



16711

MEMORANDUM

From: J. F. Ahern
Chief, G-LMI

Reply to G-LMI
Attn of: LCDR Cunningham
7-0014

To: G-MOC-3

Subj: EXPANDED FISHING VESSEL EXAMINATION QUESTIONS

Ref: (a) Your e-mail dtd 04 Nov 03

1. In reference (a) you asked the following questions:
 - a. Can a Coast Guard fishing vessel examiner go aboard a fishing vessel at the dock and conduct a compliance examination without the owner/operator's explicit permission?
 - b. What is the legal authority of a civilian examiner? Can law enforcement authority be delegated to them?

For simplicity, I will answer the second question first, before beginning a discussion of the somewhat more complex question of whether or not permission is required to conduct a dockside fishing vessel examination.

2. Coast Guard law enforcement authority is principally governed by 14 U.S.C. § 89, which reads in part:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, *commissioned, warrant, and petty officers* may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. (Emphasis added.)

By policy, the Coast Guard has further limited exercise of 14 U.S.C. § 89 law enforcement authority to specifically trained and qualified military personnel (*See* the Maritime Law Enforcement Manual, COMDTINST M16247.1(C)). Civilian personnel of the Coast Guard are not listed in 14 U.S.C. § 89 as authorized to exercise law enforcement authority.

3. Special agents of the Coast Guard Investigative Service (CGIS) may execute law enforcement authority under 14 U.S.C. § 95. Civilians may serve as CGIS special agents (*see* § 2.C.1 of the Coast Guard Investigations Manual, CIM 5527.1(B)). However, in order to exercise law enforcement authority a civilian must be first assigned by the Commandant to criminal investigations duty. Because civilian fishing vessel examiners are not assigned to criminal

investigation duty they cannot exercise law enforcement authority based on 14 U.S.C. § 95. As a result, I conclude there is no Coast Guard statutory authorization that would allow a delegation of law enforcement authority to non-CGIS civilian personnel.

4. In order to answer whether or not explicit permission is required to conduct a dockside fishing vessel examination, I will first review the statutory authority for fishing vessel inspections in general. This review will assist in determining Congressional intent in establishing the existing vessel inspection regime. 46 U.S.C. § 3301 establishes the categories of vessels generally subject to inspection. These vessels include fish processing vessels and fish tender vessels. The list specifically does not include fishing vessels. 46 U.S.C. § 3306 authorizes the Secretary (of the department in which the Coast Guard is operating) to issue regulations necessary to set requirements for inspected vessels and to carry out inspections. Under this chapter there is no authority to establish regulations or inspections for “fishing vessels.”

5. The Commercial Fishing Industry Vessel Safety Act of 1988 (“CFIVSA”, P.L. 100-424) granted the Secretary authority to establish requirements for uninspected vessels that are fishing vessels, fish processing vessels, or fish tender vessels (*see* 46 U.S.C. § 4501 *et seq.*). 46 U.S.C. § 4502(f) requires that fish processing vessels and fish tender vessels engaged in the Aleutian trade shall be examined at least once every 2 years to ensure compliance with the safety requirements established by the CFIVSA and its enabling regulations found at 46 C.F.R. § 28. No periodic examination requirement for fishing vessels was established. Despite the Coast Guard’s request Congress has shown no willingness to expand the examination requirement to fishing vessels. As a result, while fishing vessels in general must comply with CFIVSA and the applicable regulations issued under the Act, there is no authority to require periodic examinations to ensure compliance. Enforcement authority arises only if a violation is detected in the course of another law enforcement activity, such as a law enforcement boarding conducted by operational law enforcement personnel. In my opinion any other examination by civilian fishing vessel examiners under the purview of 46 U.S.C. § 4501 *et seq.* must be conducted with the permission of the owner/operator.

6. In discussions with you and your staff you have also inquired whether there are other Coast Guard authorities that may be used to allow a dockside fishing examination without the owner/operator’s permission. Specifically, you have inquired regarding using law enforcement authority and/or the Ports and Waterways Safety Act (“PWSA,” P.L. 92-340, as codified at 33 U.S.C. §1221 *et seq.*). My opinion is a qualified “yes” in that military personnel of the Coast Guard may conduct a non-consensual dockside boarding under the grant of law enforcement authority in 14 U.S.C. § 89, discussed above. As part of such a boarding a civilian fishing vessel examiner may accompany those boarding officers and participate by conducting a simultaneous compliance examination. Any discrepancies found should then be processed via the policy and procedures established for violations of U.S. law under the Coast Guard’s operational law enforcement program. Civilian fishing vessel examiners cannot exercise this organic law enforcement authority. While it may be legally possible to utilize 14 U.S.C § 89 for dockside fishing vessel examinations, there is still the significant policy question of whether this statutory authority should be used in this manner. The Coast Guard has always been very protective of its 14 U.S.C. § 89 authority; it is the foundation of our operational law enforcement missions. Any expansion that may invite a response leading to a curtailment of that authority by Congress should be discouraged.

7. Regarding the PWSA, it is my opinion that it cannot be used to require non-consensual dockside fishing vessel examinations. Congress’ intent in passage of the PWSA was to ensure

the safety of ports, waterways, and the environment. 33 U.S.C. § 1221 is Congress' statement of policy in passage of the PWSA. It reads:

The Congress finds and declares--

(a) that *navigation* and vessel safety, *protection of the marine environment*, and *safety and security of United States ports and waterways* are matters of major national importance;

(b) that increased *vessel traffic* in the Nation's ports and waterways creates substantial hazard to life, property, and the marine environment;

(c) that increased supervision of *vessel and port operations* is necessary in order to--

(1) reduce the possibility of vessel or cargo loss, or damage to life, property, or the marine environment;

(2) prevent damage to structures in, on, or immediately adjacent to the navigable waters of the United States or the resources within such waters;

(3) insure that vessels operating in the navigable waters of the United States shall comply with all applicable standards and requirements for vessel construction, equipment, manning, and operational procedures; and

(4) insure that the handling of dangerous articles and substances on the structures in, on, or immediately adjacent to the navigable waters of the United States is conducted in accordance with established standards and requirements; and

(d) that advance planning is critical in determining proper and adequate protective measures for the Nation's *ports and waterways* and the marine environment, with continuing consultation with other Federal agencies, State representatives, affected users, and the general public, in the development and implementation of such measures. (Emphasis added.)

8. The majority of the language used by Congress in its statement of policy for the PWSA emphasizes vessel navigation in the context of port and waterways operations. The statement of policy does not emphasize vessel inspections. Any vessel inspection requirements and subsequent enforcement activity is incidental to the main purpose of ensuring ports and waterways safety through oversight of vessel navigation and operations. In other words, the intent of Congress in passage of the PWSA was to establish port (i.e. a VTS) and vessel (i.e. navigation equipment requirements) operating requirements to ensure the safety of ports, waterways, the environment, and the vessel traffic that uses them. If a particular piece of equipment or material condition on an individual vessel was required under the PWSA, it was to serve this larger purpose. This view is reinforced by the fact that Congress established a separate scheme for vessel inspections (including for commercial vessels engaged in fishing) in Title 46 United States Code.

9. In addition, even if the PWSA could be used as a means to effectuate an inspection of fishing vessels, there is still the question of the character of the personnel engaging in the enforcement action. If the action is inherently a law enforcement action, it would need to be carried out by personnel authorized by statute to exercise law enforcement authority. This would preclude the use of civilian commercial fishing vessel examiners.

10. Finally, even if the PWSA could be used, 33 U.S.C. § 1223 states that the COTP may order any vessel in a port or place subject to the jurisdiction of the United States to operate or anchor in a manner he directs if he has *reasonable cause* to believe the vessel does not comply with any regulations issued under the PWSA or “any other applicable law or treaty.” (Emphasis added.) The question is what amounts to “reasonable cause”? The term is not defined by the PWSA, nor have I found anything in the PWSA’s legislative history to suggest Congress’ intended meaning. However, it is possible to draw an analogy from constitutional practice surrounding 4th Amendment arrest, search, and seizure law regarding “probable cause.”

11. The 4th Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (Emphasis added.) Federal courts have consistently held that probable cause is based on a facts and circumstances test, that it is more than mere suspicion. It exists when under the totality of the circumstances in a specific case a prudent person may conclude that a violation has occurred. *See, e.g., U.S. v. Smith*, 790 F.2d 789 (9th Cir. 1986). The Supreme Court has consistently held that the 4th Amendment gives a citizen the right to refuse a warrantless search. Analogizing probable cause with the “reasonable cause” of 33 U.S.C. § 1223, mere refusal by an owner/operator of a request to conduct an examination pursuant to 33 U.S.C. § 1223 is not by itself sufficient grounds for requiring a boarding by civilian fishing vessel examiners. It is also questionable whether a decision matrix to identify “high risk” vessels would be sufficient to meet reasonable cause. Again using our analogy above whether probable exists in a specific case cause is a facts and circumstances, case-by-case analysis. A decision matrix would eliminate that case-by-case rationale.

12. I have discussed these questions with the D13 and D17 legal officers. We are in concurrence that this is an accurate reflection of the law, and we are all of the same opinion regarding the answers to your questions.

13. In conclusion, it is my opinion that a civilian Coast Guard fishing vessel examiner may not go aboard a fishing vessel at the dock and conduct a compliance examination without the owner/operator’s explicit permission. Also, Coast Guard law enforcement authority may not be delegated to civilian fishing vessel examiners.

#

Copy: G-MO
G-MOC
CGD13 (l, m)
CGD17 (l, m)