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CREATING U.S. MARITIME INDUSTRY JOBS BY REDUCING REGULATORY BURDENS

(112–32)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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Chairman

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James H. Zoia, Democrat Chief of Staff

May 20, 2011

MEMORANDUM

TO: Members, Subcommittee on Coast Guard and Maritime Transportation

FROM: Staff, Subcommittee on Coast Guard and Maritime Transportation

RE: Hearing on Creating U.S. Maritime Industry Jobs by Reducing Regulatory Burdens

PURPOSE

On Tuesday, May 24, 2011, at 9:30 a.m., in room 2167 of the Rayburn House Office Building, the Subcommittee on Coast Guard and Maritime Transportation will meet to review the status of the Coast Guard's rulemaking program. The Subcommittee will examine backlogs in the Service's rulemaking program, as well as pending and current regulations which may be unnecessary or overly burdensome.

BACKGROUND

The Rulemaking Process

The Federal Government creates or modifies rules and regulations through a rulemaking process guided by the Administrative Procedures Act (APA), codified in title 5 of the United States Code. The process involves notice in the *Federal Register* and the opportunity for public comment in the docket maintained by the regulating agency. This is a lengthy process and often requires several layers of bureaucratic review prior to the rule becoming final.

In addition to complying with the APA, the Coast Guard must also promulgate regulations and rules in compliance with other statutory mandates and authorities, such as Executive Order (EO) 12866, and Service rules and policies.

The Coast Guard's Regulatory Development Program begins with the identification of a possible need for new or changed regulations and culminating in the publication of final, enforceable regulations in the *Federal Register*.

After identifying the need for regulatory action, usually as the result of a public petition, internal review, casualty investigation, or an act of Congress, the Coast Guard forms a rulemaking team. The rulemaking team creates a detailed and comprehensive work plan, which summarizes and defines the rulemaking project and ensures the availability of proper resources. The rulemaking team typically drafts a Notice of Proposed Rulemaking (NPRM) for publication in the *Federal Register*. The NPRM must contain: (1) details on how the public may submit comments; (2) the basis of the proposed rule; (3) the terms or substance of the proposed rule; (4) an economic impact analysis; and (5) a response to certain comments previously received by the Coast Guard related to the rulemaking (certain circumstances warrant the use of other proposed rule documents such as an Advanced Notice of Proposed Rulemaking or Supplemental Notice of Proposed Rulemaking). Prior to publication in the *Federal Register*, the NPRM must be cleared through several internal Coast Guard offices, and externally through the Department of Homeland Security and the Office of Management and Budget.

The Coast Guard typically accepts public comments in response to an NPRM for 90 days. The rulemaking team reviews the public comments and develops responses in accordance with APA requirements. The rulemaking team posts all *Federal Register* documents and public comments (provided they do not contain classified or other restricted information) to a public docket accessible via the www.Regulations.gov website.

After considering public comments, the rulemaking team typically drafts a final rule for publication in the *Federal Register*. The final rule must contain: (1) the regulatory text; (2) a concise general statement of the rule's basis and purpose; and (3) a discussion of the public comments and Coast Guard responses (certain circumstances warrant the use of other final rule documents such as an Interim Final Rule, Direct Final Rule or Temporary Final Rule, or may warrant termination of the rulemaking project, for which withdrawal procedures exist). Prior to publication in the *Federal Register*, the final rule must be cleared in a manner similar to the clearance process described above.

The final rule includes an effective date (typically 90 days after publication of the final rule in the *Federal Register*). The regulatory process is completed as of the effective date, however, once the rulemaking is effective, it is open to litigation by those with standing.

Major Rulemaking

Major rulemaking is defined by the Congressional Review Act (5 U.S.C. § 804) as one that is likely to have an annual effect on the economy of $100 million or more; or result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or adversely affect in a significant way competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Under the Congressional Review Act, an agency must submit its major rulemakings to each house of Congress. Within 60 legislative days after Congress receives an agency's rule, a Member of Congress can introduce a resolution of disapproval that, if passed and enacted into law, can nullify the rule, even if it has already gone into effect. Congressional disapproval under the CRA also prevents the agency from promulgating a "substantially similar" rule without subsequent statutory authorization.

Currently, the Coast Guard has one NPRM pending that meets the definition of "major rule": Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (RIN 1625-AA32) (see below for discussion).

Status of Coast Guard Rulemaking

Rulemaking Completed in Fiscal Year 2010:

The Coast Guard achieves progress on a rulemaking by meeting internal milestones (*e.g.*, completing a draft rulemaking document, completing review, obtaining clearance) or by meeting a public milestone (*e.g.*, forwarding a rulemaking document to the Office of Management and Budget (OMB)) for review or publication of a rulemaking document in the Federal Register).

In fiscal year 2010, the Coast Guard published 26 rulemaking documents achieving public milestones for 18 rulemaking projects: 14 final rules (5 were technical and conforming amendments); 1 interim rule; and 11 proposed rulemakings (9 of which were closed out with final rules). At the end of 2010, over 60 rulemakings remained to be closed out on the Coast Guard docket.

Rulemaking Planned for 2011:

To date, the Coast Guard has published 9 rulemaking documents: 6 final rules or direct final rules, 2 interim rules, and 1 proposed rulemaking in fiscal year 2011. The

Coast Guard has set the following rulemaking objectives for the remainder of the fiscal year:

- Move forward approximately 50 top rulemaking projects, as well as other lower priority rulemaking projects.
- Achieve rulemaking deadlines required by the Coast Guard Authorization Act of 2010 (CGAA) (P.L. 111-281). These include:
  - o October 15, 2011, for Inspection of Towing Vessels (rulemaking first required under the Coast Guard and Maritime Transportation Act of 2004); Oil Transfers from Vessels; and Higher Volume Port Area Regulatory Definition Change.
  - o January 1, 2012, for Offshore Supply Vessel regulations;
  - o April 15, 2012, for Marine Transportation-Related Facility Response Plans for Hazardous Substances; Vessel Response Plans for Hazardous Substances; and Nontank Vessel Response Plans (rulemakings originally required under the Oil Pollution Act of 1990).

Regulatory Program Backlog

Current Backlog:

In fiscal years 2008 and 2009, the Service received funding to substantially increase the number of personnel assigned to its regulatory program. The addition of these personnel enabled the Coast Guard to reduce its regulatory backlog by 35% as of the end of calendar year 2010. However, the Coast Guard still has a backlog of over 60 rulemaking projects, ranging in age from 1 to 21 years old. For instance, the Oil Pollution Act of 1990 required the filing of oil spill response plans for nontank vessels. The Service finally issued an NPRM to implement this 21 year old statutory requirement on August 31, 2009. A final rule is still under development.

In the current fiscal year, the Coast Guard expects to add approximately 30 new rulemakings projects resulting from enactment of the CGAA and the Cruise Vessel Security and Safety Act of 2010 (P.L. 111-207). In addition, the Service expects to add several new projects resulting from the BP Deepwater Horizon oil spill. As a result, it is unlikely that the Coast Guard will lower its backlog below 60 projects and the backlog may actually increase.

Administration of the Rulemaking Process:

The Coast Guard continues to lack a knowledge management system to organize, catalog, and track rulemakings as they move through the process. Such a system would provide the Coast Guard with the capacity to effectively and efficiently plan and track

rulemaking progress, effort, and communications among stakeholders. The Service had planned to implement a knowledge management system in fiscal year 2010, but failed to do so because it could not determine the exact system specifications it required and thus could not determine if and when available systems would meet this requirement.

Significant Final, Proposed, and Future Rulemakings

Recent Significant Final Rulemakings:

Passenger Weight and Inspected Vessel Stability Requirements (RIN 1625–AB20) - The Coast Guard amended its regulations governing the maximum weight and number of passengers that may safely be permitted on board a vessel. The Coast Guard determined the maximum number of persons permitted on a vessel by several factors, including an Assumed Average Weight per Person (AAWPP). As part of this rule, the Coast Guard increased the AAWPP to 185 lb because the average American now weighs significantly more than the assumed weight per person utilized in the previous regulations (160 lbs). This new regulation has the effect of reducing the number of individuals legally permitted to board certain passenger vessels. Coast Guard estimates that the ten-year cost of this rulemaking to be between $24.6 million and $28.7 million. The Coast Guard did not estimate any quantifiable benefits for this rule, but noted the rule would result in "increased safety and reduced risk of casualties". The final rule was published on December 14, 2010.

Significant Proposed Rulemakings:

Marine Vapor Control Systems (RIN 1999-5150) - The Coast Guard is in the process of revising existing safety regulations for facility and vessel vapor control systems (VCSs). The proposed changes would make VCS requirements more compatible with new Federal and State environmental requirements, reflect industry advancements in VCS technology, and codify the standards for the design and operation of a VCS at tank barge cleaning facilities. These changes are intended to increase the safety of operations by regulating the design, installation, and use of VCSs, but would not require anyone to install or use VCSs. The Coast Guard estimates that this proposed rule would affect 234 facilities with VCSs, 25 certifying entities, 15 tank barge cleaning facilities, 216 U.S.-flagged tank barge owners, and owners of 338 foreign-flagged tank barges. Over a 10-year period of analysis, the Coast Guard estimates the total cost of the rulemaking to be between $8.8 million and $10.3 million, while the monetized benefits would total approximately $2.7 million. The NPRM was published on October 21, 2010.

Vessel Requirements for Notice of Arrival and Departure, and Automatic Identification System (RIN 1625-AA99) - The Coast Guard is proposing to expand the applicability of notice of arrival and departure (NOAD) and automatic identification system (AIS) requirements to more commercial vessels. This proposed rule would

expand the applicability of notice of arrival (NOA) requirements to additional vessels, and establish a separate requirement for certain vessels to submit notices of departure (NOD). In addition, this proposed rule would expand the requirement for AIS carriage smaller commercial vessels, as well as to regulated vessel transiting all U.S. navigable waters. The Coast Guard estimates that the 10-year total cost of the proposed rule to U.S. vessel and foreign-flagged vessel owners is between $181 million and $236 million, while the benefits in the form of reduced property damage could also total $236 million. The NPRM was issued on December 16, 2008.

Nontank Vessel Response Plans and Other Vessel Response Plan Requirement (RIN 1625-AA32) – As required by the Oil Pollution Act of 1990, the Coast Guard issued a NPRM to require the owners and operators of nontank vessels greater than 400 gross tons which carry oil for fuel to prepare and submit oil spill response plans. The Coast Guard estimates that the 10-year total cost of the proposed rule to U.S. and foreign-flagged vessel owners is between $263.0 million and $318.4 million. The Coast Guard did not provide an estimate on monetized benefits, but did estimate the rules could prevent the discharge of as much as 2,446 barrels of oil over a ten year period. The NPRM was issued on August 31, 2009.

Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (RIN 1625-AA32) - The Coast Guard proposes to amend its regulations on ballast water management by establishing standards for the allowable concentration of living organisms in ships' ballast water discharged in U.S. waters. The Service also proposes to establish an approval process for the types, installation and maintenance of ballast water management equipment. These new regulations are intended to control the introduction and spread of non-indigenous species from ships discharging ballast water in U.S. waters. The Coast Guard estimates the 10-year total cost of the proposed rule on U.S. vessel owners could exceed $1.1 billion. The Service estimates benefits could total between $43 million and $3.8 billion depending on the effectiveness of the ballast water management systems in stopping the spread of invasive species. The NPRM was issued August 28, 2009.

Significant Future Rulemakings:

Towing Vessel Safety - The Coast Guard Authorization Act of 2004 required the Coast Guard to develop regulations to govern the safety and inspection of towing vessels. A draft rule was developed in cooperation with the Towing Vessel Safety Advisory Committee and has received strong support from industry. The CGAA established a January 15, 2011 deadline for the NPRM and an October 15, 2011 deadline for the issuance of a final rule. The NPRM has not yet been issued.

TWIC Relief for Individuals Not Needing Unescorted Access to Secure Areas - Section 809 of the CGAA removed the requirement for individuals to purchase and carry a Transportation Worker Identification Credential (TWIC) if they do not need unescorted

access to secure areas of vessels or facilities. The Coast Guard and TSA are developing a regulation to implement this section. In the interim, the Service is still requiring these individuals to obtain a TWIC.

Fishing Vessel Safety - Section 604 of the CGAA requires over 30,000 fishing vessels to undergo dockside examinations every two years to ensure compliance with certain vessel safety standards. Vessel operators are also required to keep records of equipment maintenance, and safety drills for Coast Guard examination. Vessels that do not receive their first examination prior to October 2012 will not be allowed to sail until they do so. The Coast Guard has indicated that its current workforce of approximately 60 qualified full or part time inspectors will not be sufficient to complete examinations on all vessels by the October 2012 deadline.

Section 604 also requires the Coast Guard to issue regulations to establish a safety training program to certify fishing vessel masters and maintain such certification.

Cruise Vessel Safety and Security – Section 3 of the Cruise Vessel Security and Safety Act of 2010 requires the Coast Guard to issue regulations governing the installation and maintenance of certain safety and security equipment aboard cruise vessels operating in U.S. waters, as well as procedures for the vessel operator to follow in the event of a sexual assault or other crime.

Foreign Rebuild Determination – In 2010 a coalition of U.S. flagged vessel operators, maritime unions and domestic shipbuilders petitioned the Coast Guard to initiate a rulemaking to clarify the extent to which a vessel can be rebuilt in a foreign shipyard and still maintain its eligibility under the Jones Act (the Jones Act requires vessels carrying merchandise or passengers between two points in the United States to be U.S. built, U.S. owned, U.S. flagged, and U.S. crewed). The Coast Guard issued a request for comments to determine if a rulemaking should be initiated.

WITNESSES

Rear Admiral Kevin Cook
Director of Prevention Policy
United States Coast Guard

Mr. Calvin Lederer
Deputy Judge Advocate General
United States Coast Guard

CREATING U.S. MARITIME INDUSTRY JOBS BY REDUCING REGULATORY BURDENS

TUESDAY, MAY 24, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in Room 2167, Rayburn House Office Building, Hon. Howard Coble presiding.

Mr. COBLE. The subcommittee will come to order. As you all know, there is a joint session scheduled for 11:00. Hopefully we will be finished prior to then, but if we are not through, say, by 10:45, I suggest that we recess and then come back here immediately after the joint session concludes.

Chairman LoBiondo, by the way, had a conflict and asked me to stand in. So it is good to be with you, Mr. Larsen, this morning. It is good to have you all here.

The subcommittee is meeting today to review the Coast Guard's regulatory program to examine ways to improve the Service's rulemaking process. We are also interested in the status of pending rules and the impact they will have on maritime safety and commerce.

The Coast Guard has brought authority to regulate maritime commerce, including establishing and enforcing rules to ensure mariner safety, vessel and facility safety and security, and the protection of the environment. With such mass authority comes great responsibility to regulate industry in a fair and reasonable way. This hearing will focus on ensuring that Coast Guard rulemaking is just that, fair and reasonable.

It is important to remember that the United States economy is fueled by maritime commerce. While regulations must address concerns relating to safety, security, and stewardship, they must also balance the importance of maintaining the free flow of maritime commerce.

Domestic shipping alone is responsible for over 500,000 American jobs and $100 billion in annual economic output. Additionally, 90 percent of all global trade and over 25 percent of our gross domestic product moves via sea. With the economy still in a fragile state and unemployment at record levels, it is imperative for the Federal Government to foster an atmosphere where our maritime industry can compete and expand. To that end, I am concerned about the cost and impact of several forthcoming Coast Guard rulemakings.

Specifically, rules requiring fishing vessel examinations, the purchase of automatic identification system for small vessels, and the installation of ballast water treatment systems aboard vessels could have tremendous impacts on the economy. If these and other rules are not done in a commonsense manner, I am concerned they could drastically increase operating costs for businesses, hamper growth, and kill jobs at a time when our Nation can ill afford economic setbacks.

Finally, just as we are facing tough decisions on how to cut the deficit, these and other pending regulations will require additional personnel and funding for the Coast Guard. I look forward to hearing from our witnesses on how the Coast Guard intends to find the resources to pay for the expansion of its regulatory mission as well as what steps it is taking to ensure rules are put forth in an efficient and commonsense manner.

I thank you all for appearing today, and I am now pleased to recognize the distinguished gentleman from Washington for his opening statement.

Mr. LARSEN. Thank you, Mr. Chairman. Good morning. And thank you for convening today's hearing to examine the status of major rulemaking activities by the U.S. Coast Guard and their impact on job creation in our domestic maritime industries and the overall economy.

Revitalizing and growing our maritime economy is a high priority for me, and I want to thank you for taking interest in this matter this morning, Mr. Chairman. The Coast Guard is a multimission maritime military service of the United States. It is the principal Federal agency responsible for ensuring marine safety, preserving maritime and port security, enhancing maritime commerce, and protecting the marine environment.

Not surprisingly, rulemaking is a prominent Coast Guard activity. In light of the Service's broad portfolio, regulations issued by the Service affect and enhance virtually every sector of our domestic maritime economy.

Mr. Chairman, we should examine whether regulatory burdens adversely affect job creation. In today's economy we in Congress have no greater responsibility than to focus on protecting and creating jobs in the private sector. However, the Coast Guard is one agency whose regulatory portfolio can enhance jobs.

The Coast Guard's regulations ensure that vessels are safe, that workers in maritime-based industries are protected in their lives and in their livelihoods, that water-run commerce can move efficiently and, should an accident occur, that there will be an effective response.

Without the certainty afforded by the Coast Guard, our maritime commerce and the economy would suffer. Our domestic maritime industry significantly impacts the overall U.S. economy. According to recent figures published by the American Maritime Partnership, the U.S. domestic maritime industry moves over 1 billion tons of cargo annually, with a market value of $400 billion; sustains 500,000 jobs in total, including 74,000 jobs on vessels and at shipyards. It generates annually $100 billion in economic output and $11 billion in tax revenue, and pays $29 billion in annual wages. By any measure these numbers verify the importance of our re-

sponsibility in Congress to ensure that the regulations issued by the Coast Guard are fair, are targeted, and support our maritime industries, which, by extension, will be good for job creation, good for the U.S. economy, and good for the American people.

Of course, as with most Federal agencies, there are some instances where the Service's rulemaking or lack thereof have created jobs. For example, as was noted in the recently released GAO report, efforts to issue regulations to fully implement the Transportation Worker Identification Credential, or TWIC, remain woefully behind schedule and over budget. Not only has this rulemaking process created uncertainty about the reliability and effectiveness of TWIC cards, it has spawned delays and frustration for mariners, boat operators, and longshore workers nationally as well as in my district. Because a TWIC card is a prerequisite for the issuance or a reissuance of a merchant mariner credential or license, overlapping administrative processes have increased costs, prompted delays, and created confusion in what otherwise should be a fairly routine process. Such inefficiencies are unacceptable. With the current need to get people back to work, we simply can't afford to strand qualified, able-bodied people on the dock because the Federal Government has been unable to effectively and efficiently coordinate the TWIC and mariner credential programs, which are vital to port security and marine safety.

With that, Mr. Chairman, we ought not to forget that under the present budget framework, budget cuts will impact the ability of the Service to promulgate regulations in a timely manner. As much as we might like the Coast Guard to do more with less, the reality is that the Coast Guard will be doing less with less in the current budget environment.

According to the latest rulemaking summary issued by the Coast Guard in January, the Service reported that internal planning and administrative reforms implemented through its Marine Safety and Security Council and additional resources provided in fiscal years 2008 and 2009 budgets enabled the Service to reduce its regulatory backlog by 35 percent by the end of 2010. Despite this progress, however, the Service unfortunately reports that recent efforts to work down the backlog may be offset this year by the approximately 20 new rulemaking requirements included in last year's Coast Guard authorization, which passed this House of Representatives by unanimous consent, and by a new rulemaking to address safety shortcomings revealed by the Deepwater Horizon oil spill, among other new issues.

Only time will tell, Mr. Chairman, if the Service's forecast is accurate. Nevertheless, it does serve to remind us that before we look to cast blame on the Service for creating burdens, we may want to examine the requirements that we in Congress have imposed upon the Service.

Thank you again Mr. Chairman, for holding this morning's hearing, and we look forward to hearing from our witnesses.

Mr. COBLE. Thank you, Mr. Larsen.

You mentioned doing more with less. I guess the Coast Guard, probably more than any other Federal entity known to me, has come close to mastering that technique. You have come close to making it clear that you can do more with less, and we hope that

won't be too burdensome. Thank you, Mr. Larsen for your opening statement.

Our witnesses today include Coast Guard Rear Admiral Kevin Cook, Director of Prevention Policy; and Mr. Calvin Lederer, who is the Deputy Judge Advocate General of the United States Coast Guard. We welcome the witnesses for participating today, and we appreciate your presence here.

Admiral, if you and Mr. Lederer could, if you could confine your statements to on or about 5 minutes, that will assure us of meeting the deadline for the joint session. You will not be keelhauled if you go past the 5 minutes, however.

We will start with you, Rear Admiral Cook.

TESTIMONY OF REAR ADMIRAL KEVIN S. COOK, DIRECTOR OF PREVENTION POLICY, UNITED STATES COAST GUARD; AND CALVIN M. LEDERER, DEPUTY JUDGE ADVOCATE GENERAL, UNITED STATES COAST GUARD

Admiral COOK. Good morning, Mr. Chairman, Ranking Member Larsen. And with your permission, Mr. Chairman, I would like to have my written testimony entered into the record.

Mr. COBLE. Without objection.

Admiral COOK. As you mentioned, I am joined here by Mr. Lederer, and I can assure you that we will be brief, sir.

I would like to highlight two main points in my testimony today: first, the impact of Coast Guard regulations, and second, the results of investments that Congress and the Coast Guard have made to our regulatory development program.

Regarding my first point, the impacts, the Coast Guard has and continues to focus on regulatory efficiency and effectiveness, which was reinforced with the recent publication of Executive Order 13563. Of the 19 significant rules published since 2003, the median first-year cost was approximately $4.5 million. But upon closer review, we note that three of the rulemakings were required by the Marine Transportation Security Act of 2002, and these account for nearly 95 percent of those total costs. Therefore, typical Coast Guard rulemakings are far less burdensome on an industry due in no small part to the efforts that go into development, including maximizing the use of industry consensus standards, pursuing international regulations, the use of performance-based regulations, and other measures.

Benefits of Coast Guard rulemaking are widespread, including enhanced safety for our mariners and the boating public, protection of our marine environment, and strengthened security of our ports and waterways. The Coast Guard will continue to seek new means of achieving regulatory benefits without undue burden on industry.

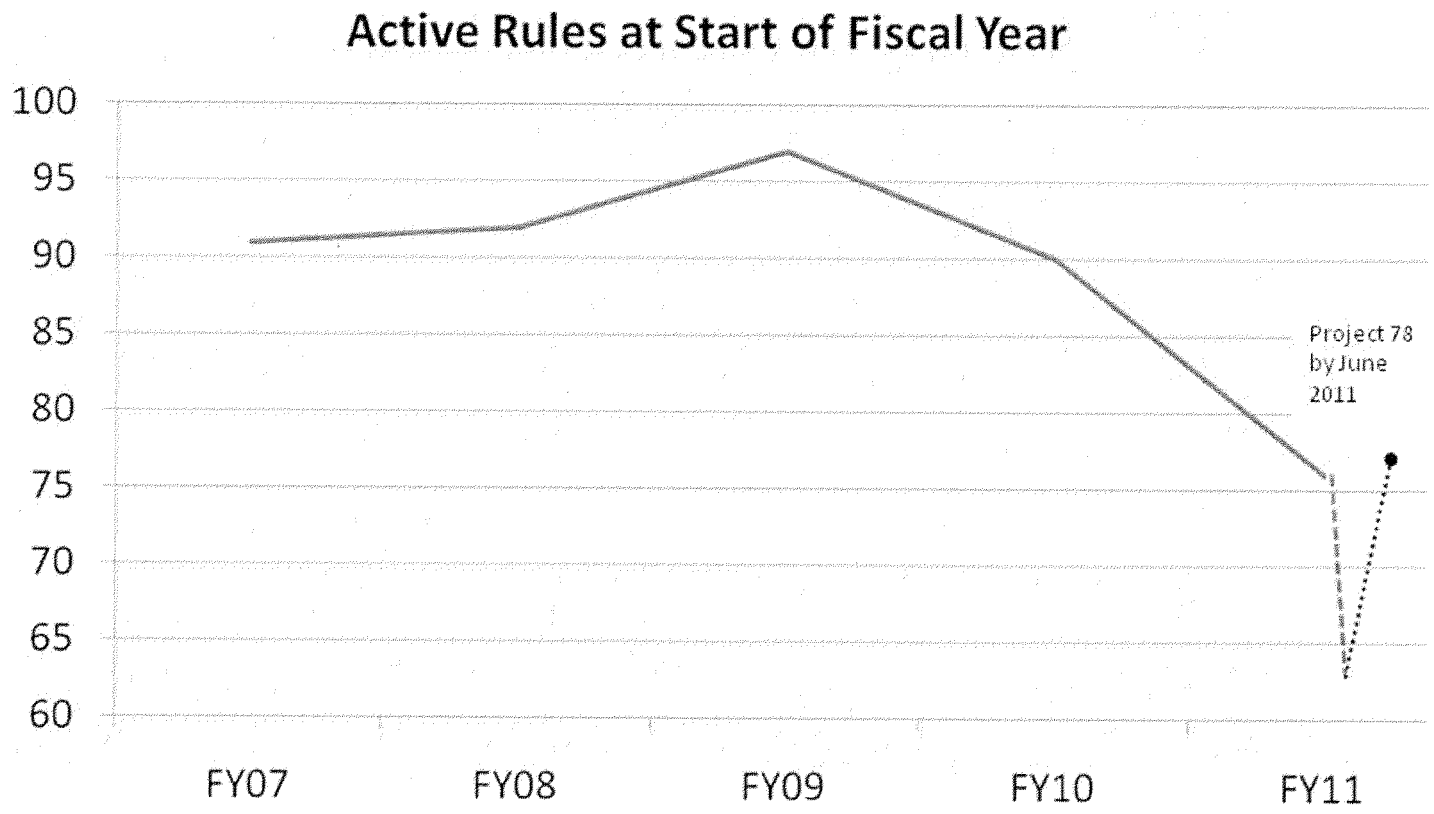
Second, regarding the improvements made to the Coast Guard's regulatory development program, I would like to start by thanking Congress for the investments made in fiscal years 2008 and 2009, as Congressman Larsen alluded to in his opening statement. This investment brought the number of personnel dedicated to rulemaking development to 82 full-time personnel, nearly a 50-percent increase. In addition, there are dozens who participate as subject-matter experts in specific projects.

In conjunction with your congressional investment, the Coast Guard is undertaking a series of improvements, including refining overall processes using an ISO 9001-compliant framework, investment in information technologies to streamline planning and management, and in training.

If I could have the first slide, please.

As a result of these combined investments, the Coast Guard has significantly reduced the overall workload as shown in this chart.

[The information follows:]

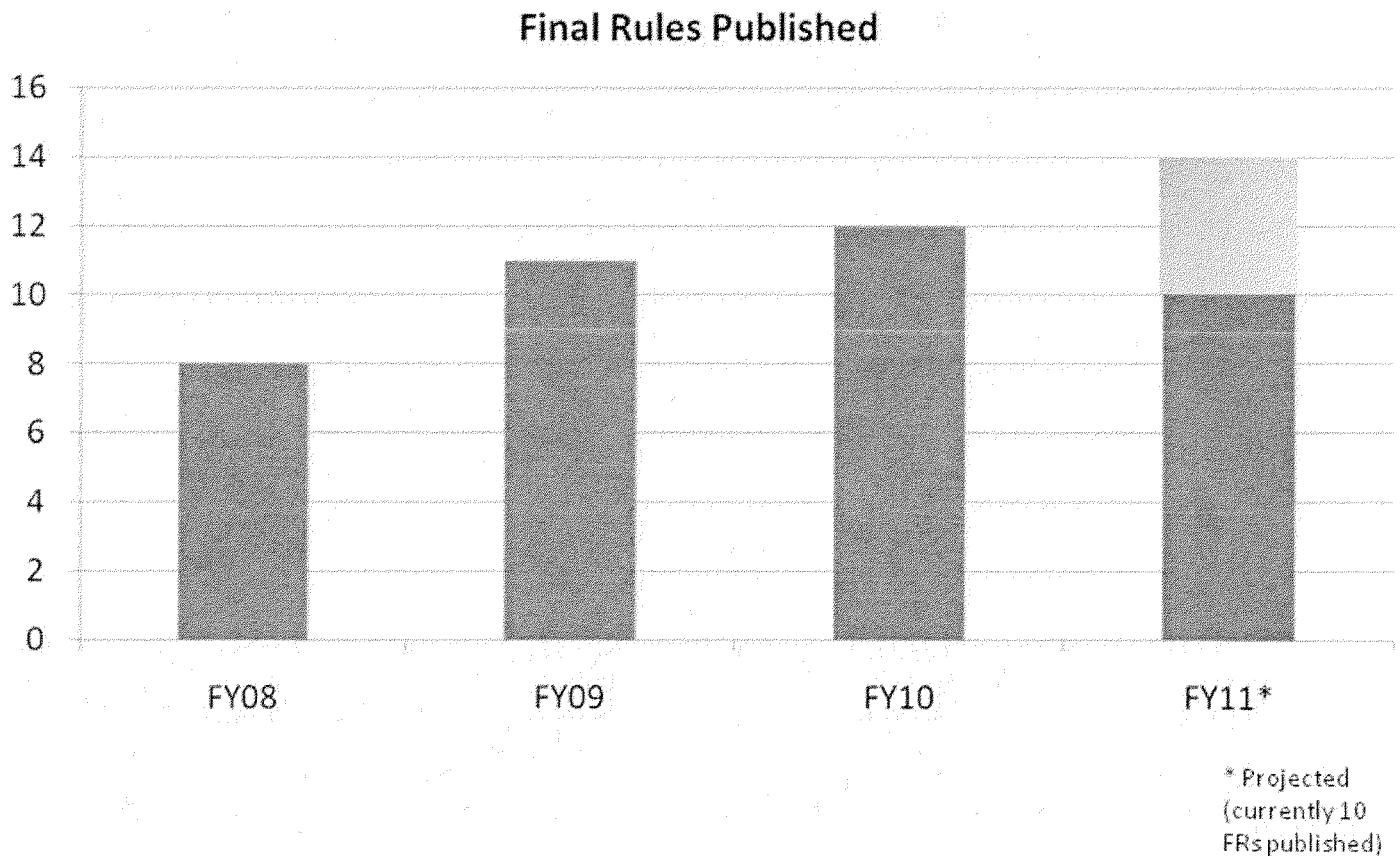

Active Rules at Start of Fiscal Year
100
95
90
85
80
75
70
65
60
FY07
FY08
FY09
FY10
FY11
Project 78 by June 2011

Admiral COOK [continuing]. While some of the reductions in backlog have been offset by congressional requirements from the authorization act, we are confident that the efficiencies we have gained will enable us to make similar reductions in the near term.

Next slide, please.

As an example of the efficiency, we have increased the rate at which final rules have been published since 2008.

[The information follows:]


Final Rules Published
16
14
12
10
8
6
4
2
0
FY08
FY09
FY10
FY11*
* Projected
(currently 10
FRs published)

Admiral COOK [continuing]. The slide highlights our continued progress up to the present date. The increase in this rate has directly impacted our overall backlog. In addition, in fiscal year 2010, public milestones were achieved for 18 Coast Guard headquarters rulemaking projects, with all top 50 projects showing progress.

Finally, since fiscal year 2009, we have reduced the average age of rules under development from 6.2 years to 5.3 years, with further reductions anticipated.

So in conclusion, Mr. Chairman, I want to assure you, other members of the subcommittee, that the Coast Guard makes every possible effort to ensure that regulations we publish are timely, effective and efficient. I thank Congress again for the investments you have made in improving our capabilities and look forward to continued gains as a result of these.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Admiral Cook.

Mr. Lederer.

Mr. LEDERER. Thank you, Mr. Chairman. Good morning, Mr. Chairman and Mr. Larsen.

In addition to the efforts described by Admiral Cook to reduce the impacts of our rules and improve our regulatory development processes, the Coast Guard has aggressively pursued rulemakings required by the 2010 authorization act. We have identified in the act 11 requirements that are self-executing, another 14 we are absorbing in existing projects, and 18 that require new rules, as Mr. Larsen was pointing out. We have started regulatory projects for all 18, and they are under way, and we are cognizant of the deadline specified by Congress.

With the addition of these projects, our active rulemaking projects will number 78, up from 60. Half of them are statutorily driven. We take very seriously the direction provided by Congress, and that direction is a significant factor in the priorities we set among regulatory projects.

While we work diligently to move all regulations along, those with higher priority, such as those with a statutory mandate, are addressed ahead of others and move more quickly. Statutorily mandated rules take an average of 1 year or less to move from concept to final rule than do discretionary regulations, which originate from sources such as our international work, accident investigations, risk analysis, and changes in technology. As Admiral Cook noted, we make a major effort to ensure that the regulations we promulgate are effective and an efficient use of societal resources. This is particularly important when so many of our partners in the industry and voting public are struggling in this current economic climate, as both of you pointed out.

In our written testimony we highlight the series of layered reviews used by the Coast Guard and the administration to ensure that the regulatory policy we have is sound, feasible, and does not place undue burden on the regulated community. For significant rules, those are the ones that are reviewed by the Office of Management and Budget, this includes a review of each document in the rulemaking process before they are published by the Marine Safety and Security Council, which brings together under the leadership of the Judge Advocate General every Coast Guard flag offi-

cer and senior executive with substantial responsibility for rulemaking.

The MSSC is a significant investment of flag officer and SES time and attention to ensure we get it right the first time. The review of rulemaking documents as rules progress is in addition to review by the MSSC at the outset of every regulatory project to improve the project in the first instance and placing it on the regulatory agenda. These reviews ensure that all the Coast Guard's regulatory actions work holistically and without unduly burdening industry.

President Obama's January Executive Order 13563 requires a retrospective review of already issued regulations. DHS asked the public to identify regulations that should be included in the retrospective review. We were pleased that public comments only identified three about the Coast Guard, and only one comment described the regulations as overly burdensome, and that was the MTSA regulations that Admiral Cook referred to. We think that this is one indicator that Congress and the Coast Guard together have made sound rulemaking decisions.

I also want to thank Congress for the investments made in improving our capabilities, which we see every day and look forward to the continuing gains as a result. Thank you very much.

Mr. COBLE. Thank you both.

Gentlemen, you have complied with the 5-minute rule. We thank you for that.

Mr. Lederer, last year a coalition of U.S. flag vessel operators, maritime unions, and domestic shipbuilders petitioned the Coast Guard to initiate a rulemaking to clarify the extent to which a vessel can be rebuilt in a foreign shipyard and still at the same time maintain its eligibility under the Jones Act. When will the Coast Guard issue a notice of proposed rulemaking in response to this petition?

Mr. LEDERER. Mr. Chairman, with respect to that, the petition—I would want to point out one thing at the outset. With respect to petitions for rulemaking, we have received around 50 of those since 2002, and 9 out of the 50 actually resulted in a notice of proposed rulemaking, which is, I think, another indicator of the responsiveness of the Coast Guard to petitions from the public and from industry.

With respect to foreign rebuilds, we put that petition out for public comment, and that period of public comment ends shortly, this week, I believe. So we will have to review the comments that have come in. So far we have received only one comment on it. We will have to assess at that point and decide whether or not if that makes sense to proceed with a notice of proposed rulemaking in response to the petition, which is principally sponsored by the Shipbuilding Association of America, and we will see where we go from there.

I would point out that last fall, or last August actually, the Fourth Circuit Court of Appeals issued a decision in a hotly litigated case concerning a foreign rebuild, and that case essentially sustained our current regulatory scheme.

The Coast Guard is very supportive of the Jones Act scheme that Congress has given us to enforce in how we document vessels, but

at the same time one of the things that we have seen over the years, and particularly in these recent cases—and there were two cases that were litigated recently—is that these regulatory schemes are very difficult to construct in a way that is equitable and understandable by industry and then to actually make it work. So in terms of changing the current regulatory scheme, that is something we need to approach very, very carefully, and we will be doing that once the comment period closes.

Mr. COBLE. Thank you, Mr. Lederer.

I have one more question, and then I will recognize Mr. Larsen.

Admiral, the FAA and other Federal agencies allow private physicians to conduct examinations of licensed workers, such as airline pilots, and then determine if the worker meets the medical fitness requirements to be licensed by the Federal agency. The Coast Guard, however, I am told, has chosen to put in place a system in which a government health care bureaucrat does not conduct the medical examination of the worker, but nonetheless makes the medical fitness determination.

My question, Admiral, is why does the Coast Guard follow this process when other Federal agencies rely on the expertise of private physicians who have actually examined the worker in question to make final fitness determinations?

Admiral COOK. Mr. Chairman, if I could start from—in our authorization act, we now have the authorization for a medical advisory committee, and that is going to be their first task. We have just gotten the appointments approved through the Department, and the Medical Advisory Committee will be meeting this summer.

But if I could—and then I will go back and put it in perspective—we used to do all of the licensing through our 17 regional exam centers. We did not have a true medical component represented in each of those regional exam centers, so we had a wide variety of decisions that were being made based on mariners visiting their own doctors and making recommendations. So we thought that in centralization, as we have done with the National Maritime Center, that we would provide medical expertise to provide consistency across the Nation in continuing that practice, and we thought that that would lead to a significant improvement.

And I think it has led to improvement as far as consistency, but what it has demonstrated is that the other modes that you have mentioned have something very viable in their program as they look at national consistency. So we are going to put it up to our Medical Advisory Committee and ask them to help us find a way to get to that solution. And in the interim we will continue to use our government doctors.

We have added and we have a very significant staff now of three medical doctors, six physicians assistants all reviewing these. They are getting much more—I would say they are very agile now in discussing cases with the mariners' doctors. So there is a number of hopeful signs even within the current system, but we do think that ultimately the registry of doctors will be the solution, and we will be working towards that.

Mr. COBLE. Thank you, sir.

And I will recognize the distinguished gentleman from Washington Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Mr. Lederer, lawsuits challenging proposed regulations are quite common, certainly at Federal regulatory agencies. For example, EPA has over 600 active lawsuits. NOAA has nearly 200 pending. U.S. Fish and Wildlife reports over 100 lawsuits filed against the agency. How many lawsuits have been filed in Federal court challenging a proposed or final rule published by the Coast Guard?

Mr. LEDERER. Sir, the last time we had a lawsuit challenging a regulation itself was a challenge to the MTSA, Maritime Transportation Security Act, provisions concerning searches or searches that were conducted pursuant to those regulations in 2006.

We have no pending cases, and we have very few cases that challenge regulations directly. We have some litigation from time to time that will challenge application of regulations, such as the recent first circuit decision in the last couple of weeks involving the regulated navigation area in Buzzards Bay off of Massachusetts. But that is again how we actually apply regulations. So we don't, fortunately, have the same experience other agencies like EPA does where policymaking is done to a large degree through litigation. And we have no cases currently pending challenging any regulations.

Mr. LARSEN. It sounds like you said one.

Mr. LEDERER. One, sir, yes.

Mr. LARSEN. Thank you. I think that does show the work that the Coast Guard does with the industry partners to try to craft something, and sometimes they are pretty tough, but the industry partners make their way through it as well.

In my opening comments, I mentioned TWIC. And as part of last year's authorization, the Coast Guard, Congress included section 809 to clarify the requirement to carry a TWIC card would not apply to licensed captains of passenger vessels who are not required to have a Coast Guard security plan, or to persons holding a Coast Guard document who are not authorized to have unescorted access to a designated secure area of vessel or the facility.

It has been 7 months since that provision became law, but nothing has happened. Furthermore, it is my understanding that the Coast Guard's National Maritime Center is still telling mariners they need to get a TWIC before they can be issued Coast Guard credentials.

Mr. Lederer, is it the Coast Guard's interpretation of this provision that it is self-executing?

Mr. LEDERER. Sir, our belief is that it is not self-executing, and that does require a rulemaking because of the structure of the original Maritime Transportation Security Act as the basis for it.

Mr. LARSEN. So the next question is when does that start? When does the rulemaking start? Why is there still confusion out there among mariners?

Mr. LEDERER. If I may defer that to Admiral Cook.

Admiral COOK. Mr. Larsen, I think that the fundamental issue is our need to have mariners enroll and provide their identification information so we can do safety, suitability, or in some cases security checks. So the system, in order to gain efficiencies, was revised

so that the TWIC enrollment centers would be the location where that would be done.

I know I am doing a retrospective, but eventually I will get to the point.

So we now have 130-some enrollment centers versus 17 regional exam centers where mariners can go, and the equipment that we were using at that time, even when the TWIC enrollment center was being stood up, was not really compatible with our new electronic way of producing mariner credentials. So that is a key input to our system, the information is gained, the picture that is taken at the enrollment center, those items.

So what we are trying to do is to move forward in kind of a three-stage way: first, some policy relief where we think we have the ability to do that, and it is being closely coordinated with TSA and with the Screening Coordination Office at DHS. The direction of that policy would enable mariners who already have been enrolled in TWIC, they wouldn't have to revisit an enrollment center. They could just get a new credential if they serve on a vessel that doesn't have a security plan. So, for example, a small passenger vessel captain, when his TWIC expires, he can still go ahead and get a new credential. It wouldn't be required. But if we added somebody new into the system where we don't have that baseline information security, we still need them to go to the enrollment center and provide that information so that we can issue their initial transportation worker identification card. So there is some relief, but, you know, not as much as we would like as far as providing instantaneous relief.

And then we wanted to look at the cost that the mariner incurs. We are going to consider whether we can reduce some of that cost through regulatory changes. And, of course, those have to be approved all the way through. We would like to do that.

And then there has to be a fundamental change of regulations with TSA so that the enrollment center can become a more versatile place that enrolls people for different purposes, charges fees that are appropriate.

It is really a three-staged approach, the policy relief that we can give for folks that are already in the system; regulations that we will try to promulgate which will impact and reduce costs; and then thirdly, a more comprehensive regulation package which would provide the ability to hit the various levels of enrollment.

Mr. LARSEN. That is fine. But I am sure you can understand the gist of my question being some of frustration being reflected back to us from mariners about the uncertainty here. And the point being, it has been 7 months since the provision has been passed, but what has been done since in order to decrease some of the uncertainty that the lack of regulation has caused to the industry? From what I hear you saying is that you have a plan. I am even more excited to see that get implemented.

Admiral COOK. I understand that, Congressman. I certainly understand the committee's impatience.

Mr. LARSEN. Mr. Chairman, I see other Members here, and I didn't have a clock on, so I will yield back to you. I have another set of questions for the second round.

Mr. COBLE. Admiral, if you would pull that mic a little closer to you.

We have been joined by the distinguished gentleman from New Hampshire and the distinguished gentleman from Maryland. I think Mr. Cummings came in first.

Mr. Cummings, do you have any questions?

Mr. CUMMINGS. Thank you very much, Mr. Chairman. Thank you all for calling this hearing.

Admiral Cook, I apologize for not being here earlier. I am now the ranking member of a full committee, so it gets kind of busy here.

According to documents provided by the minority staff, the Coast Guard published 26 rulemaking documents in fiscal year 2010. These documents pertain to 18 separate rulemaking projects. Utilizing the funding increases of additional personnel allowances provided to it in fiscal years 2008 and 2009, increases which I strongly supported, the Coast Guard reduces regulatory backlog by 35 percent, and that is pretty good. While the Service has a pending backlog of more than 60 rulemaking projects, that is far below the more than 90 pending projects back in 2007. I applaud your diligence in working through the backlog.

Can you please comment on whether you now have the staff and resources necessary to work through the remaining backlog and to begin to tackle the rulemakings required by the 2010 Coast Guard authorization as well as cruise vessel safety legislation?

Admiral COOK. Good morning, Congressman. I am disappointed also that you weren't here for my opening remarks. As we are very, very thankful for the support that the committee gave us in 2008 and 2009, and especially for the regulation-development staff, which really has increased about 50 percent, up to 82 full-time positions in addition to the various subject-matter experts that we bring in. So I think we are on a trajectory that will enable us to sustain that continued progress, sir. So I am confident that we have what we need in order to go ahead and meet the rules that you laid out.

Mr. CUMMINGS. Thank you.

As you know, finalizing the towing vessel safety regulations required by the Coast Guard legislation in 2004 has long been a key priority for me. What is the status of that rulemaking process? Will the Coast Guard meet the October 15 deadline for issuing the final rule, given that the deadline for the NPRM was not met?

Admiral COOK. Congressman, the rule is now under review at OMB, and typically that signals the final stages for us. So if they stick to the 90-day review time that they typically take, we should see that rule back to us in July. So assuming that we don't have any additional work by nature of that review, we would see it published soon after that.

Mr. CUMMINGS. Well, one of the changes I am going to do is I am going to, of course, consult with our chairman and our ranking member to do what we used to do, and that is set some deadlines for these things so that we can bring you back. Maybe in November, if we are here, so that we can follow up on these things, because, as you know, when we set these deadlines, it seems like we

get more done. So I will have to consult with them and see—you know, it is their committee, so we have to figure this out.

Admiral COOK. Yes, sir.

Mr. CUMMINGS. One last thing. As you know, during the 110th and 111th Congresses, we closely examined how the Coast Guard's ability to carry out its traditional mission areas, such as marine safety, including both inspection and investigation activities and search and rescue, had been affected by the Service's assumption of significant homeland security responsibilities after the terror attacks of September 11, 2001. Our examinations found that the Coast Guard's expertise in highly technical traditional missions had frequently suffered as the Service struggled to balance these many mission demands with an end strength that had not expanded to accommodate the increased workloads created by the new missions.

Against that background I am deeply troubled by the findings of the Coast Guard's own post-Deepwater Horizon preparedness review, which indicates that many of the challenges we found, particularly in the marine safety program, also affect the Service's implementation of the environmental response mission. Thus, the report states, and I quote, "It appears that the Coast Guard marine environmental response"—"preparedness and response programs have atrophied over the past decade, possibly as a result of competition with program development and resourcing challenges to meet the Service's enhanced homeland security responsibilities."

It goes on to say, "Additionally, the move to the Coast Guard's current Sector organization displaced the MER function from the legacy marine safety community into a new response community paired with law enforcement and search and rescue activities. This new construct created the unintended consequence of changing the existing MER community and placed many new people with little or no program experience into MER positions."

You see where I am going? Where are we? Because one of the things that I have said over and over again is that we cannot be lulled into a culture of mediocrity. There are too many people depending on us. And this is your own report. So I just want you to comment very briefly, and then I am finished.

Admiral COOK. Well, Congressman, first off, I think the Coast Guard, we certainly are a learning organization. So the fact that we did that report and pointed out things we need to improve on, we are going to improve on it. A very concrete step, we are forming an incident management directorate within the headquarters. It is going to be headed up by a senior executive. That certainly demonstrates the organization's commitment to improving that area.

We have also got some additional billets this year, I think it was 35, related to follow-on from Deepwater Horizon, but related for just incident management.

> CORRECTION: The Coast Guard was provided funding to hire 20 additional billets in fiscal year 2011 for marine environmental response and incident management purposes. Additionally, 33 billets were funded to support the marine safety program.

So the message internally is received, and we are starting to redirect our resources in order to make sure that we have the response and incident management skills that we need.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. GUINTA. [presiding.] The gentleman from Minnesota Mr. Cravaack, do you have any questions?

Mr. CRAVAACK. Yes, Mr. Chair, I do.

First off, I would like to thank Admiral Cook for being here today and Mr. Lederer thank you for being here today as well, and thank you for all of the great service those in the Coast Guard provide us each and every day. Thank you, sir.

First off with that, sir, Coast Guard regulations have a tremendous and a negative impact on Minnesota. Admiral Cook, as you well know, the Coast Guard is requiring fishing guides on non-border landlocked lakes deemed navigable by the Coast Guard to obtain Federal Operator of Uninspected Passenger Vessels license, otherwise known as a Six-Pack. This is incredibly burdensome, a requirement on a wide range of tourism-related jobs. Basically you are making high schoolers go out and get these licenses.

Now, unfortunately, I have been unable to find out exactly how much these Six-Packs cost these young people that are looking for summer employment. And you have got to remember, in Minnesota, the summer is about 3 months long. So it is a very short period of time that they are going to require these licenses. To me, this is extremely unacceptable.

The other aspect is I am very interested, sir—let us comment on that, sir. Could you comment on the Six-Pack for us?

Admiral COOK. Well, Congressman, a number of inputs regarding the TWIC have been received, and they are a fundamental piece leading to the Six-Pack license. When we are looking across the board, though, we need to validate both safety and security, and in doing so, we continue to look for refinements of that. And we are in the process of refining the TWIC requirements.

But as far as the licensing, all we can offer—and we continue to work with the locals—is a restricted license, which makes it easier for them to obtain it, but not less costly.

Mr. CRAVAACK. TWIC and the Six-Pack are completely different things, so realize that. But I would like to just focus on the Six-Pack. Where is the closest place—can you tell me where the closest place you can get a Six-Pack license in Minnesota?

Admiral COOK. Well, they are all done through the National Maritime Center in West Virginia. And if we are going to get a restricted license, they can work with their local OCMI, but the actual document is produced in West Virginia.

Mr. CRAVAACK. As I understand it, the closest place you can apply for actually a Six-Pack is like in Ohio. So you are going to have a 17-year-old kid that wants to be a fishing guide in the summertime have to go to Ohio to get a Six-Pack license. As I understand it, that is how this is supposed to work. If I am wrong, please correct me on that. But as I understand it, you are making a kid who is going to be a boat guide for less than six people—has probably been fishing that lake all his life—go to Ohio to get a Six-Pack card.

My time is quickly depleting. But one of the big things I want to know, sir, is why has the Coast Guard all of a sudden in March, I guess, of last year decided to make Lake Mille Lacs now a navigable water when it is an inland lake and has had no Federal jurisdiction on those waters since God created it? Could you explain that, sir?

Admiral COOK. Congressman, I understand that it was reviewed again recently, and it has historically navigable roots, and nothing has changed that. I know Mr. Lederer may have the background from a legal foundation standpoint, but essentially it had roots as a waterway. And the way the law goes——

Mr. CRAVAACK. March 10 of last year, sir. Now you are putting Federal requirements on an inland lake, State lake, and, quite frankly, I find that a huge overreach of Federal authority on a State's rights. This is not a navigable water. This has been a fishing—it is a large body of water. But I find that to be unacceptable, and I have asked the Coast Guard to also comment on that as well. I have not received anything from the Coast Guard yet. You are placing Federal restrictions on a lake that is a State lake. It is totally landlocked. It does not have any title tributaries, any mention like that. I think this is a huge overreach of the Federal Government. 2010, that lake has been in existence since God created it, and all of a sudden the Coast Guard deems it a navigable water. Could you explain that?

Admiral COOK. Sir, I would like to defer to Mr. Lederer. I know we have discussed this previously. There is a legal foundation for this.

Mr. LEDERER. Sir, very frequently, we are regularly around the country, there are bodies of water that may not appear to be navigable, the issue is raised to the local district. I don't know what triggered it in the case of this lake. But this does happen from time to time, and then the local district must then look very carefully, and does look carefully, at the historical use of the body of water, and a navigability determination is based upon that.

My understanding is that the ninth district went through that process and came to that conclusion. The best I can tell you is that this is not unprecedented or unusual. And in terms of the Coast Guard's responsibilities, we have to take them very seriously.

Mr. CRAVAACK. Mr. Chair, I am out of time, but I would like a second followup of questions later, sir.

Mr. GUINTA. Without objection, so ordered.

Mr. Landry.

Mr. LANDRY. Thank you, Mr. Chairman.

Admiral Cook, with respect to your rules regarding a notice of arrival, could you tell me—I had sent a letter over to the Coast Guard concerning a notice of arrival, and a lot of my supply vessel owners are having difficulty trying to understand exactly what the official position is, I guess, of the Coast Guard. You all do a tremendous job down in Louisiana in regulating our offshore supply vessel industry. They always have compliments for you all. And it seems from the correspondence that I have gotten back and forth from you all and from industry, that this is an issue that you all agree is an unnecessary burden to the industry.

So I was wondering how you can take a step forward in showing the rest of these agencies around this city how you can take a regulation that is causing industry some pain, causing you some pain, and just clearing it out once and for all? Could you update me on that?

Admiral COOK. Congressman, first off, the SAFE Port Act required us to institute the notice of arrival on the Outer Continental Shelf, consistent with other notice of arrival requirements that we have. So we went through the standard rulemaking process, and we did not receive any adverse comments to that docket, so we anticipated that the offshore industry would be ready for that.

The reason that the Coast Guard looks at the rulemaking as a benefit is that it provides safety and security situational awareness for us, or maritime domain awareness out on the Outer Continental Shelf. But since the rule was published, the Offshore Marine Safety Association also came to us and asked us to reconsider different ways we could implement it that wouldn't be burdensome to them, but would also provide us the additional maritime domain awareness that we think is important both from a safety and security standpoint. So we are working currently with OMSA to do that.

Mr. LANDRY. How did you go from regulating foreign vessels to become a regulation against domestic vessels as well? It seems to me from the discussions that I have had, the way the regulation is set up, it is nearly impossible for our industry down in the gulf to comply with because they are going back and forth so often.

Admiral COOK. Congressman, the U.S.-flagged vessels are exempt if they are—suppose they are leaving Port Foshan and are going out to work in a block and then coming back, there is no reporting required then. But there is reporting required when they go from block to block. And I think that is the point at which the industry is saying they can anticipate those moves. But the legal fundamentals were there to bring in other OSVs in order to accomplish the full visibility.

Mr. LANDRY. Mr. Lederer?

Mr. LEDERER. Mr. Landry, the only thing I would add to that is that the SAFE Port Act requirement was to complete the rulemaking, and it did specify foreign vessels. The way we looked at that was that these notice of arrival provisions had to fit within the fabric of the notice of arrival regulations that we had at the time, because, again, in terms of protecting maritime security as well as marine safety, we need to have full maritime domain awareness. So we are relying not just on the SAFE Port Act provision, but on a preexisting Ports and Waterways Safety Act provisions that are the support for the preexisting notice of arrival regulations.

So the bottom line is that we were working on our preexisting legal authorities to develop a notice of arrival scheme that would work across the board.

Mr. LANDRY. How are we going to fix this problem? Because my mariners, I think, have always upheld themselves to work very well with the Coast Guard, and they are just saying this is simply something that they can't comply with, and I agree. The traffic on the Gulf of Mexico amongst those offshore supply vessels is heavy. I mean, it is outstanding. I really wish we would bring this thing

to a head so that we can just continue to move forward in the work that they have to do down there without having to worry about an unburdensome regulation that no one can comply with and you can't enforce.

Admiral COOK. Congressman, I will commit that we are going to continue to work with OMSA, and we have a formal partnership, and we have a charter for this particular group. So it is recognized on both sides as an issue that needs to be resolved.

Mr. LANDRY. Thank you.

Mr. GUINTA. Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Admiral Cook, to the ballast water rule, the one major rule presently under consideration would amend the Coast Guard's existing regulations on ballast water management. What is the timetable for completion of this rulemaking at this point? Is it possible to develop new standards that are technically feasible, economically viable, and environmentally effective?

Admiral COOK. Congressman, if I could briefly answer that and then also ask Mr. Lederer to join in on part of the response.

Mr. LARSEN. Absolutely.

Admiral COOK. The timeline is certainly complicated by the technical nature of what we are trying to achieve and whether that technology actually exists and can be employed in the marine environment. So that makes it doubly challenging to commit to a timeline in addition to any of the administrative reviews, because there were—after we published the notice of proposed rulemaking, there were comments in the thousands. From 500 or 600 individual commenters, there are 2,000 or so comments. There is a wide range of opinions, and then beyond that there is also a range of scientifically supportable information that we have to factor into our overall rulemaking.

Mr. LEDERER. Sir, with respect, there is a short answer and a long answer. I will give you the short answer in terms of just the timing. I think we are well positioned right now with respect to getting this out. Really a remarkable amount of discussion that has gone on within the executive branch to move this rule forward, and it has been very productive. So, one, more probably discussion on this rule than any I can recall in the last several years, and productive discussion. I think we have a way ahead, and I think you are going to see something published in the next several months.

Mr. LARSEN. I will certainly task the staff to track that as well.

Mr. Chairman, am I on the clock or not? I want to clarify.

Mr. GUINTA. You are not on the clock, but I will allow you to continue.

Mr. LARSEN. Thank you. I will try to be expeditious then.

With regards to vessel weight and stability requirements, the Coast Guard recently amended its regulations governing the maximum weight and passenger capacity on vessels. It is my understanding that some boat operators have expressed their concerns these new requirements have reduced the number of passengers allowed onboard, and that, in turn, could impact the profitability of their operations, thereby fitting right into the concerns of the heading of this particular hearing.

So, Admiral Cook or Mr. Lederer, can you explain various factors that have been taken into consideration by the Coast Guard when it establishes new weight and stability requirements? And could a rule have met its intended goal to enhance marine safety if it had not considered a factor of an assumed average weight per person factor?

Admiral COOK. Well, Congressman, really that is the central piece. We went back with our national centers for disease and also looked at some of the other scientific data that showed—I mean, just generally, people are bigger. And the only thing that we can do as far as providing stability on these vessels is to take into account the weight that is already there from the vessel and then how it might be positioned in terms of people as they are located in different locations. So we have made it as straightforward as possible to have simplified stability tests where we go out and witness the weights being moved around so that the industry doesn't have to go through a full inclining test, which is much more expensive. But ultimately, the amount of weight and where it is moved has to correspond to people and the growing size of Americans.

Mr. LARSEN. As uncomfortable as that might be to say, is that a consistent approach? Has that been a consistent approach regardless of the year? The same approach in 2005, same approach in 2000, same approach in 1995 that the Coast Guard takes to determine weight and stability requirements?

Admiral COOK. The approach is consistent, although we had not raised the weight in a very large number of years. I can't recall the exact number of years, but we have gone from an average weight of 140 to an average weight of 185. But we have built into the standard such that we will continue to be tied into the national database, and if weight goes up or down for average Americans, the rule will adjust.

Mr. LARSEN. Mr. Chairman, I have one more question now, and then I will follow up, I am sure. But I will ask one more question now. And then, if you don't mind, we will go to the other Members, if that is all right with you.

Admiral Cook, two provisions were included in last year's authorization act regarding the modification to oil spill emergency response activities and traffic management in the north Puget Sound region in Washington State, probably right outside my window. The first provision would expand the definition of "higher volume port area," found in section 155–1020 of the Coast Guard's regs, to now include the Strait of Juan de Fuca out to Cape Flattery. The second provision encourages the initiation of negotiations with Canada to require tugboat escorts for all laden tank vessels transiting the northwest straits region of Puget Sound. It would also require the Coast Guard to issue recommendations for the full range of options for the management of maritime traffic and to enhance spill prevention and response systems.

So what is the status of the Coast Guard's efforts to implement these provisions? And has the Coast Guard revised its definition of "higher volume port area" as required?

Admiral COOK. Mr. Larsen, I would like to be able to take that back and give you a detailed answer for the record, if that would be acceptable to you, sir.

Mr. LARSEN. That would be acceptable.

Mr. LARSEN. What would be the timeline in terms of how soon you can get back with an answer?

Admiral COOK. I will get back to you by the middle of June.

Mr. LARSEN. The middle of June. How about June 15? That is my birthday on June 15.

Admiral COOK. June 15 it is, sir.

Mr. LARSEN. Great. Thank you.

[The information follows:]

> The Coast Guard has initiated the rulemaking proceeding required by section 710 of the Coast Guard Authorization Act of 2010 to change the definition of the "higher volume port area" in the Strait of Juan de Fuca. The Regulatory Identification Number is 1625–AB75.
>
> The Coast Guard continues ongoing preparedness and response efforts with Canada under the Canada-United States Joint Pollution Contingency Plan and geographical annexes. For example, there is a pollution response exercise planned in June 2011 in Seattle that will focus on international cooperation. Additionally, in August there is a national level convening planned for the Joint Response Team, which will include regional participation and address national and regional issues.

Mr. LARSEN. Thank you, Mr. Chairman.

Mr. GUINTA. Thank you.

Before I go to the next Member, Admiral, thank you very much for being here.

And I had a quick question regarding the fishing vessel safety rulemaking. My district of New Hampshire is greatly impacted by any type of new or additional regulatory requirement placed on the industry. While we all agree that safety needs to be foremost in our minds, I wanted to follow up with you about the authorization act, section 604, regarding dockside fishing vessels requirement undergoing the safety examination every 2 years. The first question I have is this: Are you able to complete it by October 2012?

Admiral COOK. A lot of it will depend, Congressman, on how the industry comes back to us. For example, you know, we have a program now that has voluntary exams, and probably in the neighborhood of 8,000 of those done each year. We anticipate that—although we don't know for sure whether—the exact number of vessels that are going to fish 3 miles beyond the boundary line, so we anticipate that will be about 30,000 to 35,000. So just as kind of a test bed, we have done a lot of outreach, and then we have seen how many more voluntary exams we have gotten. So since we started the outreach in October, we have only got really about a 10-percent increase in the number of voluntary exams.

So I think it is going to be difficult to get the industry to the table. Our regulatory experience in significant rulemakings like this or changes in the dynamics of the way an industry is regulated is that they will wait until very near the end of a perceived deadline. So I think the challenge is going to be more from the industry side in getting them lined up so that we can do a systematic dockside safety program.

Mr. GUINTA. And if you are not able to complete all fishing vessels by that date, what would occur at that point? Would you prevent those vessels that had not been inspected from going out? Or how would you interpret the law in that sense?

Admiral COOK. Congressman, I think, rather than give you like a very definitive answer like that today, what I would like to do is just commit to being in contact with the committee staff and let you know how it is going so that maybe you can help us avoid a situation like that where it is a showdown. But ultimately, if they are not in compliance with the law, that would be really the only sanction that we could provide is that they wouldn't be able to go out and fish.

Mr. GUINTA. Assuming both sides are diligently trying to meet this deadline, and just due to the number of vessels we have and the resources that you have doesn't allow us to meet that deadline, would it be appropriate for us to consider an extension?

Admiral COOK. I think an extension would enable us to be able to put in a more systematic way to reach the final goal.

And as an added comment, this is a very significant thing to bring an industry in that has not previously been, in quotes, "inspected," although this is called a compliance exam. So if you look at what we are doing with the towing vessel industry, we have a full bridging program that is based on voluntary examinations, and that is because those towing vessel organizations are just a little bit more systematically organized under the American Waterway Operators, who provided us that opportunity.

But we need some kind of parallel structure that enables the fishing community to be more comfortable with the Coast Guard coming down, and our Coast Guard compliance inspectors understanding a lot of the issues that are facing the fishing vessel community as far as the particulars of their vessels, the different types of installations that are on the ships. So if there was an additional time, we would be able to develop a more systematic program.

Mr. GUINTA. Thank you very much, sir.

Mr. Harris, do you have any questions?

Dr. HARRIS. Thank you very much, Mr. Chairman, and thank you very much, Admiral Cook, for coming before the committee.

Channel buoys probably aren't your shop, but maybe you can get word back to them we are waiting for those channel buoys in Rock Hall Harbor to get moved so that we can get our tourism business going for the deep-draft vessels.

Anyway, Admiral Cook, does the mariner medical fitness determinations, does that come under your jurisdiction in the rules? Let me ask you a question. Could you just outline to me—because my understanding is that it is conducted differently from FAA and highway folks how they do the medical examinations and get someone determined to be fit. How does the Coast Guard do it?

Admiral COOK. Congressman, the way we do it is that the mariner goes to their own doctor and then provides that information to a medical review staff in our centralized mariner evaluations in West Virginia.

What I would say, the thing I guess that I also want to add to the answer, is that we just got authorized for a mariner medical advisory committee from the authorization act, and we have just

now gotten departmental approval for membership. And that is going to be a prime tasking for that advisory committee to help us look at how we can bring the Coast Guard to view the physical exams, kind of a registry of doctors, the way the FAA does in particular. We like the way they do it.

But the reason that we are using the current system goes back to the legacy of the 17 RECs all doing things differently, and we thought by centralizing and providing a robust medical staff that we could eliminate a lot of those issues. And many of them we have, but we still see that further progress could be made if we were to go down a different route.

Dr. HARRIS. So when you say the medical staff, what is the level of the person who is making that determination? The centralized person.

Admiral COOK. The head doctor is an occupational medical doctor.

Dr. HARRIS. I know. But that doctor is not reviewing every examination, I take it; is that right?

Admiral COOK. There are three medical doctors, six physician's assistants, and then some medical techs. So it is a staff of just over 20.

Dr. HARRIS. Staff of over 20. And what you are suggesting is that you might go the way of the other administrations and actually just have a register of physicians whom, if they sign off on the individual, then they don't have—you can kind of eliminate a lot of those 20 staff, I take it?

Admiral COOK. Well, some of them, sir. But the challenge would be—you really have to do a lot of audits in a case like that. And FAA has a full staff of doctors on the FAA staff that go out and audit their registry of doctors to make sure that they are complying with the rules as the FAA understands them.

Dr. HARRIS. But you are willing to look into that other option and actively investigate that?

Admiral COOK. We are.

Dr. HARRIS. Well, thank you very much, Admiral, again for appearing before the committee and getting word back about Rock Hall.

Thank you very much, Mr. Chairman.

[The information follows:]

> The channel buoy in Rock Hall Harbor was moved on June 1, 2011.

Mr. LANDRY. [presiding.] Mr. Cravaack.

Mr. CRAVAACK. Thank you, Mr. Chair.

Sorry to belabor this, but, Mr. Lederer, can you tell me how much a Six-Pack costs?

Mr. LEDERER. I cannot, sir.

Mr. CRAVAACK. OK. Can you tell me, a Minnesota kid goes up to be a fishing guide for 3 months in the Mille Lacs Lake, where he needs to go to get a Six-Pack license?

Mr. LEDERER. I cannot, sir, but we will get that information to you.

[The information follows:]

In accordance with the regulations in Title 46 Code of Federal Regulations 10.219, the fees associated with obtaining an original Merchant Mariner Credential with an officer endorsement as operator of uninspected passenger vessels (OUPV) are:

Evaluation fee	$100
Examination fee	$95
Issuance fee	$45
Total	$240

Other costs incurred by an applicant associated with obtaining an endorsement as OUPV include:

TWIC Fee	$132.50
CPR/First Aid Training	$60
Physical Exam	$100
Drug Test	$49

Total costs associated with obtaining an original credential as OUPV is $581.50 for a credential good for 5 years.

Credentials issued by the Coast Guard expire 5 years from the date of issue. Finally, costs associated with the renewal of an endorsement as OUPV would include: the evaluation fee; issuance fee; physical exam; and drug test for a total of $244 for a 5-year credential.

Mr. CRAVAACK. OK. I was told by a Coast Guard Toledo, Ohio. So we have got to get a kid from Minnesota to Toledo, Ohio.

Can you tell me, do applicants need to pick up their license in person?

Mr. LEDERER. Let me pass that to Admiral Cook.

Admiral COOK. They do have to pick it up in person, but it doesn't have to be back in Toledo.

Mr. CRAVAACK. OK. Do you know, sir, where the closest Six-Pack license place would be to apply for a license in Minnesota?

Admiral COOK. Congressman, I would like to get back for the record to you, because we have a number of electronic features that we offer now, and I am just not sure whether the Six-Pack license falls under that or not.

[The information follows:]

If an applicant for an officer endorsement as operator of uninspected passenger vessels has provided their biometric and biographic information through a TWIC enrollment center, they are able to apply for the endorsement through the mail. They may apply in person or through the mail to any of the Regional Examination Centers, per 46 CFR 10.209(d).

The two closest Regional Examination Centers to Minnesota are those located in Toledo, Ohio, and St. Louis, Missouri. For an original issued credential, an applicant would need to travel to a Regional Examination Center to

take the appropriate examination, unless they make alternative arrangements for a traveling examination team to proctor the exam at a closer location.

TWIC enrollment centers are located in Duluth, Minnesota, and Roseville, Minnesota.

Mr. CRAVAACK. I was told they were not. So I was literally told that a kid from Minnesota has got to go to Toledo, Ohio, to pick up a Six-Pack. So just food for thought. That is where I am coming from.

Admiral COOK. OK.

Mr. CRAVAACK. Now, let us get back, Mr. Lederer, you told me that because of the historical use of the waterway was why Region 9 has gone ahead and deemed Mille Lacs Lake, right basically in the center of Minnesota, a navigable water. Can you expound upon that?

Mr. LEDERER. Only to say, sir, that the historical use of a body of water is a significant factor in making a navigability determination. I have not seen the ninth district opinion that I understand has been written concerning this, and I will be glad to do that when I get back to the office, and take that for the record if I could as well.

[The information follows:]

As a result of the increased focus nationwide on passenger vessel safety including licensing of operators of uninspected passenger vessels, the Ninth Coast Guard District and Eighth Coast Guard District determined they needed a navigability determination for Mille Lacs Lake in Minnesota. Portions of Mille Lacs Lake are in both Coast Guard Districts so the navigability determination was coordinated between the districts with the Eighth Coast Guard District actually issuing the determination as the majority of the lake is within its boundaries. The navigability determination was made on March 3, 2010, with a copy attached along with the supporting memo.

The foundation for Federal authority and subsequently Coast Guard jurisdiction over navigable waters of the United States traces back to the Commerce Clause of the Constitution and a series of cases decided by Federal Courts, including the U.S. Supreme Court. Regardless of the State or the waterway, the Coast Guard has applied the same basic tests in determining navigability for the past 50 years, with the exception of jurisdictional issues involving the Clean Water Act which have continued to significantly evolve. Our test is published in the Title 33 Code of Federal Regulations (CFR) Section 2.36.

§2.36 Navigable waters of the United States, navigable waters, and territorial waters.

(a) Except as provided in paragraph (b) of this section, navigable waters of the United States, navigable waters, and territorial waters mean, except where Congress has designated them not to be navigable waters of the United States:

(1) Territorial seas of the United States;

(2) Internal waters of the United States that are subject to tidal influence; and

(3) Internal waters of the United States not subject to tidal influence that:

(i) Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, or

(ii) A governmental or non-governmental body, having expertise in waterway improvement, determines to be capable of improvement at a reasonable cost (a favorable balance between cost and need) to provide, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce.

No Federal statute specifically addresses the navigability of Mille Lacs Lake, and no Federal court has made a specific determination of the navigability of this waterway. The navigability determination is based on the historical use of the waterway as a highway for interstate commerce. In the late 1800s and early 1900s, millions of feet of timber were towed across the lake to the Rum River by steamboats. At the time, the lake opened directly to the Rum River and the timber was then floated down the river to various sawmills. Consequently, in 1981, based upon the historic use of the lake, the U.S. Army Corps of Engineers determined that Mille Lacs Lake is a navigable waterway of the United States. In 2010, the U.S. Coast Guard (USCG) came to a similar conclusion.

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House Subcommittee on Coast Guard & Maritime Transportation

U.S. Department of Homeland Security
United States Coast Guard

Commander
Eighth Coast Guard District

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16591

MAR 3 2010

MEMORANDUM

From: D. L. NICHOLS, CAPT, USCG
CGD EIGHT (dl)

Reply to Attn of: LT B. MCNAMARA
(504) 671-2035

To: S. L. HUDSON, CAPT, USCG
CG SECTOR UPPER MISSISSIPPI RIVER (s)

Subj: NAVIGABILITY DETERMINATION FOR MILLE LACS LAKE, MINNESOTA

Ref: (a) 33 C.F.R. § 2.36
(b) 33 C.F.R. § 3.40-1
(c) 33 C.F.R. § 3.45-1

1. For the purpose of determining its jurisdictional authority, the Coast Guard has determined that Mille Lacs Lake is a "navigable waterway of the United States."

2. The geographic boundary between the Eighth Coast Guard District and the Ninth Coast Guard District currently runs through Mille Lacs Lake. This navigability determination is for the entirety of Mille Lacs Lake. The Ninth District Legal Staff has reviewed and agrees with this determination.

3. No federal statute addresses the navigability of Mille Lacs Lake, and no federal court has determined the navigability of the waterway. Furthermore, Mille Lacs Lake is not subject to tidal influence. This navigability determination is based on the historical use of the waterway. Specifically, Mille Lacs Lake has been used, in connection with other waters, as a highway for substantial interstate or foreign commerce.

4. Navigability determinations are administrative findings based on the criteria set forth in 33 C.F.R. § 2.36. The precise definitions of "navigable waters of the United States" and "navigability" are dependent ultimately on judicial interpretation and cannot be made conclusively by administrative agencies.

5. This opinion solely represents the opinion of the Coast Guard as to the extent of its own jurisdiction to enforce laws and regulations, and does not represent an opinion as to the extent of the jurisdiction of the United States or any of its agencies.

#

Copy: CGD EIGHT (dl) Navigability Files
CGD EIGHT (dp)
CGD NINE (dl)

U.S. Department of Homeland Security
United States Coast Guard

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16591
MAR 3 2010

MEMORANDUM

From: [redacted]
CGD EIGHT [redacted]

Reply to [redacted]
Attn of: [redacted]

To: FILE

Subj: LEGAL SUPPORT FOR NAVIGABILITY DETERMINATION FOR MILLE LACS LAKE, MINNESOTA

Ref: (a) CGD EIGHT (dl) memo of 3 March 2010, NAVIGABILITY DETERMINATION FOR MILLE LACS LAKE, MINNESOTA
(b) 33 C.F.R. § 2.36
(c) 33 C.F.R. § 3.40-1
(d) 33 C.F.R. § 3.45-1

1. Purpose. This memorandum documents the legal basis for the Coast Guard's determination of navigability in ref (a).

2. Discussion.

a. Internal waterways of the United States not subject to tidal influence are "navigable waters of the United States" if they "[a]re or have been used, or are or *have been susceptible for use*, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, *notwithstanding natural or man-made obstructions that require portage*." 33 C.F.R. § 2.36(a)(3)(i)(emphasis added). The test is one of *historic* navigability. U.S. v. Harrell, 926 F.2d 1036 (11th Cir. 1991). In 1921 the Supreme Court discussed the issue of obstructions by stating that a waterway "capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it . . . be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions." Economy Light & Power Co. v. U.S., 256 U.S. 113, 122 (1921); see also U.S. v. Appalachian Power Co., 311 U.S. 377, 408 ("When once found navigable, a waterway remains so."). When logs are floated on a waterway in interstate commerce, the waterway is a highway for interstate commerce. See id. at 405; Wisconsin Public Service Corp. v. Federal Power commission, 147 F.2d 743 (7th Cir. 1945); United States v. Underwood, 344 F. Supp. 486, 490 (M.D. Fla. 1972).

b. In April 1981 the ACOE conducted an historical analysis of commerce on Mille Lacs Lake and the Run River in Minnesota. See encl. (1). Historical accounts in the document reveal a history of interstate commerce on Mille Lacs Lake. Specifically, Mille Lacs Lake was "used in the transportation of logs" from 1848 to 1904, and evidence shows that at least a portion of the logs floated were transported to markets outside of the state. Encl (1) at 5.

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Subj: LEGAL SUPPORT FOR NAVIGABILITY DETERMINATION FOR MILLE LACS LAKE, MINNESOTA 16591

3. Conclusion. Mille Lacs Lake has been used in the past as a highway for interstate commerce. The Coast Guard thus determines that Mille Lacs Lake is a "navigable water of the United States" and the Coast Guard may properly enforce applicable federal law on this waterway.

#

Enclosure: Army Corps of Engineers (ACOE) memo of 2 April 1981: Navigability Determination for Mille Lacs Lake and Rum River, Minnesota

Copy: CGD EIGHT (dl) Navigability Files
CGD EIGHT (dp)
CGD NINE (dl)

Mr. CRAVAACK. The State of Minnesota has been in existence for 158 years, 153 years. So what I am trying to figure out is why all of a sudden now? Why all of a sudden is the Coast Guard coming in last year and deeming a body of water which is in the center of our State navigable waters when I—according to the records, I see no substantial—the word "substantial"—interstate and foreign commerce on the Lake of Mille Lacs. So, sir, you are going to definitely have to justify those words to me because, quite frankly, again, this is bureaucratic overreach on a State's lake. So could you explain, sir?

Mr. LEDERER. Sir, we will definitely get back to you on that.

Mr. CRAVAACK. Thank you very much. And with that and high hopes of hearing back, I yield back, sir. Thank you.

Mr. LANDRY. Thank you.

Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Admiral Cook, Congress passed the Cruise Vessel Safety and Security Act last year to enhance the safety and personal security of all U.S. passengers aboard cruise ships. The Coast Guard was directed to develop regulations to implement several important provisions of this law, yet statutory deadlines have come and gone, and proposed rules have yet to appear.

When can we expect to see the Coast Guard publish a notice of proposed rule on the Cruise Vessel Safety and Security Act?

Admiral COOK. Congressman, I want to assure you that we are working hard on that one and coordinating with the FBI and some other interagency coordination that we think is essential to the foundation of that rule. And it is our desire to have something published by the end of the year.

Mr. LARSEN. By the end of the calendar year?

Admiral COOK. Calendar year, yes, sir.

> CORRECTION: The Coast Guard plans to publish the notice of proposed rulemaking on cruise vessel safety by the end of 2012, not 2011 as implied in the witness' response.

Mr. LEDERER. And, Mr. Larsen, if I could also add, tomorrow there is a notice that will be going out to the public seeking available technologies, so you will see a publication in that respect in terms of forward motion.

Mr. LARSEN. So that will be a step forward. But what steps is the Coast Guard taking with the FBI or any other law enforcement agencies to ensure that reporting and enforcement actions will be seamlessly coordinated? Have the agencies entered yet into any agreements that clearly articulate responsibilities and lines of communication?

Admiral COOK. I am not aware of any formal agreement on that yet, Congressman, but I would anticipate, just the normal context of how we do business, it will be codified when the rule comes out.

But from what I have been told by my staff, the FBI is working with us as a good partner, and they understand that that part of where U.S. citizens go out on cruise ships, you know, hasn't really been charted very well before, and it is important to them to get it right, too. So I think you are going to see fruits of good cooperation and a rule that is both enforceable from a cruise ship stand-

point and something that is meaningful from a law enforcement standpoint back here.

Mr. LARSEN. Well, you know that in the past we have had hearings both in the subcommittee and in the full committee on the issue of cruise vessel safety and security, and members of this full committee and subcommittee who are extremely interested in seeing progress being made on this issue.

Admiral COOK. Yes, sir. I think this is one where the progress is behind the scenes, but it is real.

Mr. LARSEN. All right. Well, we will look forward to that end-of-the-calendar-year movement. Thank you.

Mr. LANDRY. Admiral Cook, I want to go back to my issue on the—that I talked about earlier, and I want to make sure that all of my colleagues understand the problem that we are having. I really enjoy pizza. I am a big pizza guy. I eat it all the time. I order it, the delivery guy. You have used pizza deliveries before, I am sure? All right. OK. Do you think that this morning if you called up your favorite pizza parlor, if you called the guy that delivers the pizzas to you, if he could tell you where he would be delivering pizzas to, you know, in case maybe you wanted one at your house?

Admiral COOK. I don't think he could do that, sir.

Mr. LANDRY. OK. That is the problem we are having in the Gulf of Mexico. You see, those supply vessels, it is hard for them to be able to forecast where they are going to be in that 24-hour window in order to make that reporting to the Coast Guard. It is not like a vessel coming in internationally which they know what ports it is going to, where the cargo is going to be unloaded, what cargo is going to be loaded onto it, and then leaving the country again. We have hundreds of vessels going back and forth from various ports all up and down the coast of Louisiana. So that I just wanted to make sure you understand the gravity of the problem.

Do you think that we can fix this through the regulatory process, and that we don't need to fix it legislatively?

Admiral COOK. Well, we would like to be able to fix it through the implementation of the regulation. I don't know if Mr. Lederer has any comments about that. No.

Mr. LANDRY. So the regulatory fix is certainly more conducive than a legislative fix, because we would probably get it wrong up here, I am guessing.

Admiral COOK. Well, I think in this case, Congressman, since we are aligned with OMSA in working this—you know, we are not aligned exactly what the solution is yet, but we are aligned that we both need to work on it. I think it would be fair to give us a good chance in the regulatory arena first.

Mr. LANDRY. OK. Great.

Just one last thing. Could you provide for the record, just supplement, a list of the Members that have inquired about notice of arrival and when they may have made any inquiries so I can try to figure out who our friends are out there?

Admiral COOK. We will do that, Congressman.

Mr. LANDRY. OK. Thank you so much.

[The information follows:]

Member	Request Received	Notes
Sen. Mary L. Landrieu	May 25, 2011	Question for the Record following Secretary Napolitano's May 25th hearing before the Senate Committee on Appropriations.
Rep. Don Young	May 24, 2011	Engaged RADM Cook and Mr. Calvin Lederer in a discussion regarding OCS Notices of Arrival during the same hearing.
Rep. Jeffrey M. Landry	March 15, 2011 ..	Letter citing specific concerns with the Coast Guard's published regulation for Advanced Notice of Arrivals on the U.S. Outer Continental Shelf.
Sen. David Vitter	July 21, 2010	Question for the Record following ADM Papp's July 21st hearing before the Senate Committee on Commerce, Science, and Transportation.
Rep. Frank A. LoBiondo	June 22, 2010	Letter regarding the rulemaking project for Notice of Arrivals on the U.S. Outer Continental Shelf.
Rep. Elijah E. Cummings	June 22, 2010	Letter regarding the rulemaking project for Notice of Arrivals on the U.S. Outer Continental Shelf.
Rep. Elijah E. Cummings and Rep. Frank A. LoBiondo.	June 17, 2010	Both Congressmen engaged RDML Cook in a discussion regarding OCS Notices of Arrival during the hearing held this date.

Mr. LANDRY. The chair now recognizes the Honorable Don Young.

Mr. YOUNG. Thank you, Mr. Chairman. It is such an honor to see you sitting there. I think you have probably inquired in my main interest.

Where did this regulation proposal come from, as far as the ships that go across 4 and 5 different—14 different plats? Whose bright idea was it?

Admiral COOK. Well, Congressman, I will just say that it is rooted—the reason for the rule is rooted back in the SAFE Port Act and a requirement to align——

Mr. YOUNG. I wrote that rule. I was chairman of this committee, and that was to be applied only to foreign vessels that are in ports, never to the oil industry, the crew vessels, et cetera. Now, where did it come from?

Admiral COOK. In trying to align it with the notice of arrival requirements that were already standing in our regulations, which was another part of the task.

Mr. YOUNG. Wait a minute. I am being argumentative right here, but never in the discussion that we wrote that bill was it to be applied to cruise ships, et cetera, that were doing the oil industry's work. Never. Now, if you want to bet on that, I will bet $1,000 right now. Now, where did it come from?

The Coast Guard is getting like the other agencies now. You have got these little minions down there doing this type thing. Now, why was it put in there?

Mr. LEDERER. Sir, I can't tell you whose brain it came out of, but I can tell you that as we sit here today in 2011, and having talked with OMSA about the impact of it, the Coast Guard as an entity saw that rulemaking as part of the fabric of our notice of arrival system across the country, and that was an area that we thought was a gap that needed filling. And the SAFE Port Act language urged us to complete the rulemaking.

And, yes, it did say "foreign vessels," but the rulemaking that we were working on was broader than that and is based on the Ports Waterways Safety Act, consistent with our notice of arrival fabric that we have across the country, because the gulf was a major gap both for maritime security and for safety.

Mr. YOUNG. If I am not mistaken, you know, you had to go to the TWIC program, right? Who are you protecting us from? Every crewman is already cleared by the Coast Guard. I mean, do you know how hard it is to get a TWIC card?

Mr. LEDERER. Yes, sir.

Mr. YOUNG. Very hard. And you made it harder, especially in Alaska. Yet now you are going to have a ship that is trying to do the job.

See, my frustration—and I am a big supporter of the Coast Guard. I don't believe you should be in this business. I really don't. You have the TWIC. You have made sure these people can turn around and get cleared. And now you are imposing, as agencies have done in this administration, imposing the restriction on the development of our fossil-fuel industries. Now, tell me where is the justification for it? I mean, who is the threat here?

Mr. LEDERER. Well, sir, the distinction is to be drawn between somebody, an individual mariner who holds a TWIC, and vessels that are operating in the Gulf of Mexico.

Mr. YOUNG. You clear that vessel. You have to clear the vessel.

Mr. LEDERER. I am sorry, sir?

Mr. YOUNG. You have to clear the vessel before it sails, right? But you can't have him clear when he crosses. Like you say, I am an oil rig, and I need some work right now. I need somebody to service me right now. He doesn't know that, the guy running the ship. He has got to notify you 24 hours ahead of time? How are you going to do that?

Mr. LEDERER. Sir, before you came in, we were discussing with Mr. Landry that question of how do we operationalize it, and I will defer that back to Admiral Cook. But the notion of having maritime demand awareness within the gulf to know who is there who is supposed to be there and who isn't there who isn't supposed to be there is what we are trying to get at there. And it is a significant concern. And we can see the kinds of things that happen in looking at Deepwater Horizon in terms of if an evildoer was to get

to a rig, and I think that is the concept behind it. And so that is what we are trying to get at.

Mr. YOUNG. Don't say "try." Let us do it, because I don't want to impose this type of restriction when I am on a rig and I need help right now, and he owns the ship, and he has to notify you 24 hours or he could be possibly fined. You see the ridiculousness of the situation? They are there to service the rigs.

So I still want to know what brainchild—there is no pregnancy without somebody being involved. Where did it come from? I would like to find out—in fact, I will make that an official request. What brainchild in the Coast Guard did it come from? Because that shows, for me, a lack of knowledge of what the industry is doing. That is my concern.

You know, we charge you with search and rescue and drug interdiction, et cetera, and now you are involved, and I don't see how you can possibly do it unless you change the regulation, or the proposed regulation. I don't see how you have the manpower to do it, especially with this type of budget we are facing right now. I want you to put money in something that does the service that is necessary, and I don't believe this is necessary.

Mr. Chairman, I am over my time right now, but, you know, just do me a favor, guys. Don't get caught into this bogged-down EPA, Corps of Engineers, the rest of this. We have got to get this country back on the role of industrial might again, and then we are stopped by regulations that do no good for anybody. You don't need to do that. You are a better agency than that.

Thank you, Mr. Chairman.

Mr. LANDRY. All right. Are there any other further questions?

I would ask unanimous consent to enter into the record a statement from Horizon Lines. Without objection, so ordered.

[The information follows:]

HORIZON LINES, INC

May 24, 2011

Robert S. Zuckerman
Senior Vice President,
General Counsel and
Secretary
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Admitted in New York
Not Admitted in North Carolina

Honorable Frank A. LoBiondo
Chairman
Subcommittee on Coast Guard and Maritime Transportation
Committee on Transportation and Infrastructure
United States House of Representatives
Washington, D.C 20515

Dear Mr. Chairman:

With respect to the Subcommittee's hearing on May 24, 2011, regarding "Creating U.S. Maritime Industry Jobs by Reducing Regulatory Burdens," enclosed for the consideration of the Subcommittee is the Statement by Horizon Lines, Inc. On behalf of Horizon Lines, Inc., I respectfully request that this statement be included in the record of the Subcommittee's hearing. Thank you for your consideration of our comments and for the opportunity to present them to the Subcommittee.

Respectfully submitted,

Robert S. Zuckerman

Enclosure

C w/encl: Honorable Rick Larsen

Statement of Horizon Lines, Inc.

Submitted to the

Subcommittee on Coast Guard and Maritime Transportation

Committee on Transportation and Infrastructure

United States House of Representatives

on

Creating U.S. Maritime Industry Jobs by Reducing Regulatory Burdens

May 24, 2011

Horizon Lines, Inc. commends the Subcommittee for holding its May 24 hearing on creation of U.S. maritime industry jobs by reducing regulatory burdens. Horizon Lines, Inc. (Horizon Lines) appreciates the opportunity to provide these comments and respectfully requests that this statement be included in the record of the May 24 hearing.

Horizon Lines, Inc. is the Nation's leading domestic ocean container shipping company. Horizon Lines operates a fleet of 20 U.S.-flag, U.S. citizen crewed vessels and operates five port terminals. Horizon Lines offers regular service between the mainland United States and, respectively, Puerto Rico, Hawaii, Alaska, and Guam as well as regular U.S.-flag international service between the U.S. west coast and China.

Action to reduce regulatory burdens on the maritime industry can help create jobs and economic growth, benefitting vessel operators, mariners, and shipyards, and making the maritime sector more efficient, all in the public interest. The Subcommittee's effort to identify regulatory burdens as a step towards corrective action is very welcome. Below we call to the Subcommittee's attention two issues where we believe current regulations stand as an impediment to job creation.

I. Allow Capital Construction Funds to Be Used For Capital Lease Payments

The Capital Construction Fund (CCF) program has been administered by the Maritime Administration (MARAD) in a manner that is more restrictive than required by law by not allowing qualified withdrawals from a company's CCF for capital lease payments. Instead, current rules effectively allow qualified withdrawals to be made only for the purchase of a vessel. This practice needlessly limits the ability of vessel operators to make the most effective financial decisions when considering acquiring U.S. built vessels.

The flexibility to allow funds in a CCF to be used for capital lease payments could facilitate some vessel acquisitions that might not otherwise occur and, in turn, create jobs and other economic benefits. At a minimum, MARAD should provide an operator of U.S.-flag vessels the flexibility to use funds it has placed in its own CCF to pay for vessel acquisition by means of a

bareboat charter in the nature of a capital lease as well as by means of a purchase with an attendant mortgage.

Permitting this more modern, flexible approach to acquisitions supported through CCF payments involves no new appropriations, just an alternative approach to how those desiring to build ships in United States shipyards can use their own funds in a CCF. MARAD can make this modernizing adjustment administratively and should be eager to provide this increased flexibility to U.S.-flag operators.

The Subcommittee's encouragement to MARAD to allow this flexibility would be a welcome step supporting job creation.

For the benefit of the Subcommittee, we (Horizon Lines) explain below that statutory analysis, legislative history, job creation, and commercial practice all support a determination that CCF participants should be permitted to make qualified withdrawals from CCFs to make capital lease payments on vessels.

Shipbuilding, Jobs, and Additional Benefits

Construction of a large oceangoing vessel can create 300 or more direct full time jobs for 1-2 years plus up to 4 times as many indirect jobs, including in supplier industries. The construction of new vessels provides significant benefits in addition to the direct and indirect jobs associated with vessel construction. After construction important jobs are created for U.S. citizens on board vessels. Further, new vessels are generally environmentally superior to older vessels. Ship construction helps maintain the nation's industrial base, including but not limited to the defense industrial base. The U.S. citizen crew is a defense as well as an economic asset for the nation.

Accordingly, policymakers should aggressively pursue all reasonable opportunities to facilitate shipbuilding in U.S. shipyards, including through enabling CCF participants to make qualified withdrawals from CCFs to make capital lease payments on vessels.

Overview of the Regulatory Burden

The Merchant Marine Act, 1936, as modified by the Merchant Marine Act, 1970, established the CCF program, under which owners or operators of vessels are permitted to establish tax-deferred CCFs to be used in the "acquisition" or construction of new vessels.[1] The statutory provisions set forth, among other things, conditions regarding transactions that may be financed through a CCF and the tax consequences of contributions to, and withdrawals from, CCFs. In the Tax Reform Act of 1986, Congress added section 7518 to the Internal Revenue Code "to coordinate the application of the Internal Revenue Code of 1986 with the capital construction program under the Merchant Marine Act."[2]

Traditionally, vessel owners and operators have used CCFs in connection with *purchases* of vessels – i.e., for the acquisition of *title* to vessels. However, nothing in the statutory provisions in either the Merchant Marine Act, as amended, or the Internal Revenue Code limits the reach of

[1] 46 U.S.C. §§ 53501-53517.

[2] § 261(a), Pub. L. No. 99-514. The language in section 7518 of the Internal Revenue Code tracks that of its counterpart in the Merchant Marine Act, as amended, with minor wording variations. For simplicity, this statement will refer only to the provisions in the Merchant Marine Act, as amended.

the program to "purchases"; neither the term "purchase" nor the term "title" appears in the language. Rather, the operative term in the statutory provisions is "acquisition." That term is best construed, in context, to apply to the lease of vessels, as well as to the purchase of vessels, where the lease is in the nature of an acquisition, as in a capital lease.

First, the statutory provisions explicitly authorize lessees of vessels to establish CCFs; it seems incongruous for MARAD not to authorize lessees and other vessel operators to make withdrawals from CCFs for the purpose of leasing vessels. Second, the application of the CCF program to the acquisition of vessels by lease is strongly supported by the legislative history of the program.

Finally, in today's economy, leasing is very widely utilized. A very recent report on leading containership operators found that 53% of their capacity, and nearly 60% of their container vessels, are leased and not owned.[3] Clearly, the marketplace finds leasing to be an effective and efficient means of financing the acquisition of vessels.

In short, action by MARAD authorizing the use of CCFs for the acquisition of vessels by lease would be consistent with the statutory language and legislative history of the program and with current marketplace practices. Action enabling CCF funds to be used for capital lease payments could have the effect of spurring the construction of new ships in the United States and creating or preserving thousands of jobs.

Over two decades ago, MARAD considered whether to authorize withdrawals from CCFs for the lease of vessels and did not. Whether MARAD's decision at that time was wise or not, given the developments in the marketplace since that time, and given the urgent need for jobs today, the agency should give the issue a fresh look and allow CCF funds to be used for capital lease payments. The statutory language and legislative history clearly indicate that the decision to permit the use of CCF funds for capital lease payments for vessels is within the scope of the agency's authority.

Statutory analysis

The Merchant Marine Act, 1936, as amended, provides that a United States citizen entity "*owning or leasing* an eligible vessel may make an agreement with the Secretary under this chapter to establish a capital construction fund for the vessel" (emphasis added).[4] The Act then provides, in the next subsection, that the purpose of the agreement "shall be to provide *replacement* vessels, additional vessels, or reconstructed vessels" (emphasis added).[5] It seems quite straightforward that a "replacement" for a leased vessel could be a leased vessel. The Act also includes provisions for coordinating CCF contributions between lessees and owners with respect to the same vessel.[6] In brief, the Merchant Marine Act fully and explicitly anticipates the participation of lessees in the CCF program.

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[3] *Alphaliner's Top 50 Global Container Fleet Operators*, reprinted in Journal of Commerce (March 28, 2011) at 37.
[4] 46 U.S.C. § 53503(a).
[5] 46 U.S.C. § 53503(b).
[6] 46 U.S.C. § 53505. Among other amounts, a lessee is permitted to contribute an amount equal to the tax depreciation on the agreement vessel. However, that amount is reduced by the amount of depreciation which the agreement requires or permits the owner to contribute.

The Act authorizes CCF participants to make "qualified withdrawals" from CCFs for the "acquisition," construction, or reconstruction of vessels or for the payment of principal of indebtedness incurred in such acquisition, construction, or reconstruction.[7] This provision does not specify the manner in which the CCF participant must acquire the vessels. The provision does not require the acquisition of title; nor does it require the vessel to be purchased.

In both ordinary parlance and in tax law, the term "acquisition" is far broader than the term "purchase." For example, the standard dictionary definition of the verb "to acquire" is to "gain possession of."[8] The term is not a synonym for "purchase;" one can gain the possession of property by purchase, by lease, or by a number of other methods. Similarly, in the Internal Revenue Code, the term "acquisition" is used in dozens or hundreds of places as a catch-all.[9] By contrast, the Internal Revenue Code uses the term "purchase" -- again in many places -- to refer specifically to the narrower transaction where ownership is transferred for value between unrelated persons.[10]

The difference in reach of the terms "acquisition" and "purchase" for tax purposes is illustrated clearly by section 1.263(a)-4(c) of the Treasury Regulations. That provision requires taxpayers to capitalize the cost of acquiring certain acquired intangible assets, but only if the assets are "acquired from another party in a purchase or similar transaction." In other words, it is not enough that the taxpayer obtain possession of the intangible assets -- through a lease or loan of the assets, for example; rather, the taxpayer must have purchased those assets. The provision demonstrates that the term "acquisition" can sweep in a broad array of transactions through which the possession of assets can change.[11] The distinction is similarly illustrated in section 45L(b)(4) of the Internal Revenue Code, which clarifies that, for purposes of the new energy efficient home credit, "the term 'acquire' includes purchase." In other words, the drafters understood that a taxpayer could acquire a home in a variety of ways -- one of which was through a purchase.

In title 46 as well, Congress has sometimes chosen to refer to a "purchase" rather than to an "acquisition", further demonstrating that the terms are not synonymous. See 46 U.S.C. section 53706.

In short, the term "acquisition" can sensibly read to be far broader than the acquisition of ownership or a standard purchase. Given the explicit statutory authorization for the establishment of CCFs by lessees, and given that the statute explicitly states that one of its purposes is to "provide replacement vessels" for eligible entities owning or leasing eligible vessels, and in light of the legislative history discussed below, MARAD would be taking an obvious and short step in reaching the conclusion that the statutory language is sufficiently broad to permit withdrawals from CCFs for capital lease payments, as well as for purchases.

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[7] 46 U.S.C. § 53509.

[8] See, e.g., The American Heritage Dictionary of the English Language (1975). See also, Black's Law Dictionary (1996) (defines "acquisition" as "[t]he act of gaining possession or control of something").

[9] See, e.g., 26 U.S.C. § 42(e)(2)(B); 26 U.S.C. § 47(c)(2)(B)(ii).

[10] 26 U.S.C. § 36(a); 26 U.S.C. § 45L(b)(4) (clarifies that the term "acquire" includes purchase).

[11] Other examples of the distinction are found in the wash sale rules of section 1091, the small business expensing rules of section 179, and the accelerated cost recovery rules for cellulosic biofuels plant property and recycling property of section 168.

There appears to be nothing in the statute to preclude interpretation of the term "acquisition" in the CCF context as including acquisition through capital lease. In fact, the opposite conclusion would appear to frustrate the intent of the legislation. Additionally, as recited above, the Merchant Marine Act permits withdrawals from CCFs for the purpose of paying off indebtedness incurred in the acquisition of vessels. It is hard to imagine that Congress would have intended for debt payments (i.e., mortgage payments) to qualify but not lease payments. In the modern commercial world, there is simply little difference between the two payments; leases are a method of finance, as are loans. If loan payments are permissible, lease payments should be permissible as well.

Legislative History

The legislative history makes it even clearer that the drafters of the CCF program fully intended to permit CCF participants to make qualified withdrawals for the lease of vessels. As described above, the tax provisions for the CCF program were re-codified in the Internal Revenue Code in the Tax Reform Act of 1986. The General Explanation of the Tax Reform Act of 1986, prepared by the staff of the Joint Committee on Taxation, describes Congressional intent as follows:

> *"... the phrase 'acquisition, construction, or reconstruction of a 'qualified vessel' is to be interpreted as including acquisition through either purchase or lease of an agreement vessel for a period of five years or more. This interpretation parallels the structure of: (1) the scope of eligibility to establish a capital construction fund under section 607(a) of the Merchant Marine Act, 1936 (which permits deposits into a CCF fund by either an owner/lessor or the lessee of an eligible vessel, of both, subject to certain limitations), and (2) the scope of qualified withdrawals for vessel acquisitions through either purchase (in the form of a down payment toward the purchase price) or payment of long-term indebtedness on an agreement vessel. This interpretation is also consistent with current industry acquisition practices reflecting a long-term trend toward vessel acquisition through lease rather than purchase."* [12]

The foregoing language originated in the following statement in the report of the House Ways and Means Committee on the 1986 act:

> *"For purposes of the definition of the term 'qualified withdrawals,' under new section 7518(e) (sec. 607(f) of the Merchant Marine Act, 1936), the committee intends the phrase, 'acquisition, construction, or reconstruction of a qualified vessel' to be interpreted as including acquisition through either purchase or lease of an agreement vessel for a period of five years or more."* [13]

As importantly, when the Congress revised the Capital Construction Fund provision in the Merchant Marine Act, 1970, the committees of jurisdiction clearly provided for flexibility as to

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[12] STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 (Comm. Print 1987).

[13] H. REP. NO. 99-426 (1986) (Committee on Ways and Means). The Conference Committee on the 1986 legislation adopted the Ways and Means approach.

the form of a vessel acquisition with CCF funds. The report of the Senate Committee on Commerce accompanying the 1970 legislation stated:

> *"Your committee expects that care will be taken to permit use of legitimate financing techniques to further the purposes of the capital construction funds maintained under this section. For example, the term 'acquisition' should be interpreted in a broad sense to include legitimate financing techniques that are the substantial equivalents of acquisitions in terms of furthering the purposes of this section."* [14]

In that same year, the report of the House Committee on Merchant Marine and Fisheries accompanying the legislation stated:

> *"Your committee expects that care will be taken to permit use of legitimate financing techniques to further the purposes of the capital construction funds maintained under this section."* [15]

In sum, the legislative history from both 1970 and 1986 reflects a general Congressional intent that the term "acquisition" be construed broadly to include leases, in accordance with the CCF program's goal of promoting vessel construction in the United States.

The Essential Change Needed is Straightforward

The fundamental action that should be taken is for MARAD to advise the industry that, under current statutes, it will allow capital lease payments as a qualified withdrawal from a CCF. As explained above, that is warranted by analysis of the statute, the legislative history, the purpose of the CCF program (to facilitate shipbuilding in the United States), and the widespread use of leasing in the marketplace.

MARAD is vested with the authority to prescribe regulations to carry out the CCF program. 46 U.S.C. section 53502(a). MARAD does share regulatory authority with Treasury "for the determination of tax liability" under the program, which is appropriate. See 46 U.S.C. section 53502(b). But MARAD has the authority and opportunity to provide that capital lease payments are an eligible use of CCF funds. Current regulations require that a qualified withdrawal be one for costs that are capitalized under the tax code.[16] MARAD could simply combine continuing that requirement with a simple implementing action providing that acquisition can be by means of lease (and also providing for coordination with the lessor with respect to required tax basis reduction for CCF withdrawals). That would establish a basic framework allowing capital lease payments to be made from a CCF.[17]

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[14] S. REP. NO. 91-469 (1970) (Committee on Commerce), reprinted in Pike and Fischer, Shipping Regulation at 52:640.

[15] H. REP. NO. 91-1073 (Committee on Merchant Marine and Fisheries) at 53 (1970).

[16] 46 CFR § 390.9(c)(1).

[17] Certainly there could be other approaches, but we do not advocate any that are inconsistent with the basic concept of capital leasing and its treatment under current tax law. The basic point is that MARAD, as the "gatekeeper" for what is allowed in CCF agreements, can and should allow CCF funds to be used for capital lease payments. From there, basic tax law concepts regarding capital leasing would be applied, though within the CCF context.

Conclusion – CCF Leasing

The Subcommittee should encourage MARAD to promptly exercise the authority it has to determine that capital lease payments can be made from a CCF. This more flexible approach would modernize the CCF program and help ensure its continued relevance in an era that features extensive use of leasing.

II. Revise Title XI Loan Guarantee Program Rules to Ensure That MARAD Can At Least Consider Applications from Well-Established Vessel Operators

Horizon Lines also takes this opportunity to advise the Subcommittee that improvements in MARAD's loan guarantee program would remove regulatory barriers and facilitate job creation. MARAD should revise its rules regarding vessel guarantees, 46 CFR 298, to provide itself the flexibility to consider certain worthy applications that are effectively precluded by rule today. Specifically, under 46 CFR 298.13(f)(1)(ii) MARAD requires an applicant to have long term debt no greater than twice its equity. Under 46 CFR 298.13(i) MARAD may waive this requirement if there is "adequate security". This approach appears to preclude even consideration of applications backed by a sound business plan because of an artificial debt-equity ratio written into the rule. Entities with debt equity ratios above 2-1 may not have specific assets to post as security that are not already pledged as security, rendering moot the apparent exception in 46 CFR 298.13(i).[18]

The Subcommittee should encourage MARAD to modify its rules to make clear that it has the flexibility to consider applications from freight operators with an established record of revenue generation, without being restricted by its current inflexible rules.[19]

We emphasize that nothing in this proposal would require MARAD to grant any particular application. MARAD would still be required to make an "economic soundness" finding. A change(s) such as discussed here, however, would remove apparent impediments to MARAD's even considering the merits and economic soundness of certain applications that it could well find meritorious.

In an effort to provide a path that would provide clarity while staying true to that approach, Horizon Lines has advanced some specifics that it believes consistent with that approach, though we are flexible and open to others. Thus, the effecting action could establish that an "acquisition" –

> includes a lease of a vessel by means of bareboat charter if the Secretary determines that the lease period is for at least 10 years or for the remaining useful life of the vessel, whichever is less.

The 10 year test would provide the benefit of a bright line (at least in some cases), to facilitate planning by vessel operators, and is based on a vessel's depreciable life. (Instructions, IRS Form 4562, list a vessel newly placed in service as 10 year property for depreciation.) This is a more conservative approach even than the 5 year lease concept set forth in the 1986 legislative history.

[18] We are not aware that MARAD would consider a revenue or income pledge, as opposed to a specific physical asset, to be a security under the rule.

[19] Under 46 U.S.C. § 53707(d), in administering the title XI program, MARAD can establish exceptions or waivers to otherwise applicable requirements regarding financial condition so long as there is no waiver of the requirement that an application be economically sound and if the waiver or exception provides for imposition of other requirements designed to compensate for increased risk associated with an applicant's not meeting the otherwise applicable requirements. We submit that the requirement of an established record of revenue generation, combined with continuation of economic soundness requirements, can meet the tests in 46 U.S.C. § 53707(d).

Conclusion – Title XI

Action to effectively provide in 46 CFR 298 the additional flexibility suggested here could well result in shipbuilding activity that would generate numerous jobs in direct construction, indirect jobs and, after completion of construction, shipboard jobs. Requirements under MARAD's loan guarantee program should be modified to ensure that MARAD can at least consider applications from freight operators with an established record of revenue generation, even if those applicants do not meet the rigid debt-equity tests and waiver provisions in current rules. Creating this flexibility will give MARAD the opportunity, consistent with economic soundness, to consider and, where appropriate, approve, additional shipbuilding projects, with all the jobs and economic and environmental benefits that would follow. The Subcommittee should encourage MARAD to make these administrative changes.

Conclusion

Horizon Lines thanks the Subcommittee for its consideration and welcomes its support in achieving elimination of the regulatory barriers to job creation that we have described in this statement.

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Mr. LANDRY [continuing]. Before I thank you again, you know, I want to thank the witnesses for their testimony and the Members for their participation. As you can see, look, I am a big proponent of the Coast Guard. I think you guys do a wonderful job. I think you all can do a little bit better of a job and lead here in Washington and show other agencies how we can get rid of some of these unnecessary regulations.

And so with that, this subcommittee will stand adjourned.

[Whereupon, at 10:50 a.m., the subcommittee was adjourned.]

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United States Coast Guard

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TESTIMONY OF
RADM KEVIN S. COOK
DIRECTOR OF PREVENTION POLICY
AND
MR. CALVIN M. LEDERER,
DEPUTY JUDGE ADVOCATE GENERAL

ON THE
COAST GUARD REGULATORY PROGRAM

BEFORE THE
HOUSE COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD & MARITIME TRANSPORTATION

MAY 24, 2011

Introduction

Good morning Mr. Chairman and distinguished members of the subcommittee. It is our pleasure to be here today to discuss the Coast Guard's regulatory program.

Beginning with the establishment of the Steamboat Inspection Service, the Coast Guard has been publishing regulations for more than 150 years, with a proven track record of managing maritime risk in a cost-effective manner. Building on these successes, the Coast Guard has been modernizing its approach to regulatory development by increasing its workforce and process transparency, streamlining processes, and scrutinizing all regulatory actions to ensure the maritime industry operates in a safe, secure, and environmentally sound manner while promoting maritime commerce. The Coast Guard's Regulatory Development Program (RDP) has continued its success, earning dividends from program enhancements and a reinvigorated focus on the impacts of regulations allowing for increased emphasis on the requirements set forth in the Coast Guard Authorization Act of 2010 (CGAA2010).

Overview of Coast Guard Regulatory Program

The Coast Guard's RDP manages the publication of regulatory actions covering the spectrum of maritime safety, security, and stewardship issues. Consistent with the nature of the Service's broad maritime missions, the Coast Guard's regulatory actions typically span more than one issue or benefit area. For instance, a rule associated with vessel position and movement reporting promotes safety and security through enhanced awareness within the maritime community, reducing the potential for vessel mishaps and increasing awareness of traffic and potential terrorist targets. In addition, this reduction in vessel mishaps also reduces the likelihood of damage to our natural resources from a vessel casualty. As such, Coast Guard regulatory actions and corresponding resource investments result in multiple benefits across the spectrum of the Coast Guard's maritime mission.

At a high level, the regulatory development process can be viewed in four parts as shown in Figure 1: policy development; rulemaking documentation development; internal and external review; and publication.

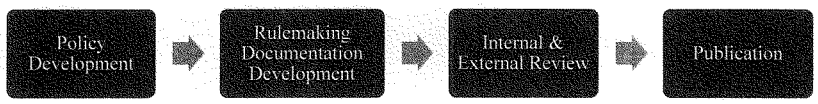

Figure 1: Rulemaking Process

The first phase, policy development, accounts for the bulk of time spent on regulatory development and can take multiple years depending on the complexity of the issues involved. During this phase, the Coast Guard draws upon internal and external expertise, research, interaction with stakeholders and other tools to ensure that (1) there is a full understanding of the issue to be addressed, and (2) various options for addressing the subject of rulemaking are considered so that the right decision can be made.

Once a policy is developed and approved, the process for developing the rulemaking documentation should take seven to nine months, again, depending upon the complexity of the issue/solution. During this time, assessments of cost, benefit, small business, environmental and other impacts are refined, and rulemaking documentation prepared. Proposed rules are then subjected to review by subject matter experts and leadership, as depicted in Figure 2, including review by the cognizant Coast Guard Director and a departmental review at the Department of Homeland Security (DHS). While this process incurs a significant investment of time and resources, this review process ensures that the right policy decisions have been made during the Policy Development stage.

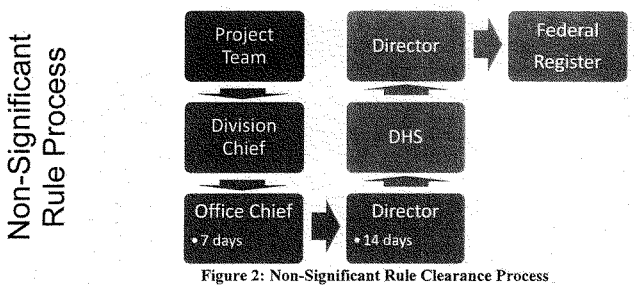

Figure 2: Non-Significant Rule Clearance Process

This review process is expanded for rules classified as "significant" per Executive Order 12866. As shown in Figure 3, the reviews within the Coast Guard are broadened for such rules to include an additional review by the Marine Safety and Security Council (MSSC), additional review within DHS, and review at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). These additional senior-level reviews further ensure the Coast Guard is meeting mission goals while avoiding excessive costs to the industry, unnecessary adverse impact on maritime commerce, or actions inconsistent with policies of other federal agencies.

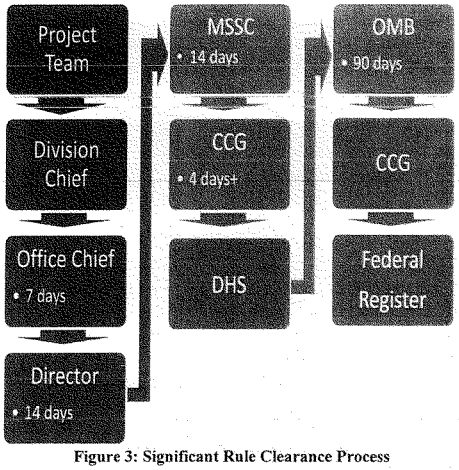

Figure 3: Significant Rule Clearance Process

The Coast Guard's RDP is comprised of two core offices: the Office of Regulations and Administrative Law (CG-094) and the Office of Standards Evaluation and Development (CG-523). Together, the two offices dedicate 16 attorneys, one paralegal, 23 economists, four environmental analysts, 15 technical writers, 21 project managers, and two overall managers, for a total of 82 full-time personnel to the RDP.

The staff dedicated to rulemaking development is complemented by members from across Coast Guard headquarters who serve as subject matter experts on rulemaking project teams. They are responsible for the wide range of commercial maritime sector safety, security, and environmental protection programs assigned to the Coast Guard. In addition to developing new regulations when needed, they also develop enforcement policy, industry guidance, and Coast Guard field office guidance.

In addition to dedicating significant resources to the RDP, the Coast Guard initiated major reforms to processes, training, and other capabilities, including the Rulemaking Review and Reform Project (2009). This initial reform effort has been followed by a continuous series of improvements, focusing on refining and streamlining processes, developing performance measurement systems, and adopting more current information technology and project management capabilities. Coast Guard regulatory development is guided by the Mission Management System, an International Standards Organization (ISO) 9000-compliant program used to document, standardize, and streamline our rulemaking processes. Further investments in advanced project management training, commercial project management software and increased performance measurement will allow for enhanced tracking of projects and resources, driving further efficiencies.

The Coast Guard is beginning to see the results of the increased staffing, funding, training, and process streamlining and improvement. Figure 4 shows the increase in Final Rules published since the resources were added and reforms were enacted. As shown, the Coast Guard published 12 Final Rules in FY 2010 and eight so far in FY 2011, with another six to eight projected by the remainder of the fiscal year.

Additionally, the Coast Guard publishes approximately 20-30 rulemaking proposals (Notice of Proposed Rulemaking- NPRM, Advance NPRM, and Supplemental NPRM) per year, with progress made on more than 50 of the currently active regulatory projects in the past year. Furthermore, the average age of rules under development is currently 5.3 years, a decrease from 6.2 years at the end of FY 2009. The Coast Guard anticipates further reductions by prioritizing completing older rulemaking projects and eliminating the existing regulatory backlog.

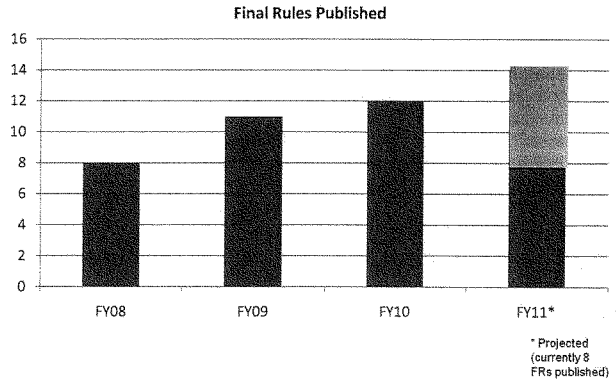

Figure 4: Final Rules Published

Overall, active projects were reduced by 35 percent over the course of FY 2010. This reduction, however, was offset by increases in the regulatory workload resultant from the passage of CGAA2010 and additional regulations proposed by Coast Guard programs, which together increased the current active project list by 38 percent thus far in FY 2011. Of the requirements identified in CGAA2010 that will require regulations, 26 percent have been determined to be self-executing, with another 33 percent calling for regulations that can be incorporated into existing projects, and the remainder requiring new rulemaking projects in order to be implemented. All of these projects are underway, cognizant of the deadlines specified by Congress in certain provisions. With the addition of the regulations required by CGAA2010, 46 percent of the Coast Guard's current rulemaking workload is legislatively mandated, 52 percent is originated by Coast Guard programs, and the remainder are required to ensure compliance with international treaties and standards.

In addition to working on traditional rulemaking projects, the Coast Guard is also working with DHS to implement the requirements of Executive Order 13563 ("Improving Regulation and Regulatory Review" January 18, 2011). The Coast Guard is incorporating the enhanced requirements of the Executive Order into its economic analyses. In addition, the Coast Guard is assisting in the development of the DHS-wide Preliminary Plan for the retrospective review of existing DHS regulations. The Preliminary Plan will identify how DHS will review its existing significant regulations "to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." For the Coast Guard, this has included the identification of Coast Guard rules for retrospective review as well as the review of comments posed by the public on regulations believed to be outdated, outmoded, or unnecessarily burdensome.

Reinvigorating Focus on Impacts of Regulations

In an effort to balance maritime safety, security, and stewardship while promoting commerce, the Coast Guard continues to focus on the practical impacts of each regulation. This focus is guided by Executive Order 13563, and includes a blend of international and domestic regulations and industry consensus standards, while simultaneously expanding flexibility. Additionally, the Coast Guard encourages strong stakeholder engagement and public participation throughout the regulatory process. Each of these is discussed further below.

- Presidential Executive Order 13563: While always a focus for Coast Guard rulemaking, the agency is adding further attention to the cumulative impacts of regulations, increasing formality of retrospective analyses, and renewing emphasis on small business impact for all regulatory actions as directed by Administration guidance. One illustrative example of such efforts is the recent update of requirements for personal flotation devices, which provided manufacturers greater flexibility in meeting Coast Guard safety objectives by incorporating new industry standards and best practices.

- Blend of International, Industry Consensus Standards and Domestic Regulations: OMB Circular A-119 establishes policies on federal use and development of voluntary consensus standards and conformity assessment activities. The Coast Guard effectively uses the blending of standards and regulations as a means to achieve desired compliance at a reduced cost and burden to the maritime industry. In our current regulations, the Coast Guard has incorporated by reference 641 industry consensus standards into 1,321 sections with greater than 52 percent of the technical sections in 33 and 46 CFR incorporating at least one standard by reference. This focus on incorporating existing international and industry consensus standards ensures the continuing efforts and achievements of the private sector in establishing standards utilized by the federal government. The use of such standards in federal regulations ensures effectiveness and promotes interoperability.

- Expansion of Flexibility: The Coast Guard uses a variety of mechanisms to provide flexibility for businesses to stylize compliance and reduce costs. One primary method is in working with affected stakeholders to find the most cost-effective solutions to the challenges presented. Another is in providing a variety of options for meeting regulatory objectives, including use of performance (vice prescriptive) standards and incorporation of industry standards by reference. Furthermore, regulations are intentionally tailored to reduce the burden on small entities. Finally, the Coast Guard emphasizes, when possible, the use of voluntary compliance alternatives such as the Alternate Compliance Program, which is administered through surveys and inspections conducted by authorized classification society surveyors, and the Streamlined Inspection Program where vessel owner/operators take an active role in examining their own vessels, documenting their findings, and taking corrective actions.

- Stakeholder Engagement and Public Participation: The Coast Guard embraces stakeholder input and public participation in the development of all regulatory actions. In addition to working alongside stakeholders in many standards committees as described previously, the Coast Guard further embraces engagement through many formal and informal meetings, the use of federal advisory committees, and attendance at industry and public interest group meetings ranging from the national and international level down to the local waterfront. The Coast Guard further maximizes access to information on regulatory actions through public meetings and public comment periods. Such engagement is critical to our understanding of current issues and challenges, and to our subsequent ability to execute our responsibilities for ensuring safety, security, and stewardship.

Conclusion

Providing an interactive and quality regulatory framework for safety, security, and stewardship for the maritime industry is a primary goal of the Coast Guard's Regulatory Development Program. The Coast Guard understands the importance and value of developing and implementing regulations that target a particular area of need while balancing economic, environmental and other concerns. This is a greater challenge in tough economic times, but the Coast Guard's strong partnerships with the maritime industry ensures that regulatory actions are in the best possible interest of all affected parties.

The Coast Guard is committed to meeting the requirements set forth in the Coast Guard Authorization Act of 2010, reducing the current regulatory backlog of older regulatory projects, balancing our program enhancements, and continuing to focus on the impacts of regulations.

Thank you for your continued support and the opportunity to testify before you today. We will be happy to answer any questions you may have.

Coast Guard Rulemaking Actions Related to Outstanding Statutory Requirements (by Age)

Rule	Age	Last Completed Phase/Date	Current Phase	Deadline	Summary
Discharge Removal Equip	21	IR 12/93	NOI	None	• Interim rule in effect since 1993
State Access to the Oil Spill Liability Trust Fund	21	IR 11/92	SNPRM	None	• Interim rule in effect since 1992
Claims Procedures under the Oil Pollution Act of 1990	21	IR 8/92	NOI	None	• Interim rule in effect since 1992
Haz Sub TVRP	14	NPRM 3/99	FR	CGAA 2010 FR 15April2012	• Reopened comment period 2/17/11-5/18/11 • On path to meet April 2012 deadline
Undoc Barges	14	NPRM 1/01	SNPRM	None	• Working with stakeholders to refine rulemaking
OSRV Regulations	14		NPRM	None	• Developing policy and regulatory documents leveraging insights from Deepwater Horizon spill experience.
Haz Sub FRP	13	NPRM 3/00	FR	CGAA 2010 FR 15April2012	• Reopened comment period 2/17/11-5/18/11 • On path to meet April 2012 deadline
MARPOL Annex VI	7	N/A	NPRM	Maritime Pollution Prevention Act of 2008 FR January 2011	• The Coast Guard issued a Final Rule in 2004 authorizing Coast Guard-approved classification societies to issue certificates. • EPA and Coast Guard are each developing follow-on regulations.
Inspection of Towing Vsls	7	Work Plan 3/06	NPRM	CGAA 2010 NPRM January 2011 FR October 2011	• NPRM under review by OMB/OIRA since 1 April
NTVRP	7	NPRM 8/09	FR	CGAA 2010 FR 15 April 2012	• On a path to meet April 2012 deadline
MTSA 2	7	Work Plan 1/09	NPRM	None	• Rulemaking under development, intend 2011 publication
TWIC Card Reader	5	ANPRM 3/09	NPRM	SAFE Port Act 2006 FR August 2010	• TSA Pilot Program report being concluded. • USCG rulemaking to follow using pilot program findings
Cruise Vessel Safety and Security	1	N/A	NPRM	None	• Under development. Request for public comments pending Federal Register publication.
2012 GLP Rates Annual Review	1	N/A	NPRM	Great Lakes Pilotage Act of 1960 1 March 2012	• On a path to meet March 2012 deadline