner can establish: (1) A valid, good faith interest in the property; (2) that he did not know of or consent to the violation; and (3) that he had no knowledge or reason to believe that the property was being or would be used in violation of law, or that if he at any time had, or should have had knowledge that the property would be used in a violation, that he did what reasonably could be expected to prevent the violation.

Section 6079 also provides that the Attorney General, Secretary of the Treasury and the Secretary of Transportation shall provide joint regulations providing for issuance of a summons to appear in lieu of seizure of a commercial fishing industry vessel for violations involving the possession of personal use quantities of a controlled substance. These regulations are to apply when the violation is committed on a commercial fishing industry vessel that is proceeding to or from a fishing area or intermediate port of call or is actually engaged in fishing operations.

Representatives of the Department of Justice on behalf of the Attorney General, the U.S. Coast Guard on behalf of the Secretary of Transportation and the U.S. Customs Service on behalf of the Secretary of the Treasury developed, in accordance with section 6079 of the Act, proposed regulations which were published in the Federal Register (54 FR 14242) on April 10, 1989.

Eleven comments were received by Customs in response to its Notice of Proposed Rulemaking. Customs exchanged the comments it received with the Coast Guard and the Department of Justice. A discussion of the comments and our responses follows:

Discussion of Comments

Comment: Proposed § 171.53 provided that Customs will attempt to make a final administrative determination regarding the disposition of property seized for particular statutory violations involving the possession of personal use quantities of a controlled substance within 21 days of the seizure. If such a determination is not made within 21 days, Customs shall determine, within 20 days after receiving a timely submitted petition for expedited procedures, whether a petitioner established his right to have the property returned or whether Customs should proceed with the administrative forfeiture action. Several commenters stated that this proposed procedure is contrary to the purpose of section 6079, which is to require Customs to make a final determination in 21 days or release the property. The commenters stated

that § 171.53 actually provides Customs with 40 days during which to make a final determination.

Response: We do not agree. Customs is unable to make a final determination until it receives a petition for expedited procedures establishing the elements required by the Act. The regulations provide that Customs will attempt to make a final determination within 21 days, but this is entirely dependent upon the receipt of petitions. Because the names and addresses of interested parties who should be notified of a seizure are not always known to Customs immediately, and because interested parties who are not in possession of their conveyances at the time of seizure do not always petition promptly, there are frequent delays in the administrative process which are entirely outside of Customs control. If Customs were required to make a final determination 21 days after seizure, it would be forced to deny relief when petitions are not received shortly after seizure. Parties submitting petitions which may otherwise have been granted would be forced to submit supplemental petitions or to unnecessarily file claim and cost bonds requesting judicial determinations. The procedure proposed by Customs is more flexible giving the petitioner a reasonable period of time in which to submit his petition. Further, if the petitioner does submit his petition on the same day of the seizure, Customs will make a final determination within 20 days.

Comment: A commenter stated that "personal use quantity" should be defined as that quantity which can be easily concealed upon the body or personal effects of an individual rather than a quantity that is based on weight.

Response: We do not agree. It is possible to conceal on a person or in personal effects amounts of controlled substances which are clearly for non-personal use. We believe that the use of weight as a criterion while, at the same time, allowing certain other variables to be taken into consideration is a preferable way to determine whether an amount of controlled substance possessed by an individual is a personal use quantity.

Comment: Some commenters complained that the proposed procedures are harsh in that a seizure may be imposed upon an innocent owner. They also took issue with the proposed regulations assuming guilt and requiring an owner to prove his innocence before a conveyance is returned.

Response: When a conveyance is seized because of a violation involving

the possession of a personal use quantity of a controlled substance, long-standing statutory authority specifies that the burden of proof is upon the claimant to prove his innocence. Section 1615 of title 19, United States Code (19 U.S.C. 1615), provides this unique allocation of the burden of proof in all forfeiture actions for drug-related offenses as it considers the property the "guilty" party. The purpose of the proposed procedures is to protect the interests of innocent owners by allowing them to prove their innocence as expeditiously as possible.

Comment: One commenter stated that the Anti-Drug Abuse Act required new alternative procedures to expedite release of seized property and the substitute res procedure set forth in proposed § 171.54 should not be considered a new procedure as it is already available. Further, the commenter indicated that proposed § 171.54 was a little unclear and specifically questioned under what circumstances could an offer to post a substitute res not be accepted.

Response: The substitute res procedure contained in proposed § 171.54 is distinct and separate from the expedited procedures. The alternative expedited procedures required by the statute were set forth in paragraphs (a) and (b) of proposed § 171.53. Release, pending a final determination, upon the deposit of the domestic value of seized merchandise, is well-established Customs procedure and is effected pursuant to 19 U.S.C. 1614. The substitute res is not mandatory. We included the substitute res procedures in these regulations for the convenience of innocent owners who may wish to consider all the ways they may obtain release of their property expeditiously. We believe, however, that some clarification is needed regarding the substitute res provision. The substitute res is not a bond; it is the actual payment of the appraised value of the property and it may be posted at any time up until a conveyance has been administratively forfeited. We stated in the proposal that the payment may be in the form of cash, irrevocable letter of credit, or a traveler's check or money order made payable to U.S. Customs. We now believe that an additional category of payment, certified funds such as a certified check, should be added. Finally, we are changing the language in § 171.54 to more clearly reflect that an offer to post a substitute res may not be accepted by Customs when the seized conveyance that is in Customs custody is evidence of violation of law or has other

characteristics that particularly suit it for use in illegal activities.

Comment: A commenter suggested that, in the case of commercial vessels appraised at very high values, the substitution of substantial bonds, rather than the equivalent of the domestic value of the vessel, be permitted to obtain release of the vessel prior to a final determination.

Response: The Act does not require such a provision. However, Customs may choose, as it has in some past cases, to release such large vessels, pending a final determination, upon the execution of a constructive seizure agreement which requires no deposit, or upon other terms which protect the government's interest.

Comment: One commenter suggested that a demonstration of company compliance with Federal mandatory drug testing regulations be specified to constitute prima facie evidence that a company established the element set forth in proposed § 171.52(c)(3)—that it did not know or consent to the illegal use of the property or, in the event that it knew or should have known of the illegal use, it did what reasonably could be expected to prevent the violation.

Response: We do not agree. However, compliance with federal mandatory drug-testing regulations may be considered in determining whether § 171.52(c)(3) has been satisfied.

Comment: Some commenters were concerned that Customs will consider arrest and/or conviction records of persons in possession of controlled substances as evidence of possession for other than personal use. They stated that innocent owners may not know of the criminal records of all lessees, employees, and acquaintances who may be on board their conveyance.

Response: A determination of whether a controlled substance is possessed solely for purposes of personal use is a determination of subjective intent based upon the totality of the circumstances. Customs will take many factors into account, including the quantity of controlled substances possessed, in determining whether the possessor of the controlled substance intended to distribute. This operates both to the advantage of interested parties and the government. It must be stressed that a person's prior arrest or conviction record for drug offenses will not necessarily be determinative of whether the drugs were possessed for personal use; it is merely one factor Customs will consider. It should also be noted that one may still be found to be an innocent owner even though persons on the

conveyance had drug-related criminal records.

Comment: A commenter questioned why hearsay (proposed § 171.52(b)(6)(ii) (C) and (F)) should be permitted to be introduced as a means of denying the right to an expedited proceeding.

Response: Hearsay is admissible in administrative proceedings. As noted earlier, the issue of whether a controlled substance is possessed solely for purposes of personal use involves a determination of subjective intent. Hearsay may be considered in determining that intent. Further, as stated earlier, many factors may be considered in determining whether the possessor of a controlled substance intended to use the controlled substance for personal use. The types of statements discussed in § 171.52(b)(6)(ii) (C) and (F) are just two of the factors that may be considered.

Comment: A commenter stated that proposed § 171.51(b)(5), by stating that holding primary and direct title to property may not constitute a sufficient beneficial interest in the property to support a petition, may be disqualifying some innocent lienholders.

Response: We agree. Accordingly, we are deleting the last sentence of § 171.51(b)(5).

Comment: A commenter stated that the definition of "normal and customary manner" in proposed § 171.51(b)(4) is too restrictive.

Response: We disagree. We believe that the reasonable and prudent standard combined with consideration of established norms, standards and customs is a broad definition permitting Customs to consider a large number of factors. What is "normal and customary" will vary with the circumstances of individual cases, and there may be cases in which mere compliance with an industry "norm" or customary industry practice, for example, would not be viewed by an objective person as reasonable, normal or customary under the circumstances.

Comment: A commenter suggested that the term "sweepings" as used in proposed § 171.51(b)(8)(ii) should be clarified so as to exclude substances other than controlled substances and to reflect a collective amount of sweepings.

Response: The term "sweepings" as used in both the Act and the proposed regulations has a clear meaning which does not include substances other than controlled substances. Further, the term "sweepings" clearly relates to small quantities which are actually evidence of larger quantities having been carried on board.

Comment: Some commenters wished the applicability of the provisions for issuance of a summons to appear expanded to different kinds of vessels other than those included within the definition of commercial fishing industry vessels set forth in proposed § 171.51(b)(2). One commenter stated that the term "commercial fishing industry vessel" meant to embrace private-for-hire and charter sport fishing vessels and headboats.

Response: Section 6079 of the Act specifies that the summons to appear in lieu of physical seizure is applicable to "a commercial fishing industry vessel as defined in § 2101(11a), (11b), and (11c) of title 46, United States Code." The definition set forth in proposed § 171.51(b)(2) is totally consistent with the definition in section 2101(11a), (11b) and (11c) of title 46, United States Code. The definition does not include sport-fishing vessels, headboats, or vessels in the barge and towing industry. Customs is not statutorily required to provide the summons to appear in lieu of seizure procedure to other vessels. However, Customs is not prohibited by the Act from expanding the procedures to other kinds of vessels. Any policy decisions to expand the summons to appear procedure to other vessels will be based on Customs experience under these regulations.

Comment: One commenter asked that the regulations include a definition of what constitutes "proceeding to or from a fishing area or intermediate port of call." It was also suggested that the definition include times when a vessel has been outfitted for a voyage whether or not it is still in port.

Response: The language at issue has been taken directly from the statute and is unambiguous on its face. There is no reason to give the terms "proceeding to or from" other than their literal meaning. The literal meaning cannot be said to include times when the vessel is in port.

Comment: One commenter suggested that the regulations clarify the provision in the summons that requires a commercial fishing industry vessel to report to the port designated in the summons to take into account unique geographic factors confronted in Alaska.

Response: We do not agree that such clarification belongs in the regulations. Local ports have been instructed to workout appropriate operational details in unique and/or unusual circumstances.

Comment: A commenter stated that the regulations should not specify, as they did in § 171.52(e)(3), that a statement of the facts and circumstances, supported by satisfactory evidence, should be included in a petition because

§ 171.52(c)(1)-(3) specifies the statutory elements of proof. The commenter stated that § 171.52(e)(3) requires more than section 6079 of the Act.

Response: We do not agree. The section, as written, makes it clear that a petitioning party may not obtain return of the seized conveyance by merely citing § 171.52(c)(1)-(3) verbatim. Evidence is required to support the assertions.

Comment: A commenter suggested that the regulations address the treatment of cargo carried on board a commercial vessel that is seized.

Response: We disagree. Cargo is not part of a vessel. It is, therefore, not subject to forfeiture and may be returned to its owner. Customs already has procedures for the disposition of cargo on seized vessels.

Other Changes

Based on a change being made to the Department of Justice regulations on this subject because of a comment, Customs has decided to modify § 171.52(c) to reflect that petitioners also may establish in their petition any statutory rights or defenses beyond those encompassed by the three elements specified in section 6079(b)(2) of the Act.

Conclusion

After careful consideration of all the comments received and further review of the matter, it has been determined that the amendments, with the modifications discussed above, should be adopted.

Regulatory Flexibility Act

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the analysis requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), are not applicable to these amendments.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service; however, personnel from other offices participated in its development.

List of Subjects in 19 CFR Parts 162 and 171

Administrative practice and procedures, Law enforcement, Penalties, Seizures and forfeiture.

Amendments to the Regulations

Parts 162 and 171, Customs Regulations (19 CFR parts 162 and 171), are amended as set forth below:

PART 162—RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. The general authority citation of part 162, Customs Regulations, and the specific authority citation for § 162.22, Customs Regulations are revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

Section 162.22 also issued under 18 U.S.C. 546; 19 U.S.C. 1458, 1460, 1504, 1595a, 1701, 1703-1708.

2. Section 162.22(b) is revised to read as follows:

§ 162.22 Seizure of conveyances.

(b) *Facilitating importation contrary to law.* Except as provided in § 171.52(b), every vessel, vehicle, animal, aircraft, or other thing, which is being or has been used in, or to aid or facilitate, the importation, bringing in, unloading, landing, removal, concealing, harboring or subsequent transportation of any article which is being, or has been introduced or attempted to be introduced into the United States contrary to law, shall be seized and held subject to forfeiture. Any person who directs, assists financially or otherwise, or is in any way concerned in any such unlawful activity shall be liable to a penalty equal to the value of the article or articles involved.

3. Section 162.31(a) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 162.31 Notice of fine, penalty, or forfeiture incurred.

(a) *Notice.* * * * For violations involving the possession of personal use quantities of a controlled substance, also see § 171.55.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The contents of part 171 are amended by adding the contents of subpart F to read as follows:

Subpart F—Expedited Petitioning Procedures

- Sec. 171.51 Application and definitions.
- 171.52 Petition for expedited procedures in an administrative forfeiture proceeding.

Sec.

171.53 Ruling on petition of expedited procedures.

171.54 Substitute res in an administrative forfeiture action.

171.55 Notice provisions.

2. The general authority citation for part 171 is revised and a specific citation added for subpart F to read as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624.

d. Subpart F also issued under 19 U.S.C. 1595a, 1605, 1614, Pub. L. 100-690.

3. Section 171.12(b) is revised to read as follows:

§ 171.12 Filing of petition.

(b) *When filed.* If a petitioner seeks expedited relief under subpart F of this part, a petition must be filed within the time frame stated in § 171.52(d). Otherwise, unless additional time has been authorized as provided in § 171.15, petitions for relief shall be filed within 30 days from the date of the mailing of notice of fine, penalty, or forfeiture incurred.

4. Part 171 is amended by adding a new subpart F consisting of §§ 171.51 through 171.55, to read as follows:

Subpart F—Expedited Petitioning Procedures

§ 171.51 Application and definitions.

(a) *Application.* The following definitions, regulations, and criteria are designed to establish and implement procedures required by section 6079 of the Anti-Drug Abuse Act of 1988, Public Law 100-690, title VI (102 Stat. 4181). They are intended to supplement existing law and procedures relative to the forfeiture or property under the identified statutory authority. The provisions of these regulations do not affect the existing legal and equitable rights and remedies of those with an interest in property seized for forfeiture, nor do these provisions relieve interested parties from their existing obligations and responsibilities in pursuing their interests through such courses of action. These regulations are intended to reflect the intent of Congress to minimize the adverse impact occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving possession of personal use quantities of controlled substances. The definition of personal use quantities of controlled substance as contained herein is intended to distinguish between those quantities small in amount which are generally considered to be possessed for personal consumption and not for distribution,

and those larger quantities generally considered to be subject to distribution.

(b) *Definitions.* As used in this subpart, the following terms shall have the meanings specified:

(1) *Appraised value.* "Appraised value" has the meaning given in § 162.43(a) of this chapter.

(2) *Commercial fishing industry vessel.* "Commercial fishing industry vessel" means a vessel that:

(i) Commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish;

(ii) Commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling; or

(iii) Commercially supplies, stores, refrigerates, or transports fish, fish products, or materials directly related to fishing or the preparation of fish to or from a fishing, fish processing, or fish tender vessel or fish processing facility.

(3) *Controlled substance.* "Controlled substance" has the meaning given in 21 U.S.C. 802.

(4) *Normal and customary manner.* "Normal and customary manner" means that inquiry suggested by particular facts and circumstances which would customarily be undertaken by a reasonably prudent individual in a like or similar situation. Actual knowledge of such facts and circumstances is unnecessary, and implied, imputed, or constructive knowledge is sufficient. An established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether a petitioner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property.

(5) *Owner or interested party.* "Owner or interested party" means one having a legal and possessory interest in the property seized for forfeiture or one who was in legal possession of the property at the time of seizure and is entitled to legal possession at the time of granting the petition of expedited procedure. This includes a lienholder, to the extent of his interest in the property, whose claim is in writing (except for a maritime lien which need not be in writing), unless the collateral is in the possession of the secured party. The agreement securing such a lien must create or provide for a security interest in the collateral, describe the collateral and be signed by the debtor.

(6) *Personal use quantities.* "Personal use quantities" means possession of controlled substances in circumstances where there is no evidence of intent to distribute, or to facilitate the

manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance. A quantity of a controlled substance is presumed to be for personal use if the amounts possessed do not exceed the quantities set forth in paragraph (b)(6)(i) of this section if there is no evidence of illicit drug trafficking or distribution such as, but not limited to the factors set forth in paragraph (b)(6)(ii) of this section. The possession of a narcotic, a depressant, a stimulant, a hallucinogen or a cannabis-controlled substance will be considered in excess of personal use quantities if the dosage unit amount possessed provides the same or greater equivalent efficacy as described in paragraph (b)(6)(i) of this section.

(i) *Quantities presumed to be for personal use unless evidence of illicit drug trafficking or distribution exists.*

(A) One gram of a mixture of substance containing a detectable amount of heroin;

(B) One gram of a mixture of substance containing a detectable amount of—

(1) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(2) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(3) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(4) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (b)(6)(i)(B) (1) through (3) of this section;

(C) ½oth gram of a mixture of substances described in paragraph (b)(6)(i)(B) of this section which contains cocaine base;

(D) ½oth gram of mixture of substance containing a detectable amount of phencyclidine (PCP);

(E) 500 micrograms of a mixture of substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) One ounce of a mixture of substance containing a detectable amount of marihuana; or

(G) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture of substances containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(ii) *Evidence of possession for other than personal use.* Quantities shall not be considered to be for personal use if sweepings are present or there is other evidence of possession for other than personal use such as:

(A) Evidence such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug "cutting" agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(B) Information from reliable sources indicating possession of a controlled substance with intent to distribute;

(C) The arrest and/or conviction record of the person or persons in actual or constructive possession of the controlled substance for offenses under Federal, State or local law that indicates an intent to distribute a controlled substance;

(D) The controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(E) The controlled substance is possessed under circumstances that indicate such a controlled substance is a sample intended for distribution in anticipation of a transaction involving large quantities, or is part of a larger delivery; or

(F) Statements by the possessor, or otherwise attributable to the possessor, including statements of conspirators, that indicate possession with intent to distribute.

(7) *Property.* "Property" means property subject to forfeiture under 21 U.S.C. 881(a) (4), (6), and (7); 19 U.S.C. 1595a, and 49 U.S.C. App. 782.

(8) *Seizing agency.* "Seizing agency" means the Federal agency which has seized the property or adopted the seizure of another agency, and has the responsibility for administratively forfeiting the property.

(9) *Sworn to.* "Sworn to" refers to the oath as provided by 28 U.S.C. 1746 or as notarized in accordance with state law.

§ 171.52 Petition for expedited procedures in an administrative forfeiture proceeding.

(a) *Procedures for violations involving possession of controlled substance in personal use quantities.* The usual procedures for petitions for relief when property is seized are set forth in subpart B of this part. However, where property is seized for administrative forfeiture pursuant to 21 U.S.C. 881(a) (4), (6) or (7), 19 U.S.C. 1595a and/or 49 U.S.C. App. 782 due to violations involving controlled substances in personal use quantities, a petition may be filed pursuant to paragraphs (c) and (d) of this section to seek expedited procedures for release of the property. A petition filed pursuant to this subpart will also serve as a petition for relief under subpart B of this part. The petition may be filed by an owner or interested party.

(b) *Commercial fishing industry vessels.* Where a commercial fishing industry vessel proceeding to or from a fishing area or intermediate port of call or actually engaged in fishing operations is subject to seizure for administrative forfeiture for a violation of law involving controlled substances in personal use quantities, a summons to appear shall be issued in lieu of a physical seizure. The vessel shall report to the port designated in the summons no later than the date specified in the summons. When a commercial fishing industry vessel reports, the appropriate Customs officer shall, depending on the facts and circumstances, either issue another summons to appear at a time deemed appropriate, execute a constructive seizure agreement pursuant to 19 U.S.C. 1605, or take physical custody of the vessel. When a summons to appear has been issued, the seizing agency may be authorized to institute administrative forfeiture as if the vessel had been physically seized. When a summons to appear has been issued, the owner or interested party may file a petition for expedited procedures pursuant to subsection (a); the provisions of subsection (a) and other provisions in this subpart relating to a petition for expedited release shall apply as if the vessel had been physically seized.

(c) *Elements to be established in petition.* (1) The petition for expedited procedures shall establish that:

(i) The petitioner has a valid, good faith interest in the seized property as owner or otherwise;

(ii) The petitioner reasonably attempted to ascertain the use of the property in a normal and customary manner; and

(iii) The petitioner did not know or consent to the illegal use of the property or, in the event that the petitioner knew or should have known of the illegal use, the petitioner did what reasonably could be expected to prevent the violation.

(2) In addition, the petitioner may submit evidence to establish that he has statutory rights or defenses such that he would prevail in a judicial proceeding on the issue of forfeiture.

(d) *Manner of filing.* A petition for expedited procedures must be filed in a timely manner to be considered by Customs. To be filed in a timely manner, the petition must be received by Customs within 20 days from the date the notice of seizure was mailed, or in the case of a commercial fishing industry vessel for which a summons to appear is issued, 20 days from the original date when the vessel is required to report. The petition must be sworn to by the petitioner and signed by the petitioner or his attorney at law. If the

petitioner is a corporation, the petition may be sworn to by an officer or responsible supervisory employee thereof and signed by that individual or an attorney at law representing the corporation. Both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED PROCEDURES." The petition shall be addressed to the U.S. Customs Service and filed in triplicate with the district director for the district in which the property was seized, or for commercial fishing industry vessels, with the district director having jurisdiction over the port to which the vessel was required to report.

(e) *Contents of petition.* The petition shall include the following:

(1) A complete description of the property, including identification numbers, if any, and the date and place of the violation and seizure;

(2) A description of the petitioner's interest in the property, supported by the documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances relied upon by the petitioner to justify expedited return of the seized property, supported by satisfactory evidence.

§ 171.53 Ruling on petition for expedited procedures.

(a) *Final administrative determination.* Upon receipt of a petition filed pursuant to § 171.52, Customs shall determine first whether a final administrative determination of the case can be made within 21 days of the seizure. If such a final administrative determination is made within 21 days, no further action need be taken under this subpart.

(b) *Determination within 20 days.* If no such final administrative determination is made within 21 days of the seizure, Customs shall within 20 days after the receipt of the petition make a determination as follows:

(1) If Customs determines that the factors listed in § 171.52(c) have been established, it shall terminate the administrative proceedings and release the property from seizure, or in the case of a commercial fishing industry vessel for which a summons has been issued, but not yet answered, dismiss the summons. The property shall not be returned if it is evidence of a violation of law.

(2) If Customs determines that the factors listed in § 171.52(c) have not been established, it shall proceed with the administrative forfeiture.

§ 171.54 Substitute res in an administrative forfeiture action.

(a) *Substitute res.* Where property is seized for administrative forfeiture for a violation involving controlled substances in personal use quantities, the owner or interested party may offer to post an amount equal to the appraised value of the property (the *res*) to obtain release of the property. The offer, which may be tendered at any time subsequent to seizure and up until the completion of administrative forfeiture proceedings, must be in the form of cash, irrevocable letter of credit, certified funds such as a certified check, traveler's check(s), or money order made payable to U.S. Customs. Unless the property is evidence of a violation of law or has other characteristics that particularly suit it for use in illegal activities, it will be released to the owner or interested party subsequent to tender of the substitute *res*.

(b) *Forfeiture of res.* If a substitute *res* is posted and it is determined that the property should be administratively forfeited, the *res* will be forfeited in lieu of the property.

§ 171.55 Notice provisions.

(a) *Special notice provision.* At the time of seizure of property defined in § 171.51, written notice must be provided to the possessor of the property regarding applicable statutes and Federal regulations including the procedures established for the filing of a petition for expedited procedures as set forth in section 6079 of the Anti-Drug Abuse Act of 1988 and implementing regulations.

(b) *Notice provision.* The notice as required by section 1607 of Title 19, United States Code and applicable regulations shall be made at the earliest practicable opportunity after determining ownership of, or interest in, the seized property and shall include a statement of the applicable law under which the property is seized and a statement of the circumstances of the seizure sufficiently precise to enable an owner or interested party to identify the date, place and use of acquisition which makes the property subject to forfeiture.

William von Raab,
Commissioner of Customs.

Approved: September 1, 1989.
Salvatore R. Martoche,
Assistant Secretary of the Treasury.

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DEPARTMENT OF JUSTICE

**Office of the Attorney General
Drug Enforcement Administration**

21 CFR Part 1316

[Order No. 1363-89]

**Anti-Drug Abuse Act of 1988;
Expedited Forfeiture Procedures for
Certain Property**

AGENCY: Office of the Attorney General,
Drug Enforcement Administration,
Department of Justice.

ACTION: Final rule.

SUMMARY: Section 6079 of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690) requires the Attorney General and the Secretary of the Treasury to prescribe regulations for expedited administrative procedures for seizures under section 511(a)(4), (6) and (7) of the Controlled Substances Act (21 U.S.C. 881(a)(4), (6) and (7)); section 596 of the Tariff Act of 1930 (19 U.S.C. 1595a(a)); and section 2 of the Act of August 9, 1939 (53 Stat. 1291; 49 U.S.C. App. 782) for violations involving the possession of personal use quantities of a controlled substance. Section 6079 further requires that the Attorney General, the Secretary of the Treasury, and the Secretary of Transportation prescribe joint regulations providing for issuance of a summons to appear in lieu of seizure of a commercial fishing industry vessel as defined in section 2101(11a), (11b), and (11c) of title 46, United States Code, for violations involving the possession of personal use quantities of a controlled substance. These regulations would apply when a violation is committed on a commercial fishing industry vessel that is proceeding to or from a fishing area or intermediate port of call or is actively engaged in fishing operations.

The Department of Justice, on behalf of the Attorney General, has consulted with the U.S. Customs Service, acting on behalf of the Secretary of the Treasury, and the U.S. Coast Guard, acting on behalf of the Secretary of Transportation, in formulating consistent and compatible regulations to carry out section 6079.

Section 6080 of the Anti-Drug Abuse Act of 1988 requires the Attorney General to prescribe regulations providing for: (1) The expedited release, in certain cases, of conveyances seized for drug-related offenses during the pendency of civil judicial forfeiture proceedings against the conveyance; (2) the expedited filing of complaints against conveyances seized for drug-related offenses; and (3) the release,

except in certain specified circumstances, of any such conveyance to any owner who provides security in the form of a bond in an amount equal to the value of the conveyance.

The Department of Justice, on behalf of the Attorney General and in consultation with the United States Customs Service and United States Coast Guard, published a Notice of Proposed Rulemaking in the Federal Register on April 10, 1989. (54 FR 14246). On that same date, the United States Customs Service and the United States Coast Guard published separate Notices of Proposed Rulemaking in the Federal Register to carry out their respective responsibilities under section 6079. (54 FR 14242 and 54 FR 14250).

Various comments have been received in response to these Notices of Proposed Rulemaking. The Department of Justice has reviewed the comments received by all of the agencies and is today responding to those comments and promulgating its Final Rule. The United States Customs Service and the United States Coast Guard are also responding to comments and promulgating Final Rules which are being published separately in today's Federal Register.

EFFECTIVE DATE: October 11, 1989.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

Drafting Information

The principal person involved in drafting this Final Rule is Harry S. Harbin, Associate Director, Asset Forfeiture Office, Criminal Division.

Discussion of Comments

Seven comments were received in response to the Notices of Proposed Rulemaking published by the Department of Justice, the United States Customs Service and the United States Coast Guard. Several of the comments were duplicates that were sent either to two or to all three agencies. Copies of all of the comments were exchanged by the three agencies.

Applicable Time Periods

Several comments complained that § 1316.93 of the Proposed Regulation allows the Department of Justice more time to make a decision on a petition filed in an administrative forfeiture action than section 6079 of the Anti-Drug Abuse Act of 1988 (ADAA) provides for. We disagree.

Section 6079 of the ADAA specifies that the regulations shall "provide for a

final administrative determination of the case within 21 days of seizure, or provide a procedure by which the claimant can obtain release of the property pending a final determination of the case". It is virtually impossible in most cases for the Department of Justice to make a "final administrative determination" of a forfeiture case within 21 days of seizure. Title 19, United States Code, section 1607 requires the publication of notice of seizure and intention to forfeit for at least three successive weeks prior to issuance of a declaration of administrative forfeiture. Thus, in order to make a "final administrative determination of the case" within 21 days of seizure, publication of notice would have to commence on the day of seizure—a demand which is virtually impossible to meet given the realities of the newspaper publishing industry.

Moreover, notice by publication is the most minimal form of notice that will satisfy the requirements of due process. The Department of Justice makes every reasonable effort to identify the record owners of all property seized for forfeiture and to provide these owners with actual notice of seizure and intention to forfeit prior to issuance of a declaration of administrative forfeiture. In some cases (particularly those involving absentee owners), it is simply impossible to identify and provide actual notice to all record owners within 21 days of seizure. These owners would be foreclosed from filing petitions or challenging the administrative forfeiture if they did not receive notice via publication and failed to file their petitions prior to issuance of the determination of administrative forfeiture 21 days after seizure. The only recourse for such owners would be to file a petition for remission or mitigation pursuant to title 19, United States Code, section 161. We do not believe that Congress intended this result.

Even if the words were more loosely interpreted to mean that the seizing agency must rule on a petition for release within 21 days of seizure, the result would be untenable. First, as just explained, many owners would not receive notice in time to file their petitions within 21 days of seizure. These owners would be foreclosed from the expedited release procedures under section 6079 of the ADAA by virtue of the strict 21-day limit established in the statute. Second, this interpretation would leave the system open to abuse by non-innocent owners who could file their petitions on the 21st day after seizure and leave the government no time to investigate or determine the

accuracy of their representations. Again, we do not believe that Congress intended either of these results.

It should be noted that the regulations nonetheless provide for a "final administrative determination of the case" within 21 days of seizure to allow for the rare case in which such determinations are possible without offending due process or opening the system to abuse. See § 1316.93(a). To avoid the foregoing problems, however, the Department of Justice also implemented the second alternative under section 6079(b)(2) of the ADAA by devising a "procedure by which a claimant can obtain release of the property", in an expedited manner, "pending a final determination of the case." This procedure allows an owner to file a petition for expedited release of the property at any time from the date of seizure through the twentieth day following first publication of the notice of seizure. See § 1316.92(d). This is more time than would be possible if the government were required to make a final administrative determination of the case within 21 days of seizure.

More importantly, the regulations require the seizing agency to make a decision on the petition within 20 days of the filing of the petition, regardless of when the petition is filed. See § 1316.93(b). Thus, an owner may file a petition on the day of seizure, even if notice of seizure has not been published, and the seizing agency must make a decision within 20 days. On the other hand, an owner may wait until the twentieth day following first publication of the notice of seizure to file the petition and the seizing agency must still make its decision within 20 days. It is the owner, not the government, who controls the timing of release under this procedure and, in no case, is the seizing agency allowed more than 20 days after filing to make its decision.

The procedure adopted by the Department of Justice provides greater safeguards to owners while, at the same time, limiting the decision-making period to twenty-days following filing of the petition. We feel that this procedure "minimize[s] the adverse impact caused by prolonged detention", while limiting the potential for abuse of the system by non-innocent owners.

It should be noted that these procedures differ somewhat from the procedures in the Final Rule being implemented by the United States Customs Service. Under the Final Rule of the Customs Service, a petition must be filed within 20 days from the date the notice of seizure was mailed, or in the case of a commercial fishing industry

vessel for which a summons to appear is issued, 20 days from the original date when the vessel is required to report. Under the Justice Department regulations, the petition must be filed within 20 days from the date of the first publication of the notice of seizure. This difference reflects the differing administrative practices of the Customs Service and the seizing agencies of the Department of Justice.

Burden of Proof/"Presumption of Guilt"

Several comments complained that the regulations violated due process by imposing the burden of proof on the petitioning owner, instead of the seizing agency, with respect to the factors specified in §§ 1316.92(c) and 1316.95(b). Another comment objected to the requirement in § 1316.92(e)(3) that petitions contain a statement of facts and circumstances supporting the petition instead of a mere recitation of the elements specified in section 6079(b) of the ADAA. These comments simply misconceive the unique allocation of burden of proof in civil forfeiture actions. Title 19, United States Code, section 1615—which governs all forfeiture actions for drug-related offenses—specifies that the burden of proof in such actions shall lie upon the claimant. This is as it should be since the only issue of guilt in such *in rem* cases is the "guilt" of the property, which the government must establish by probable cause. See 19 U.S.C. 1615. The "innocent owner" defense is an affirmative statutory defense, under certain provisions of the drug statutes, which the owner must establish by a preponderance of the evidence.

It should be noted that several provisions of section 6079(b) of the ADAA consistently reflect this historical allocation of the burden of proof. Thus, subsection 6072(b)(2)(B) expressly states that the owner must establish a valid, good faith interest in the property as owner or otherwise. Similarly, subsection 6079(b)(2)(C) states that the owner must establish the factors identified therein. More importantly, nothing on the face of either section 6079 or 6080 even remotely suggests a congressional intent to reverse or modify the traditional allocation of burden of proof in civil forfeiture cases for drug-related offenses.

Summons in Lieu of Seizure

Section 1316.92(b) implements section 6079(d) of the ADAA which specifically provides for the promulgation of joint regulations "providing for issuance of a summons to appear in lieu of seizure of a commercial fishing industry vessel as

defined in section 2101 (11a), (11b) and (11c) of title 46, United States Code, for violations involving personal use quantities of a controlled substance." Section 1316.91(b) defines the term "commercial fishing industry vessel" consistent with its definition in section 2101 (11a), (11b) and (11c) of title 46, United States Code.

Several comments urged that this definition be expanded to include vessels that are not "commercial fishing industry vessels" as defined in the statute. We disagree. Section 6079(d) clearly specifies the scope of applicability for issuance of a summons in lieu of seizure: To "a commercial fishing industry vessel as defined in section 2101 (11a), (11b) and (11c) of title 46, United States Code". There is no ambiguity in the terms of the statute and the statute does not extend its provisions to any other kinds of vessels. Moreover, section 6079(d) specifically provides that the *in rem* jurisdiction of the district court "shall not be affected by the use of a summons under this section". It does not appear from the face of the statute that this jurisdictional safeguard would apply in cases involving any other kinds of vessels. Thus, we have decided not to amend the regulations in question.

One comment suggested including a definition of what constitutes "proceeding to or from a fishing area or intermediate port of call". It was also suggested that the definition include the time when a vessel has been outfitted for a voyage whether or not it is still in port. We disagree. The language at issue is taken directly from the statute and is unambiguous on its face. There is no reason to give the term "proceeding to or from" any meaning other than its literal meaning. That literal meaning cannot be said to include the time when the vessel is in port.

Normal and Customary Manner

Several comments objected to that part of the definition of "Normal and Customary Manner" in § 1316.91(h) which states that "[a]n established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether an owner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property" as too restrictive. We disagree.

The thrust of the statute is to grant certain rights to owners who acted reasonably in ascertaining how their property would be used by another in possession. The statutory provision in question merely provides that the property shall not be returned to the

owner in any case in which the owner did not act in a normal or customary manner to ascertain how the property will be used. What is "normal and customary" will vary with the circumstances of the individual case, and there may be cases in which mere compliance with an industry "norm" or customary industry practice, for example, would not be viewed by an objective person as reasonable, normal or customary under the circumstances. Thus, we have decided to retain this provision which states that compliance with an established norm, custom or standard will be deemed persuasive, but not controlling, in determining whether a person acted in a normal or customary manner.

Substitute Res Bond

Section 6080 of the ADAA created a new Federal statute codified at 21 U.S.C. 881-1. Subsection (d) of this statute provides that, except in certain specified instances, any owner of a conveyance seized for a drug-related offense may obtain release of the conveyance pending judicial forfeiture by providing security in the form of a bond to the Attorney General in an amount equal to the value of the conveyance. This requirement is reflected in § 1316.98. A decision was made to extend this alternative release procedure to owners facing administrative forfeiture actions in the circumstances specified in section 6079 of the ADAA as well. The availability of this alternative release procedure for administrative forfeitures is reflected in § 1316.94. This provision merely formalizes an existing practice among the seizing agencies.

Several comments were received which appear to interpret § 1316.94 not as an alternative to the petition procedures specified in §§ 1316.92 and 1316.93, but as a precondition to use of those procedures. This is simply not the case. An owner of property described in title 21, United States Code, section 881(a) (4), (6) and (7), which has been seized for a drug-related offense involving personal use quantities of a controlled substance, may seek expedited release of the property through two alternative procedures. First, the owner may file a timely petition under §§ 1316.92 and 1316.93 and seek return of the property based upon the owner's innocence. This procedure does not require the posting of a bond of any kind. Second, the owner may, at any time prior to issuance of the declaration of administrative forfeiture, post a substitute res bond in an amount equal to the value of the property and obtain its release pursuant to § 1316.94. This

latter alternative permits an owner to obtain release of the property immediately after seizure without filing a petition or making any showing of innocence. It is intended as an alternative to the petition procedures in §§ 1316.92 and 1316.93, not as a prerequisite to those procedures.

One comment advocated that the regulations be amended to provide for return of the substitute res bond if the seizing agency fails to decide a petition within twenty-one days. The substitute res bond is intended to be a true substitute for the property seized. Thus, when the owner of property posts a substitute res bond to obtain release of the property immediately after seizure and also files a timely petition under the procedures set forth in § 1316.92, a ruling will be made on the petition within twenty days and the substitute res bond shall be returned to the owner or retained for administrative forfeiture in accordance with § 1316.93. When the owner posts a substitute res bond to obtain release of the property immediately after seizure and also files a claim and cost bond and petition pursuant to § 1316.95, the substitute res bond shall be returned to the owner if the United States Attorney does not rule on the petition within twenty days in accordance with § 1316.96(b).

Sections 1316.94(a) and 1316.98(a), as originally proposed, specified that the substitute res bond must be in the form of a traveler's check or money order. Several comments advocated that other forms of payment be authorized. After reviewing these comments, we have decided to amend §§ 1316.94(a) and 1316.98(a) to allow for posting of the bond in the form of a cashier's check or an irrevocable letter of credit. In order to provide security to the seizing agency and to prevent abuse of the substitute res bond procedure, a sentence has been added to §§ 1316.94(a) and 1316.98(a) specifying that a bond in the form of a cashier's check will be considered as paid once the check has been accepted for payment by the financial institution which furnished the check. Other suggested means for posting the substitute res bond were rejected because of security concerns.

"Personal Use Quantities"

Several comments were directed at the proposed regulatory definition of the term "personal use quantities". Before addressing these comments, we wish to note that section 6079(e) of the ADAA specifically provides that "personal use quantities of a controlled substance shall not include sweepings or other evidence of non-personal use amounts".

The regulatory definition of the term "personal use quantities" is set forth in § 1316.91(j). This definition specifically provides that the term "personal use quantities" shall not include "sweepings" and it sets forth a list of "other evidence" which may be considered in determining whether or not a controlled substance is possessed for personal use only. See § 1316.91(j)(1). It also formulates a presumption that the possession of controlled substances is for personal use only when the amounts possessed do not exceed a certain specified quantity and there are no other indicia of illicit drug trafficking or distribution. See § 1316.91(j)(2).

Several comments complained of the inclusion of "[t]he arrest and/or conviction record of the person or persons in * * * possession of the controlled substance for offenses * * * that [indicate] an intent to distribute a controlled substance" as "other evidence" which may be considered in determining whether a controlled substance is possessed solely for purposes of personal use in any given case. See § 1316.91(j)(1)(iii). After considering these comments, we have decided to retain this provision in the Final Rule. First, it must be emphasized that a determination of whether a controlled substance is possessed solely for purposes of personal use is a determination of subjective intent based upon the totality of the circumstances. Among the more reliable indicia of a person's intent is his or her past record with respect to the illegal distribution of controlled substances. Second, a person's prior arrest or conviction record for drug offenses is not necessarily determinative of whether a controlled substance is possessed solely for purposes of personal use. It is but one of several factors which may be considered in determining a person's subjective intent.

Several comments noted that it is difficult for the owner of a conveyance to know the arrest and/or conviction records of all employees, lessees, acquaintances or other persons who may be on or in possession of a conveyance at any given time. This observation confuses the issue of an owner's innocence with the issue of whether a controlled substance is possessed solely for purposes of personal use. The knowledge of the owner as to the arrest and/or conviction record of the person in possession of a controlled substance is simply irrelevant to an administrative determination of whether the controlled substance is possessed for personal use only. However, a determination that a

controlled substance was possessed solely for purposes of personal use does not foreclose the owner from seeking expedited release of the conveyance pursuant to the procedures specified in §§ 1316.95 and 1316.96 or through the substitute res bond procedures specified in §§ 1316.94 and 1316.98. Finally, the owner's lack of knowledge as to the arrest and/or conviction record of the person in possession of the controlled substance is not necessarily determinative of the owner's innocence under the criteria specified in § 1316.95(b) nor is it necessarily determinative of any rights or defenses that the owner may assert in a judicial forfeiture action.

Several comments objected to the fact that the criteria specified in § 1316.91(j)(1) allow for use of various forms of hearsay in determining whether, in a particular case, the controlled substance was possessed solely for purposes of personal use. These forms of hearsay include "[i]nformation from reliable sources indicating possession of a controlled substance with intent to distribute" and "statements attributable to the possessor, including statements of conspirators, that indicate possession with intent to distribute". However, section 6079 of the ADAA merely requires an administrative determination as to whether an owner is entitled to the expedited release procedures specified thereunder. Hearsay is freely admissible in administrative proceedings. See *Richardson v. Perales*, 402 U.S. 389, 407-08 (1971). As noted earlier, the issue of whether a controlled substance is possessed solely for purposes of personal use involves a determination of subjective intent. We believe that hearsay evidence may properly be considered in determining that intent. And it is worth reiterating that a determination that a controlled substance was not possessed solely for purposes of personal use—whether based upon information from reliable sources or upon hearsay statements attributable to the possessor—does not foreclose the owner from seeking expedited release of the property under either the procedures specified in §§ 1316.94 and 1316.95 or the substitute res bond procedures specified in §§ 1316.94 and 1316.98.

One comment suggested that the definition of "personal use quantities" be defined as quantities that can be easily concealed upon the body or personal effects of an individual. We disagree. Enormous quantities of controlled substances can easily be

concealed upon the person, or in the personal effects, of an individual. In one very recent decision, two defendants were discovered with six and one-half pounds of cocaine concealed in tightly wrapped packages taped to the small of their backs; the bundles were inconspicuous and the defendants were stopped only because one of them engaged in suspicious behavior. See *United States v. Charleus*, 871 F.2d 265 (2d Cir. 1989). This is but one recent example; many cases of "personal concealment" involve far larger quantities of controlled substances. The quantities specified in § 1316.91(j)(2)(i)-(vii) are quantities which, in the experience of the Drug Enforcement Administration, are generally consistent with possession of a controlled substance for purposes of personal use.

Section 6079(e) of the ADAA specifically provides that the term "personal use quantities" shall not include "sweepings". One comment suggested that only when the "sweepings" exceed the "personal use" amounts specified in § 1316.91(j)(2)(i)-(vii) should the owner be barred from utilizing the expedited release procedures under section 6079. We disagree. It is not unusual for a conveyance, which has been used to transport significant quantities of a controlled substance, to contain only "sweepings" of the controlled substance after the illicit cargo has been unloaded or the controlled substances have been destroyed in an effort to avoid seizure or arrest. See generally *United States v. "Monkey"*, 725 F.2d 1007 (5th Cir. 1984) (ship involved in major marijuana smuggling operation contained only "sweepings" at time of seizure). We feel that the owners of such conveyances should not be eligible for the expedited release procedures under section 6079 even where the aggregate amount of the sweepings is less than the presumptive "personal use quantity" specified for the substance in § 1316.91(j)(2).

"Owner"

One comment criticized the definition of "owner" in § 1316.91(i) as one having a legal and possessory interest in the property seized for forfeiture on the ground that this definition would exclude many innocent lienholders from obtaining prompt release of seized property. We disagree. Lienholders with an immediate right to possession of the seized property would qualify as an "owner" under this definition. The definition necessarily excludes other lienholders in order to avoid problems in which multiple petitions are filed with respect to a single asset by persons

claiming a property interest in the asset. Section 1316.91(i) goes on to provide that "[e]ven though one may hold primary and direct title to the property seized, such person may not have sufficient actual beneficial interest in the property to support a petition as owner if the facts indicate that another person had dominion and control over the property" (emphasis supplied). The purpose of this limitation is not to exclude innocent lienholders with immediate possessory interests in the property seized; it is to exclude "straw owners" from obtaining expedited release of the property. The limitation is discretionary and will be applied on a case-by-case basis. It is not the intent of the Department of Justice to disqualify any bona fide lienholder with an immediate right to possession of the seized asset from filing a petition under these regulations.

Section 1316.92(c)(2)

Several comments noted that § 1316.92(c)(2) of the Proposed Rule appeared to require proof of a factor not provided for in the statutory language of section 6079(b)(2) of the ADAA: That the petitioner had statutory rights or defenses, that would show to a substantial probability that the owner would prevail on the issue of forfeiture. By adding this factor, the Department did not intend to add to the burden of persons filing petitions for expedited release under § 1316.92. Rather, this factor was inserted to provide certain petitioners with an additional basis for obtaining expedited release of their property.

In order to clarify this intent, the factor in question has been removed from the provisions of § 1316.92(c) and a new paragraph (d) has been added which allows petitioners the opportunity to establish statutory rights or defenses beyond those encompassed by the criteria specified in section 6079(b)(2) of the ADAA.

Section 1316.95(b)(3)

One comment complained that the requirement in § 1316.95(b)(3)—that an owner demonstrate that he/she "reasonably attempted to ascertain the use of the conveyance in a normal and customary manner"—constitutes an improper attempt to "lift" a requirement out of section 6079(b)(2) and include it as a requirement in petitions filed pursuant to section 6080 of the ADAA. We agree that the requirement in question constitutes a statutory element applicable to petitions filed pursuant to section 6079(b)(2) of the ADAA but we disagree that inclusion of this element as a requirement for petitions filed

pursuant to section 6080 is in any way improper.

Section 6080 of the ADAA requires the Attorney General, *inter alia*, "to make a determination on a petition [for release of a conveyance seized for a drug-related offense] expeditiously, including a determination of any rights or defenses available to a petitioner." See 21 U.S.C. 881-1(a)(1). The statute is silent as to what must be included in a petition filed thereunder and does not confine the discretion of the Attorney General in any way. It merely specifies that "[t]he Attorney General shall prescribe regulations to carry out this section." See 21 U.S.C. 881-1(a)(4). Thus, the Attorney General has broad discretion to determine the requirements for petitions filed under the statute.

It is not unreasonable to include, as a requirement for petitions filed under section 6080, a provision that the owner establish that he/she "reasonably attempted to ascertain the use of the conveyance in a normal and customary manner." It seems logical to impose, as to owners of conveyances seized for any drug-related offenses, the same threshold requirement which must be met by owners seeking release of property seized for drug-related offenses involving only personal use quantities of a controlled substance.

Moreover, a demonstration that the owner reasonably attempted to ascertain the use of the conveyance in a normal and customary manner is directly relevant to the "determination of [the] rights or defenses available to the [owner]" as required by section 6080. One's "conscious indifference" to the use of a conveyance is sufficient, without more, to negate any common law "innocent owner" defense. See, e.g., *United States v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947, 952* (4th Cir. 1985). Similarly, one who avoids knowledge concerning the illegal use of a conveyance by "sticking his head in the sand" cannot prevail on a statutory innocent owner defense. See *United States v. 1980 Red Ferrari, 827 F.2d 477, 480* (9th Cir. 1987) (rejecting "innocent owner" defense under 21 U.S.C. 881(a)(6)). The requirement in question is certainly relevant to the issue, under 21 U.S.C. 881(a)(4)(C), of whether the owner acted with knowledge or willful blindness as to the illegal use of the conveyance and it clearly may be relevant in determining whether a common carrier either consented or was privy to the illegal use of a conveyance. Because the requirement specified in § 1316.95(b)(3) is not barred by the language of section 6080 and because it is clearly relevant to

the determination of rights or defenses which may be available to the petitioner, we feel that its inclusion in the regulations is both rational and proper.

Section 1316.96(d)

One comment noted that § 1316.96(d), as set forth in the Proposed Rule, specified that "[i]f, within 20 days, the United States Attorney * * * advises the petitioner that there is not enough available information to make a decision on the petition, the Government shall retain possession of the conveyance until the owner provides a substitute res bond * * * or until the forfeiture is finalized". This comment correctly noted that this provision directly contradicts that part of section 6080 of the ADAA which provides that "[i]f the Attorney General does not grant or deny a petition * * * within 20 days after the date on which the petition is filed, the conveyance shall be returned to the owner pending further forfeiture proceedings". Section 1316.96(d) has been amended to conform with the statutory language.

Seizure of Cargo

One comment advocated that there be a specific provision in the Final Rule for release of any cargo carried on board a conveyance that is seized for forfeiture. The relevant statutes do not require inclusion of such a provision. The release of cargo from seized conveyances is currently handled by the seizing agencies on a case-by-case basis. This will continue to be the case after the Final Rule becomes effective.

Notice Provisions

Due to a typing error, § 1316.99 was misnumbered in the Proposed Rule as § 1316.19. This error has been corrected. The first sentence of § 1316.99(a) has also been amended to reflect the distinction between the expedited release procedures under section 6079 of the ADAA, which apply to property identified in § 1316.91 that is seized for violations involving personal use quantities of a controlled substance, and the procedures under section 6080 of the ADAA, which apply to conveyances seized for drug-related offenses. This amendment is consistent with the intent of Congress and states more precisely the categories of cases to which the "special notice provision" applies.

An erroneous reference was made to a "petition for substitute res bond" in this section as published in the Proposed Rule. There are no "petitions" for substitute res bonds. Rather, the owner of property seeking its expedited release

pursuant to § 1316.94 or § 1316.98 need only establish his identity as owner of property, post a bond satisfactory in amount, and the property will be released to the owner as provided therein unless the property is evidence of violation of law or has design or other characteristics that particularly suit it for use in illegal activities.

Technical Amendments

A citation to section 1316.92(e) was inadvertently omitted from the definition of "Sworn to" in § 1316.91(n) of the Proposed Rule. The word "industry" was inadvertently omitted from the phrase "commercial fishing industry vessel" in § 1316.93(b)(1) of the Proposed Rule. These omissions are corrected in the Final Rule. A reference to "property" was added to the phrase "property or conveyance" in § 1316.99(b) to more clearly specify the scope of the standard notice provisions.

Conclusion

After due consideration of the comments noted above, the Department of Justice has adopted the proposal as originally set forth, except for the amendments noted above.

Regulatory Flexibility Act/Executive Order 12281

As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a substantial impact on small business entities. 5 U.S.C. 604(B). It is not a major rule within the meaning of Executive Order No. 12291 of February 17, 1981.

List of Subjects in 21 CFR Part 1316

Administrative practice and procedure, Drug traffic control, Seizures and forfeitures.

Amendment

By virtue of the authority vested in me by law, including 28 U.S.C. 509, 510 and sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988, Public Law No. 100-690, 102 Stat. 4181, title 21, chapter II, of the Code of Federal Regulations is amended as follows:

PART 1316—[AMENDED]

1. The authority citation for part 1316 is revised to read as follows:

Authority: 21 U.S.C. 822, 871, 872, 880, 881, 881-1, 883, 958, 965; 19 U.S.C. 1606, 1607, 1608, 1610, 1613, 1618; 28 U.S.C. 509, 510; Pub. L. No. 100-690, sec. 6079, 6080.

A new subpart F is added to part 1316 to read as follows:

Subpart F—Expedited Forfeiture Proceedings for Certain Property

Sec.

1316.90 Purpose and scope.

1316.91 Definitions.

1316.92 Petition for expedited release in an administrative forfeiture action.

1316.93 Ruling on petition for expedited release in an administrative forfeiture action.

1316.94 Posting of substitute res in an administrative forfeiture action.

1316.95 Petition for expedited release of a conveyance in a judicial forfeiture action.

1316.96 Ruling on a petition for expedited release of a conveyance in a judicial forfeiture action.

1316.97 Initiating judicial forfeiture proceeding against a conveyance within 60 days of the filing of a claim and cost bond.

1316.98 Substitute res bond in a judicial forfeiture action against a conveyance.

1316.99 Notice provisions.

Subpart F—Expedited Forfeiture Proceedings for Certain Property

§ 1316.90 Purpose and scope.

(a) The following definitions, regulations, and criteria are designed to establish and implement procedures required by sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988, Public Law No. 100-690 (102 Stat. 4181). They are intended to supplement existing law and procedures relative to the forfeiture of property under the identified statutory authority. The provisions of these regulations do not affect the existing legal and equitable rights and remedies of those with an interest in property seized for forfeiture, nor do these provisions relieve interested parties from their existing obligations and responsibilities in pursuing their interests through such courses of action. These regulations are intended to reflect the intent of Congress to minimize the adverse impact on those entitled to legal or equitable relief occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving personal use quantities of controlled substances, and conveyances seized for drug-related offenses. The definition of personal use quantities of a controlled substance as contained herein is intended to distinguish between those quantities small in amount which are generally considered to be possessed for personal consumption and not for further distribution, and those larger quantities generally considered to be subject to further distribution.

(b) In this regard, for violations involving the possession of personal use quantities of a controlled substance, section 6079(b)(2) requires either that

administrative forfeiture be completed within 21 days of the seizure of the property, or alternatively, that procedures are established that provide a means by which an individual entitled to relief may initiate an expedited administrative review of the legal and factual basis of the seizure for forfeiture. Should an individual request relief pursuant to these regulations and be entitled to the return of the seized property, such property shall be returned immediately following that determination, and the administrative forfeiture process shall cease. Should the individual not be entitled to the return of the seized property, however, the administrative forfeiture of that property shall proceed. The owner may, in any event, obtain release of property pending the administrative forfeiture by submitting to the agency making the determination, property sufficient to preserve the government's vested interest for purposes of the administrative forfeiture.

(c) Section 6080 requires a similar expedited review by the Attorney General or his representative in those instances where a conveyance is being forfeited in a civil judicial proceeding following its seizure for a drug-related offense.

§ 1316.91 Definitions.

As used in this subpart, the following terms shall have the meanings specified:

(a) The term "Appraised Value" means the estimated domestic price at the time of seizure at which such or similar property is freely offered for sale.

(b) The term "Commercial Fishing Industry Vessel" means a vessel that:

(1) Commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish;

(2) Commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling; or

(3) Commercially supplies, stores, refrigerates, or transports fish, fish products, or materials directly related to fishing or the preparation of fish to or from a fishing, fish processing, or fish tender vessel or fish processing facility.

(c) The term "Controlled Substance" has the meaning given in section 802 of title 21, United States Code (U.S.C.).

(d) The term "Drug-Related Offense" means any proscribed offense which involves the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or

transfer any substance the possession of which is prohibited by Title 21, U.S.C.

(e) The term "Immediately" means within 20 days of the filing of a petition for expedited release by an owner.

(f) The term "Interested Party" means one who was in legal possession of the property at the time of seizure and is entitled to legal possession at the time of the granting of the petition for expedited release. This includes a lienholder (to the extent of his interest in the property) whose claim is in writing (except for a maritime lien which need not be in writing), unless the collateral is in the possession of the secured party. The agreement securing such lien must create or provide for a security interest in the collateral, describe the collateral, and be signed by the debtor.

(g) The term "Legal and Factual Basis of the Seizure" means a statement of the applicable law under which the property is seized, and a statement of the circumstances of the seizure sufficiently precise to enable an owner or other interested party to identify the date, place, and use or acquisition which makes the property subject to forfeiture.

(h) The term "Normal and Customary Manner" means that inquiry suggested by particular facts and circumstances which would customarily be undertaken by a reasonably prudent individual in a like or similar situation. Actual knowledge of such facts and circumstances is unnecessary, and implied, imputed, or constructive knowledge is sufficient. An established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether an owner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property. The failure to act in a normal and customary manner as defined herein will result in the denial of a petition for expedited release of the property and is intended to have the desirable effect of inducing owners of the property to exercise greater care in transferring possession of their property.

(i) The term "Owner" means one having a legal and possessory interest in the property seized for forfeiture. Even though one may hold primary and direct title to the property seized, such person may not have sufficient actual beneficial interest in the property to support a petition as owner if the facts indicate that another person had dominion and control over the property.

(j) The term "Personal Use Quantities" means possession of controlled substances in circumstances where there is no other evidence of an intent to distribute, of to facilitate the

manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance. Evidence of personal use quantities shall not include sweepings or other evidence of possession of quantities of a controlled substance for other than personal use.

(1) Such other evidence shall include:

(i) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug "cutting" agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(ii) Information from reliable sources indicating possession of a controlled substance with intent to distribute;

(iii) The arrest and/or conviction record of the person or persons in actual or constructive possession of the controlled substance for offenses under Federal, State or local law that indicates an intent to distribute a controlled substance;

(iv) The controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(v) The controlled substance is possessed under circumstances that indicate such a controlled substance is a sample intended for distribution in anticipation of a transaction involving large quantities, or is part of a larger delivery; or

(vi) Statements by the possessor, or otherwise attributable to the possessor, including statements of conspirators, that indicate possession with intent to distribute.

(2) Possession of a controlled substance shall be presumed to be for personal use when there are no indicia of illicit drug trafficking or distribution such as, but not limited to, the factors listed above and the amounts do not exceed the following quantities:

(i) One gram of a mixture of substance containing a detectable amount of heroin;

(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture or preparation which contains any quantity of any of the substances referred to in paragraphs (j)(2)(ii)(A) through (j)(2)(ii)(C) of this section;

(iii) 1/16th gram of a mixture or substance described in paragraph (j)(2)(ii) of this section which contains cocaine base;

(iv) 1/16th gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture of substance containing a detectable amount of marijuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(3) The possession of a narcotic, a depressant, a stimulant, a hallucinogen or cannabis-controlled substance will be considered in excess of personal use quantities if the dosage unit amount possessed provides the same or greater equivalent efficacy as described in paragraph (j)(2) of this section.

(k) The term "Property" means property subject to forfeiture under title 21, U.S.C., sections 881(a) (4), (6), and (7); title 19, U.S.C., section 1595a, and; title 49, U.S.C. App., section 782.

(l) The term "Seizing Agency" means the Federal agency which has seized the property or adopted the seizure of another agency, and has the responsibility for administratively forfeiting the property;

(m) The term "Statutory Rights or Defenses to the Forfeiture" means all legal and equitable rights and remedies available to a claimant of property seized for forfeiture.

(n) The term "Sworn to" as used in §§1315.92(e) and 1315.95(c) refers to the oath as provided by Title 28, U.S.C., section 1746.

§ 1315.92 Petition for expedited release in an administrative forfeiture action.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities the owner may petition the seizing agency for expedited release of the property.

(b) Where property described in paragraph (a) of this section is a commercial fishing industry vessel proceeding to or from a fishing area or intermediate port of call or actually engaged in fishing operations, which would be subject to seizure for administrative forfeiture for a violation of law involving controlled substances in personal use quantities, a summons to appear shall be issued in lieu of a

physical seizure. The vessel shall report to the port designated in the summons. The seizing agency shall be authorized to effect administrative forfeiture as if the vessel had been physically seized. Upon answering the summons to appear on or prior to the last reporting date specified in the summons, the owner of the vessel may file a petition for expedited release pursuant to paragraph (a) of this section and the provisions of paragraph (a) of this section and other provisions in this subpart pertaining to a petition for expedited release shall apply as if the vessel had been physically seized.

(c) The owner filing the petition for expedited release shall establish the following:

(1) The owner has a valid, good faith interest in the seized property as owner or otherwise;

(2) The owner reasonably attempted to ascertain the use of the property in a normal and customary manner; and

(3) The owner did not know or consent to the illegal use of the property, or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

(d) In addition to those factors listed in paragraph (c) of this section, if an owner can demonstrate that the owner has other statutory rights or defenses that would cause the owner to prevail on the issue of forfeiture, such factors shall also be considered in ruling on the petition for expedited release.

(e) A petition for expedited release must be filed in a timely manner to be considered by the seizing agency. In order to be filed in a timely manner, the petition must be received by the appropriate seizing agency within 20 days from the date of the first publication of the notice of seizure. The petition must be executed and sworn to by the owner and both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED

RELEASE." Such petition shall be filed in triplicate with the Special Agent in Charge of the Drug Enforcement Administration (DEA) or Federal Bureau of Investigation (FBI) field office in the judicial district in which the property was seized, depending upon which agency seized the property. The petition shall be addressed to the Director of the FBI or to the Administrator of the DEA, depending upon which agency seized the property.

(f) The petition shall include the following:

(1) A complete description of the property, including identification

numbers, if any, and the date and place of seizure;

(2) The petitioner's interest in the property, which shall be supported by title documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify expedited release of the seized property.

§ 1316.93 Ruling on petition for expedited release in an administrative forfeiture action.

(a) Upon receipt of a petition for expedited release filed pursuant to § 1316.92(a), the seizing agency shall determine first whether a final administrative determination of the case, without regard to the provisions of this subpart, can be made within 21 days of the seizure. If such a final administrative determination is made within 21 days, no further action need be taken under this subpart.

(b) If no such final administrative determination is made within 21 days of the seizure, the following procedure shall apply. The seizing agency shall, within 20 days after the receipt of the petition for expedited release, determine whether the petition filed by the owner has established the factors listed in § 1316.92(c) and:

(1) If the seizing agency determines that those factors have been established, it shall terminate the administrative proceedings and return the property to the owner (or in the case of a commercial fishing industry vessel for which a summons has been issued shall dismiss the summons), except where it is evidence of a violation of law; or

(2) If the seizing agency determines that those factors have not been established, the agency shall proceed with the administrative forfeiture.

§ 1316.94 Posting of substitute res in an administrative forfeiture action.

(a) Where property is seized for administrative forfeiture involving controlled substances in personal use quantities, the owner may obtain release of the property by posting a substitute res with the seizing agency. The property will be released to the owner upon the payment of an amount equal to the appraised value of the property if it is not evidence of a violation of law or has design or other characteristics that particularly suit it for use in illegal activities. This payment must be in the form of a traveler's check, a money

order, a cashier's check or an irrevocable letter of credit made payable to the seizing agency. A bond in the form of a cashier's check will be considered as paid once the check has been accepted for payment by the financial institution which issued the check.

(b) If a substitute res is posted and the property is administratively forfeited, the seizing agency will forfeit the substitute res in lieu of the property.

§ 1316.95 Petition for expedited release of a conveyance in a judicial forfeiture action.

(a) Where a conveyance has been seized and is being forfeited in a judicial proceeding for a drug-related offense, the owner may petition the United States Attorney for an expedited release of the conveyance.

(b) The owner filing the petition for expedited release shall establish the following:

(1) The owner has a valid, good faith interest in the seized conveyance as owner or otherwise;

(2) The owner has statutory rights or defenses that would show to a substantial probability that the owner would prevail on the issue of forfeiture;

(3) The owner reasonably attempted to ascertain the use of the conveyance in a normal and customary manner; and

(4) The owner did not know or consent to the illegal use of the conveyance; or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

(c) A petition for expedited release must be filed in a timely manner in order to be considered by the United States Attorney. To be considered as filed in a timely manner, the petition must be received by the appropriate United States Attorney within 20 days from the date of the first publication of the notice of the action and arrest of the property, or within 30 days after filing of the claim, whichever occurs later. The petition must be executed and sworn to by the owner, and both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED RELEASE." Such petition shall be filed in triplicate and addressed to and filed with the United States Attorney prosecuting the conveyance for forfeiture with a copy to the seizing agency.

(d) The petition shall include the following:

(1) A complete description of the

conveyance, including the identification number, and the date and place of seizure;

(2) The petitioner's interest in the conveyance, which shall be supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and,

(3) The facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify expedited release of the seized conveyance.

§ 1316.96 Ruling on a petition for expedited release of a conveyance in a judicial forfeiture action.

(a) Upon receipt of a petition for expedited release filed pursuant to § 1316.95, the United States Attorney shall rule on the petition within 20 days of receipt. A petition shall be deemed filed on the date it is received by the United States Attorney.

(b) If the United States Attorney does not rule on the petition for expedited release within 20 days after the date on which it is filed, the conveyance shall be returned to the owner or interested party pending further forfeiture proceedings, except where it is evidence of a violation of law. Release of conveyance under provisions of this paragraph shall not affect the forfeiture action with respect to that conveyance.

(c) Upon a favorable ruling on the petition for expedited release, the United States Attorney shall, where necessary, move to terminate the judicial proceedings against the conveyance and immediately direct the return of the conveyance except where it is evidence of a violation of law.

(d) If, within 20 days, the United States Attorney denies the petition for expedited release, the government shall retain possession of the conveyance until the owner provides a substitute res bond pursuant to § 1316.98 or the forfeiture is finalized.

§ 1316.97 Initiating judicial forfeiture proceeding against a conveyance within 60 days of the filing of a claim and cost bond.

(a) The United States Attorney shall file a complaint for forfeiture of the conveyance within 60 days of the filing of the claim and cost bond.

(b) Upon the failure of the United States Attorney to file a complaint for forfeiture of a conveyance within 60 days unless the court extends the 60-day period following a showing of good cause, or unless the owner and the United States Attorney agree to such an extension, the court shall order the return of the conveyance and the return of any bond.

§ 1316.98 Substitute res bond in a judicial forfeiture action against a conveyance.

(a) Where a conveyance is being forfeited in a judicial proceeding for a drug-related offense, the owner may obtain release of the property by filing a substitute res bond with the seizing agency. The conveyance will be released to the owner upon the payment of a bond in the amount of the appraised value of the conveyance if it is not evidence of a violation of law or has design or other characteristics that particularly suit it for use in illegal activities. This bond must be in the form of a traveler's check, a money order, a cashier's check or an irrevocable letter of credit made payable to the Department of Justice or to the United States Customs Service depending on which agency seized the conveyance. A bond in the form of a cashier's check will be considered as paid once the check has been accepted for payment by the financial institution which issued the check.

(b) If a substitute res bond is filed and the conveyance is judicially forfeited, the court will forfeit the bond in lieu of the property.

§ 1316.99 Notice provisions.

(a) *Special notice provision.* At the time of seizure of property defined in § 1316.91 for violations involving the possession of personal use quantities of a controlled substance and conveyances seized pursuant to § 1316.95, written notice must be provided to the possessor of the property regarding applicable statutes and Federal regulations including the procedures established for the filing of a petition for expedited release and for the posting of a substitute res bond as set forth in sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988 and implementing regulations.

(b) *Standard notice provision.* The standard notice to the owner as required by title 19, U.S.C., section 1607 and applicable regulations, shall be made at the earliest practicable opportunity after determining ownership of the seized property or conveyance and shall include the legal and factual basis of the seizure.

Dated: August 18, 1989.

Dick Thornburgh,
Attorney General.

[FR Doc. 89-20305 Filed 9-8-89; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 1

[CGD 89-003]

RIN 2115-A020

Summons in Lieu of Seizure of Commercial Fishing Industry Vessels

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: These regulations provide for issuance of a summons to appear in lieu of seizure of a commercial fishing industry vessel for violations involving the possession of personal use quantities of a controlled substance. The Anti-Drug Abuse Amendments Act of 1988 requires the Attorney General, the Secretary of the Treasury, and the Secretary of Transportation to issue such regulations. These regulations require, when a violation involving the possession of personal use quantities of a controlled substance is committed on a commercial fishing industry vessel that is proceeding to or from a fishing area or intermediate port of call or is actively engaged in fishing operations, that a summons to appear be issued in lieu of seizure of the vessel.

EFFECTIVE DATE: October 11, 1989.

FOR FURTHER INFORMATION CONTACT: Commander Gerald A. Gallion, Office of the Chief Counsel, (202) 267-1534.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal person involved in the drafting of this final rule is Commander Gerald A. Gallion, Office of the Chief Counsel.

Background

Section 6079 of the Anti-Drug Amendments Act of 1988 (Pub. L. 100-690) requires the Attorney General and the Secretary of the Treasury to prescribe regulations for expedited administrative procedures for seizures under section 511(a) (4), (6), and (7) of the Controlled Substances Act (21 U.S.C. 881(a) (4), (6), and (7)); section 596 of the Tariff Act of 1930 (19 U.S.C. 1595a(a)); and section 2 of the Act of August 9, 1939 (53 Stat. 1291; 49 U.S.C. App. 782) for violations involving the possession of personal use quantities of a controlled substance. Section 6079 further requires that the Attorney General, the Secretary of the Treasury, and the Secretary of Transportation prescribe joint regulations providing for issuance of a summons to appear in lieu of seizure of a commercial fishing industry vessel, as defined in section

(1a), (11b), and (11c) of title 46, United States Code, for violations involving the possession of personal use quantities of a controlled substance. These regulations are to apply when a violation is committed on a commercial fishing industry vessel that is proceeding to or from a fishing area or intermediate port of call or is actively engaged in fishing operations. Section 6079 further provides that these regulations shall not interfere with existing authority to arrest an individual for drug-related offenses or to release that individual into the custody of the master.

The Coast Guard, on behalf of the Secretary of Transportation, has consulted with the U.S. Customs Service, acting on behalf of the Secretary of the Treasury, and the Department of Justice, acting on behalf of the Attorney General, in formulating consistent and compatible regulations to carry out section 6079. Customs Service and Department of Justice final rules are published separately in this Federal Register issue.

The Coast Guard exercises broad authority under 14 U.S.C. 89 on the high seas and waters over which the United States has jurisdiction to prevent, detect and suppress violations of the laws of the United States. That authority includes searches, seizures, and arrests for violations of the laws cited in section 6079 of the Anti-Drug Abuse Amendments Act of 1988. Coast Guard law enforcement action, then, may include the seizure of a commercial fishing industry vessel for a violation involving the possession of personal use quantities of a controlled substance.

These regulations apply to commercial fishing industry vessels, as defined in section 2101 (11a), (11b), and (11c) of title 46, United States Code. These definitions address fishing vessels, fish processing vessels, and fish tender vessels, all of which are commercially engaged in activities related to the catching, processing, transporting, or storing of fish. Sport fishermen are not affected by the provisions of these regulations.

These regulations provide, when a commercial fishing industry vessel is subject to seizure for a violation involving the possession of a personal use quantity of a controlled substance, that the Coast Guard will issue a summons to appear in lieu of seizing the vessel, if that vessel is proceeding to or from a fishing area or intermediate port of call or is actively engaged in fishing operations. What constitutes a "personal use quantity" for determining whether or not a summons should be issued is defined in Customs Service regulations (19 CFR part 171). That

definition and a parallel one in Department of Justice regulations (21 CFR 1318.91) govern all regulations developed to implement section 6079 of the Anti-Drug Abuse Amendments Act of 1988. In that the Coast Guard, after escorting a seized vessel into U.S. waters, routinely transfers custody of the vessel to the Customs Service for appropriate disposition, including forfeiture to the United States, the summons to be issued in lieu of seizure will be that prescribed in Customs regulations (19 CFR 171.52).

Discussion of Comments

On April 10, 1989, the Coast Guard published a Notice of Proposed Rulemaking for the issuance of a summons in lieu of seizure (54 FR 14250). Proposed Customs Service and Department of Justice regulations for expedited administrative procedures for seizures, including provisions for the issuance of a summons in lieu of seizure, were published separately in the same issue of the Federal Register (54 FR 14242 and 14246). Three comments were received on the Coast Guard proposal.

Two comments recommended extending the coverage of the regulations to provide for issuance of a summons in lieu of seizure to vessels other than commercial fishing industry vessels. One advocated expansion to include sport fishing vessels and headboats; another encouraged extension to vessels in the barge and towing industry. We disagree. These regulations implement the requirements of section 6079 of the Anti-Drug Abuse Amendments Act of 1988. That statute clearly specifies the scope of applicability of the requirement for issuance of a summons in lieu of seizure: to "a commercial fishing industry vessel as defined in section 2101 (11a), (11b), and (11c) of title 46, United States Code." There is no ambiguity in the terms of the statute, and those terms do not encompass sport fishing vessels, headboats, or vessels in the barge and towing industry. To expand the applicability of the summons in lieu of seizure requirement would exceed the legislative mandate.

One comment suggested including a definition of what constitutes "proceeding to or from a fishing area or intermediate port of call." It was also suggested that the definition include times when a vessel has been outfitted for a voyage whether or not it is still in port. The Coast Guard disagrees. Again, the language at issue has been taken directly from the statute and is unambiguous on its face. There is no reason to give the terms "proceeding to or from" other than their literal meaning.

That literal meaning cannot be said to include times when the vessel is in port.

In view of the above, the Coast Guard is adopting the proposed rule as a final rule, without change.

E.O. 12291

This final rule is considered to be non-major under Executive Order 12291 and non-significant under the DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). The economic impact of this rule has been found to be so minimal that further evaluation is unnecessary.

Regulatory Flexibility Act

The final rule affects the owners of commercial fishing industry vessels. In that the rule provides for issuance of a summons in lieu of seizing such a vessel engaged in fishing or in transit to or from a fishing area, it bestows a financial benefit on the owner of a vessel subject to seizure because of a violation of law involving a personal use quantity of a controlled substance. Rather than seizing the vessel as it currently has the authority to do, and thus depriving its owner of the income associated with its voyage, the Coast Guard will issue a summons to appear. Accordingly, the Coast Guard certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 33 CFR Part 1

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Freedom of information, Penalties.

For the reasons set forth in the preamble, part 1 of title 33 of the Code of Federal Regulations is amended as set forth below:

PART 1—GENERAL PROVISIONS

1. The authority citation for part 1 is revised to read as follows:

Authority: 14 U.S.C. 633; 49 U.S.C. 322; Sec. 6079(d), Pub. L. 100-690, 102 Stat. 4181; 49 CFR 1.45(b), 1.46; section 1.01-70 also issued under the authority of E.O. 12316, 46 FR 42237.

2. Section 1.07-100 is added to read as follows:

1.07-100 Summons in lieu of seizure of commercial fishing industry vessels.

(a) As used in this section, the following terms have the meanings specified:

(1) *Commercial fishing industry vessel* means a fishing vessel, a fish processing vessel, or a fish tender vessel as defined in 46 U.S.C. 2101 (11a), (11b), or (11c), respectively.

(2) *Personal use quantity* means a quantity of a controlled substance as specified in 19 CFR 171.51.

(b) When a commercial fishing industry vessel is subject to seizure for a violation of 21 U.S.C. 881(a)(4), (6), or (7); of 19 U.S.C. 1595a(a); or of 49 U.S.C. App. 782 and the violation involves the possession of a personal use quantity of a controlled substance, the vessel shall be issued a summons to appear as prescribed in subpart F of 19 CFR part

171 in lieu of seizure, provided that the vessel is:

- (1) Proceeding to or from a fishing area or intermediate port of call; or
- (2) Actively engaged in fishing operations.

Dated: August 4, 1989.

W. T. Leland,

Chief, Office of Law Enforcement and Defense Operations.

[FR Doc. 89-18804 Filed 9-8-89; 8:45 am]

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