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

Commander
Eighth Coast Guard District
Hale Boggs Federal Bldg.

500 Poydras Street
New Orleans, LA 70130-3310
Staff Symbol: (dpi)
Phone: (504) 671-2165
Fax: (504) 671-2269
Email: Kevin.L.Maehler@uscg.mil

16703 / Work Site Exclusion
D8(dpi) Policy Ltr 03-2011

MAR 12 2012

MEMORANDUM

From: J. SCOTT PARADIS
CGD8(dp)

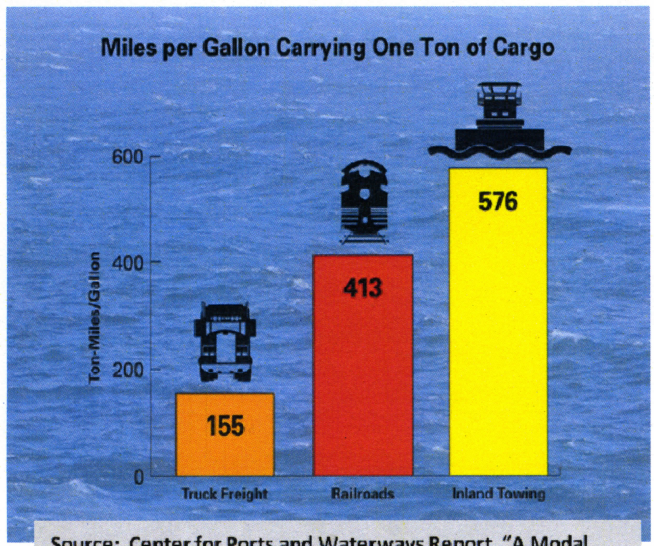
Reply to Attn of: Mr. Kevin Maehler
Ext. 2165

To: Distribution

Subj: INTERIM GUIDANCE FOR MANAGING WORK SITE EXCLUSIONS AND WORK BOATS [1]

Ref: (a) MSM 3/26/2/a/2/a [2]

1. HISTORY AND BACKGROUND.



Source: Center for Ports and Waterways Report "A Modal Comparison of Domestic Freight Transportation Effects on the General Public" of December 2007

The U.S. economic boom following WWII resulted in an extraordinary need for cost effective transportation of bulk raw materials. In order to take full benefit of this opportunity, the inland towing industry abandoned their pre-war reliance upon steam propulsion in favor of the business advantage of diesel motor propulsion [3]. This advantage rested upon the cheaper mile-for-mile operating cost of a diesel motor, and the absence of personnel licensing and vessel inspection requirements – then only applied to steam driven inland towing vessels. It was not until 1972, and the enactment of Public Law 92-39, that Congress had the Coast Guard start mandatory licensing for the operators (nowadays, "Masters") of diesel driven inland towing vessels. Surprisingly, per the Senate Conference Report (see enclosed) accompanying Public Law 92-39,

[1] On August 11, 2011 the Coast Guard published the NPRM "Inspection of Towing Vessels" (76 FR 49976). The NRPM deals peripherally with work sites and work boats and postpones making regulations for them (see NPRM at pg 49979, Section IV/B). The interim guidance in this D8 Policy Letter will be amended or withdrawn when work site or work boat regulations come about.

[2] Sic. At this point in its text, MSM Vol. 3 contains a sequence numbering error. The correct paragraph number is "3/26/2/c".

[3] Commandant U.S. Coast Guard (G-MMI), report entitled "Review of Marine Safety Issues Regarding Uninspected Towing Vessels" of 1 December 1993.

Congress also intended that some noncommercial (not-for-hire) towing by unlicensed masters be kept in place. Which towing tasks they meant to be preserved for unlicensed masters has been an enduring puzzle. The Conference Report clearly conveys that the Senate had in mind to preserve multiple "instances", but it does not explain these beyond mentioning the movement of dredging equipment and emergency assistance towing[4]:

> … "The licensing requirements will apply only to those vessels which are documented to perform commercial service as a towing vessel and will not apply to those vessels which are documented solely for other services or are not required to be documented. The vessels covered are those which perform towing services as a business and the bill does not cover vessels towing in an emergency or on an intermittent basis, not directly connected with the service for which the vessel may have been documented. Excluded from coverage would be, for instances, work boats which are used to move dredging equipment for short distances at the dredging site or vessels which would assist other vessels by undertaking to tow them in emergencies. As to size, only those towing vessels measuring 26 feet or more over the deck excluding sheer are covered under the bill." …

Now, nearly 40 years removed from P.L. 92-39, few realize that for the first quarter century after they came into vogue, diesel powered inland towing vessels could legally be captained by unlicensed Masters. Perhaps even more obscured by time is that the same Legislators which mandated that all inland towing vessel Masters become licensed, also intended that towing by *unlicensed masters* continue in some limited way. The post-P.L. 92-39 tradeoff for this allowance being — an unlicensed master was restricted to intermittent operation, for short distances, of a noncommercial (not-for-hire) towing vessel called a work boat. Towing under these restrictions is now known by the Coast Guard marine safety term of art, "work site exclusion" (WSE).

2. **DEFINITIONS:**

The following definitions apply to this interim guidance:

a. *Business* means "Employment; that which occupies the time, attention and labor … for the purpose of profit or improvement…"[5].

b. *Intermittent* means "Ceasing at intervals;…"[6].

c. *Not-for-hire* as it pertains to this interim guidance means, a towing vessel that a business uses for its own purposes, as opposed to that business offering towing services performed by the vessel as a means of profit making [cf. "commercial

[4] The Senate Conference Report's vagueness undoubtedly intended a family of towing tasks be acceptable to be performed by unlicensed Masters, where that family of tasks was characterized by being: noncommercial (not-for-hire), performed only on an intermittent basis, and only for short distances within a work site.
[5] Webster's American Dictionary of the English Language (1828 Edition), <http://1828.mshaffer.com/d/search/word,business> (Web accessed 28 July 2011)
[6] Ibid.

service" at 46 USC 2010 (5)]. A not-for-hire towing vessel is a noncommercial towing vessel.

d. *Protected Waters*[7] means sheltered waters presenting no special hazards such as most small rivers, harbors, lakes, etc.

e. *Sailing line* means a track line that a down bound vessel would follow considering the prevailing river conditions[8]; or if other than a river environment, the navigational channel or fairway.

f. *Short distances* means within the confines of a work site.

g. *Towing vessel*[9] means a commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling along side, or any combination of pulling, pushing, or hauling along side.

h. *Work boat*[10] means a vessel that pushes, pulls, or hauls alongside equipment including dredging, construction, maintenance, or repair equipment within a work site . (For the purpose of this interim guidance: A work boat is a not-for-hire towing vessel.)

i. *Work site*[11] means an area specified by the cognizant Officer in Charge, Marine Inspection (OCMI) within which workboats are operated over short distances for dredging, construction, maintenance, or repair work and may include shipyards, owner's yards, or lay-down areas used by marine construction projects. (For the purpose of this interim guidance: Since Congress chose the

Top –Bridge construction activity is eligible for a work site exclusion.

Bottom – *Arable island in Ohio River served by a work boat and covered by a work site exclusion (broad white line is route).*

[7] 46 CFR 170.050
[8] U.S. Army Corps of Engineers, "Mississippi River Navigation Book."< http://www.mvd.usace.army.mil/navbook/book/Legend.pdf> and page 2 of <http://www.mvd.usace.army.mil/navbook/book/Map%20Symbols.pdf > (Web accessed 18 November 2010)
[9] NPRM "Inspection of Towing Vessels" of August 11, 2011 (76 FR 49976), § 136.110
[10] Ibid.
[11] Ibid.

term "short distances" to describe the route allowed the unlicensed master of a work boat, we believe a work site should be the smallest area or shortest route practicable considering the work to be done. Further, since an unlicensed master of a work boat may not have formally demonstrated (via written or verbal testing) a sufficient knowledge of the Rules of the Road and seamanship to the Coast Guard, we believe the work site accessible for navigation by that master should be confined to protected waters, and should be well clear of the sailing line available to marine traffic — excepting such work like dredging or construction occurring in, upon, or near the sailing line. In summary then, a work site should normally be just that — a site — generally no larger than a few tenths of a mile in width and length. However, when the OCMI/COTP thinks it justified, the worksite may be expanded to encompass a short route. Examples where a short route may be reasonable include construction or repair of a bridge that itself is miles-long, or when issues such as land form or right-of-way considerations require that a farm ferry[12] be docked remotely from the arable island or other land it serves. Conversely, an unreasonably long work site route would be one that allows travel for mile upon mile along a navigable waterway, or the entirety of a river, large harbor, large lake, etc.[13])

j. *Work Site Exclusion (WSE)* means the use of an unlicensed master to operate a work boat of 26 feet and greater in length[14], when that work boat intermittently performs not-for-hire towing for short distances within a work site.

3. **CURRENT SITUATION.**

Farm ferry and barge operated under a Work Site Exclusion on the Ohio River.

Currently, we do not know how many work boats are using WSEs within D8. This is because there is no requirement to notify the Coast Guard, or to gain Coast Guard approval, before operating a work boat. We are currently aware of total about a half-dozen WSEs, involving farm ferries or dredge operations. However, many more WSEs may exist given the extensive list of dredging and marine construction activity regularly appearing in the D8 Notice to Mariners.

Forming interim guidelines for present day use of the work site exclusion is anything but straightforward. First, neither the Senate Conference Report nor extant Marine Safety Manual guidance define the key terms involved such as "work boats", "short distances" or job "site", and neither document clearly speaks to

[12] Farm ferries (see picture) are workboats so nicknamed because they tow small barges that transport farming implements, farm hands, and crops to and from arable islands in the Western Rivers.
[13] The vessel owner shall be encouraged to consult with the OCMI/COTP before operating on a route. See enclosed sample CG business letter to vessel owner.
[14] 46 USC § 8904(a)

implementation. Further, we must contemplate, or at least recognize that, marine accident history and the current regulatory climate suggest only very modest operations by an unlicensed master of a work boat. Indeed, such things as the apparent involvement of an under-licensed employee in the MEL OLIVER casualty (July 2009) [15], the removal of the Mineral & Oil Exemption (October 2010)[16], and a Supplemental Notice of Proposed Rulemaking proposing to add a Utility license endorsement that would cover "marine repair, construction, and other utility type services" (August 2011)[17], heighten the need for D8 Officers in Charge Marine Inspection/Captains of the Port (OCMI/COTP) to gain awareness and exercise oversight of work site exclusions.

4. **DIRECTIVES AFFECTED:**

None.

5. **RELEVANT LAW, REGULATION, AND COMMANDANT GUIDANCE**.

a. While the Coast Guard has no formal regulations implementing it, the statute requiring licensed operators for towing vessels is clear:

46 U.S.C. § 8904(a) –

> *"A towing vessel that is at least 26 feet in length measured from end to end over the deck (excluding sheer), shall be operated by an individual licensed by the Secretary to operate that type of vessel in the particular geographic area, under prescribed regulations."*

b. Less clear is the exception in the supporting congressional conference report. The exception uses terms ("work boat", "short distances", etc.) that it does not further defined and, so we must assume, are to be taken for their plain language meaning:

S. REP. 92-926, S. Rep. No. 926, 92ND Cong., 2ND Sess. 1972 –

> …"*The vessels covered* [required to have licensed Masters] *are those which perform towing services as a business and the bill* [H.R. 6479] *does not cover vessels towing in an emergency or on an intermittent basis, not directly connected with the service for which the vessel may have been documented. Excluded from coverage would be, for instances, work boats which are used to move dredging equipment for*

[15] The United States Attorney's Office (Eastern District of Louisiana), press release entitled "Captain Sentenced for Leaving Operation of Tugboat with Unlicensed Pilot" of 13 April 2011.
[16] Commander Eighth Coast Guard District (dpi), Marine Safety Information Bulletin 02-10 entitled, "Removal of the Mineral and Oil Licensing Exemption Found in 46 USC 8905(b)" of 13 January 2011.
[17] On August 1, 2011 the Coast Guard published the SNPRM "Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to Domestic Endorsements" (76 FR 45908). The SNRPM proposes to add a Utility license endorsement (see SNPRM at pg 45912, Section VI/B/8). The interim guidance in this D8 Policy Letter will be amended or withdrawn when the Utility license endorsement regulations come about.

short distances at the dredging site or vessels which would assist other vessels by undertaking to tow them in emergencies."…

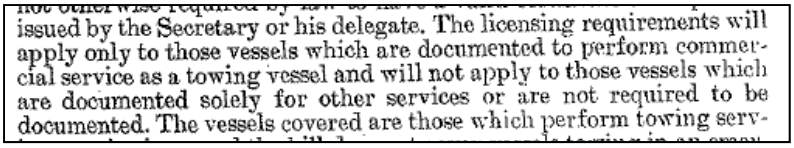
c. It is this less precise language that is present in the Marine Safety Manual policy:

MSM 3/26/2/a/2/a [sic] –

Operator Of Uninspected Towing Vessel (OUTV) Work Site Exclusion.

*"The statute addressing licensed operators for uninspected towing vessels, 46 U.S.C. 8904, requires a towing vessel that is at least 26 feet (7.9 meters) in length to be operated by a licensed individual. The U.S. Senate Committee on Commerce Report of June 27, 1972, however, described various situations in which the statute was not intended to apply. The following statement was included in the report: "The licensing requirement***s** *will apply only to those vessels which are documented* **to perform commercial service as a towing vessel and will not apply to those vessels which are documented**[18] *solely for other services or are not required to be documented. The vessels covered are those which perform towing services as a business and the bill does not cover vessels towing in an emergency or on an intermittent basis, not directly connected with the service for which the vessel may have been documented. Excluded from coverage would be, for instance, work boats which are used to move dredging equipment for short distances at the dredging site" (H.R. 92-125, 92nd Cong., 1st sess., 3.). The import of the legislative history comment was that workboats, at a work site, that may be called upon to move a piece of equipment a short distance at a work site, would not be required to be operated by licensed individuals. On the other hand, vessels engaged to perform towing services, however intermittently, would be required to be operated by licensed individuals. Towing vessels not specifically engaged in the commercial towing service, operating solely as work boats in dredging operations may be exempt from the manning requirements of 46 U.S.C. 8904. Each case shall be carefully scrutinized to determine whether the exemption applies. The Coast Guard, therefore, must consider the facts of a particular situation in making a determination as to the applicability of the statute."*

[18] At this point, MSM Vol 3 misquotes the portion of the General Statement of Senate Report No. 92-926 that lies at the heart of the WSE. The error includes a missing plural ("s") and 18 missing words, nearly reversing the meaning of the original. The missing plural and the 18 missing words are restored here and in bold, underlined text. We noted that this error may be reproduced by having one's eye inadvertently travel between the first and second occurrence of the word "documented" in the original document (see inset). This is almost certainly what happened to the copyist, and that which produced the misquotation error.


issued by the Secretary or his delegate. The licensing requirements will apply only to those vessels which are documented to perform commercial service as a towing vessel and will not apply to those vessels which are documented solely for other services or are not required to be documented. The vessels covered are those which perform towing serv-

6. **APPICABILITY:**

A work site exclusion whereby an unlicensed master may operate a work boat is appropriate in situations where the work boat:

a. is at least 26 feet in length, and

b. is operating within a work site on navigable waters of the U.S, and

c. is operating on protected waters (as defined earlier herein), and

d. is towing for short distances within a work site, and

e. performs not-for-hire towing on an intermittent basis within a work site[19], and

f. is not towing a vessel subject to inspection under 46 U.S.C. 3301[20].

6. **ACTION:**

As resources permit, D8 OCMI/COTPs shall for their zone:

a. regularly review the District 8 Local Notice To Mariners to find potential instances of WSE operations, and

b. acknowledge all WSEs in writing using the enclosed sample letter as a guide, and

c. annually re-examine the validity of each long term or recurring WSEs, and

d. as appropriate, included WSEs as a topic at Sector outreach events such as "Industry Day" meetings with the aim of educating attendees and finding WSE operations.

7. **RELIEF:**

This work site exclusion interim guidance replaces a less rigorous approach of several decades' standing, and may disallow some work boat operations that are currently known to the Coast Guard or that become known subsequent to the publishing of this interim guidance. As a result, the related business may face the need to devote significant time and expense to either obtain a tow vessel Master license for an employee, or find and hire a licensed Master. If this happens, the cognizant OCMI/COTP shall make every effort to fashion a suitable bridging strategy to prevent disrupting ongoing work at a work site, or from injuring the related business. This includes making liberal use of the regulatory leeway for licensing, presently found at 46 CFR 11.201(i), and engaging the District Prevention staff.

#

[19] Contact D8(dpi) for further guidance when a work boat wishes to move between or among WSEs issued to separate businesses.

[20] 46 CFR § 15.515 (b): "Any vessel subject to inspection under 46 U.S.C. 3301 must, while on a voyage, be under the direction and control of an individual who holds an appropriate license or appropriate officer endorsement on their MMC."…

Encl: (1) S. REP. 92-926, S. Rep. No. 926, 92ND Cong., 2ND Sess. 1972
(2) Sample letter to acknowledge a Work Site Exclusion

Dist: All Eighth District Sectors and MSUs

Copy: COMDT (CG-543)
LANTAREA-3P