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# Towing Vessel Safety: Analysis of Congressional and Coast Guard Investigative Response to Operator Involvement in Casualties Where a Presumption of Negligence Exist

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**TOWING VESSEL SAFETY:**  
**Analysis of Congressional**  
**and Coast Guard Investigative Response**  
**to Operator Involvement in Casualties**  
**Where a Presumption of Negligence Exist**

by

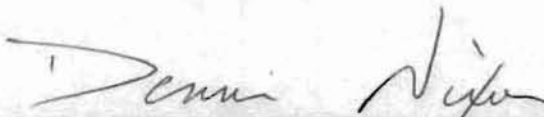
Paul J. Cormier

A paper submitted in partial fulfillment of the  
requirements for the degree of  
Master of Marine Affairs

University of Rhode Island

1994

**MAJOR PAPER**  
**MASTER OF MARINE AFFAIRS**

Approved:   
\_\_\_\_\_  
Professor Dennis Nixon

UNIVERSITY OF RHODE ISLAND  
1994

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My 20-year Coast Guard career has been rewarding. The successes I've enjoyed would not have been possible without the cumulative assistance provided by numerous mentors whom I've worked for and with. I never met a person whom I did not learn from. This includes the many fine people whom I've served as supervisor. They taught me the most. I am indebted to the Coast Guard for funding my Master's Degree Program. The Coast Guard has always been good to me and my family. To the Guard, we owe our well being.

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Bless all of you for taking a personal interest in me and my pursuits. My career seems fulfilled by the impending Master of Marine Affairs Degree; however, personal development should never end. Therefore, it is time to create and achieve new goals.

## **HYPOTHESIS**

Legislation proposed by members of the 103rd Congress to address towing vessel safety resulted from three focusing events. The proposed legislation was not passed. There is a continuing need to address the human element in marine casualties. Prevention through enforcement is a viable solution to some human causal factors. Numerous personnel investigations which should have been initiated following towing vessel groundings during 1992 and 1993, were not pursued; despite a presumption of negligence that exists in grounding cases. Due to the presumption, all groundings, and particularly those attributed to human factors during a casualty investigation provide sufficient reason to initiate a personnel investigation to ascertain if the casualty is attributable to the operator's action or inaction. Initiating personnel investigations is necessary to establish whether remedial action is justified. Failure to initiate remedial action against a negligent towing vessel operator's license following a grounding allows the individual to continue operating under the authority of a license. When remedial action is not pursued, similar casualties could reoccur. Therefore, the Coast Guard has foregone a prime opportunity: to adequately address human factor in casualties; to preclude similar casualties from recurring; and, ultimately improve towing vessel safety.



## INTRODUCTION

Towboats and tugs registered in the United States have primarily operated in a domestic trade in and around the United States. The nature of towing and the inherent confined operating area places towing vessels in constant risk of grounding, alliding, or colliding with other objects. While towing vessels are routinely involved in groundings and allisions, national attention focuses only on major marine casualties that: directly impact the transportation infrastructure; result in multiple deaths; or contribute to environmental harm. This paper will show that three such focusing events occurred between May 1993 and January 1994 which raised questions regarding towing vessel safety and prompted proposals for new legislation. The Towing Vessel Safety Act of 1993 was introduced as HR 3282 on October 14, 1993 and The Towing Safety Act was introduced as HR 4058 on March 16, 1994.

This paper will review the proposed legislation to assess whether the legislation was overdue, prompt, premature, unnecessary or helpful. Among other things, this paper will demonstrate that the legislative process involves many interests: government, industry and the general public.

This legislative history serves to demonstrate that public involvement plays a powerful role in the molding of laws designed to regulate domestic maritime industry.

In addition to reviewing focusing events, legislative process and public involvement; the paper will provide a chronological overview of applicable topics, such as; casualty reporting, casualty investigation, personnel investigation, personnel remedial action and subsequent appeal processes. The Coast Guard's marine casualty reporting and investigation program is established by law and regulation. The program serves to collect and analyze casualty statistics. The National Transportation Safety Board also has a casualty investigation program; however, this program is designed to investigate casualties which are focusing events. Both programs identify common causal factors in casualties which can be addressed to prevent similar casualties from occurring. This paper will show that a common causal factor in most casualties is a human factor. When a grounding or allision occurs, there is a concurrent presumption of operator negligence. Currently this negligence is not adequately addressed through the Coast Guard's existing personnel investigation program. The presumption that an operator is negligent is well founded in admiralty law. To determine if negligence can be proven, a personnel investigation should be initiated following each grounding or allision. A review of recent grounding

statistics will indicate that most towing vessel groundings which were determined to involve human causal factors during a casualty investigation did not result in subsequent personnel investigations.

A personnel investigation is conducted to establish the operator's role in a casualty and to determine if an administrative action against the licensed vessel operator is appropriate. The second largest fleet of U.S. commercial vessels operated is the towing vessel fleet. Some towing vessels are exempt from requirements for licensed operators. The vessels are uninspected and not subject to vessel inspection by the Coast Guard. When licensed operators are involved in towing vessel casualties they can be held accountable for their role. This paper will show that obtaining evidence and identifying witnesses on an uninspected vessel which will support a presumption of negligence during an administrative hearing, after a rebuttal, is a difficult task. Despite the presumption of negligence, the odds are stacked in favor of negligent operators and against Coast Guard investigators. Hence fewer personnel investigations and actions are initiated.

Finally, to improve safety while also easing the overwhelming burden placed on Coast Guard investigators, this paper will identify and recommend viable solutions to the problem which can be implemented immediately without

additional legislation. A justified proposal for additional legislation will also be offered which would give Coast Guard investigators authority to temporarily suspend licenses.

## **CHAPTER 1: NEW POLICY STEMS FROM FOCUSING EVENTS**

Some marine casualties are incidents of national significance which open a window of opportunity to pass new laws. Two recent disasters involving towboats pushing barges into bridges, resulted in multiple deaths. Another casualty caused a major oil spill and environmental harm. Ultimately, the three cases brought increasing legislative focus on the uninspected towing vessel industry.

On May 28, 1993, the towboat CHRIS pushing the hopper barge DM3021 struck the Judge Seeber Bridge causing it to collapse into the Inner Harbor Navigation Canal in New Orleans, LA. Motorists were crossing the bridge at the time of the incident. Two injuries and the death of a woman and her unborn child resulted.<sup>1</sup>

Another allision occurred on September 22, 1993, when the towboat MAUVILLA pushing six barges struck a railroad crossing causing the bridge to collapse into the Big Bayou

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<sup>1</sup> Boyd, John, "AMTRAK disaster may be regulatory watershed," The Journal of Commerce, Vol. 398, No. 28,121, December 13, 1993, p. 8A;  
National Transportation Safety Board, Highway-Marine Accident Report, U.S. Towboat CHRIS Collision with the Judge William Seeber Bridge, New Orleans, LA, May 28, 1993, Adopted June 7, 1994, Washington, D.C.

Canot near Mobile, AL. Shortly after that allision, the long haul passenger train known as the AMTRAK SUNSET LIMITED plunged into the water killing forty-seven people.<sup>2</sup>

Historians must look back almost 50 years to find a long haul passenger train wreck which was worse than the Amtrak disaster. That accident occurred in December 1943, when an Atlantic Coast Line Railroad train derailed and collided with another train near Buie, N.C. killing 72 people. Unlike the other two casualties, this incident was not a marine casualty.<sup>3</sup>

Just four months after the AMTRAK incident, another towing vessel accident occurred. This time, the result was environment degradation in lieu of personnel injuries, death and structural damage. On January 7, 1994, the tank barge MORRIS J. BERMAN broke away from the tugboat EMILY, twice. After the second break away, the tank barge grounded three hundred yards off San Juan, Puerto Rico.<sup>4</sup> The barge was

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<sup>2</sup> Boyd, John, "Barges are focus of probe hearing," The Journal of Commerce, Vol.398, No. 28,121, December 13, 1993, Pp 1A & 8A;  
National Transportation Safety Board, Railroad-Marine Accident Report, Derailment of Amtrak Train No. 2 on the CSXT Big Bayou Canot Bridge near Mobile, Alabama, September 22, 1993, Adopted September 19, 1994, Washington, D.C.

<sup>3</sup> Watson, Rip and Lawrence H. Kaufman, "Historic Wreck Kills 40, Snarls Freight Trains", The Journal of Commerce, Vol. 397, No. 28,068, September 23, 1993, Pp 1A & 2A.

<sup>4</sup> Abrams, Alan, "Puerto Rico Spill Taps \$10 Million From U.S. Fund," The Journal of Commerce, Vol. 399, No. 28,144, January 18, 1994, p. 1B;

holed while hard aground on a coral reef. The spillage of 750,000 gallons of number 6 oil coated six miles of beach. This occurred just before peak months for Puerto Rico tourism. As of March 11, 1994, the cleanup cost approached \$70 million. At that time, approximately \$60 million in cleanup cost was paid by the U. S. Oil Spill Liability Trust Fund. The other \$10 million was provided by the barge owner's insurer.<sup>5</sup>

Ironically, tug escorts were identified as a solution to human factor causes of oil tanker incidents in Valdez, Alaska when the Oil Pollution Act of 1990 was enacted. Tug

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"Food for Thought: American Pie-Spill Shame," Fairplay, Volume 321, Issue 5748, January 20, 1994, p. 12;  
 Cantwell, Alice, "Coast Guard Seeks Cause of Puerto Rican Spill," The Journal of Commerce, Vol. 399, No. 28,141, January 12, 1994, p. 8B;  
 Cantwell, Alice, "Weather Hinders Cleanup of Puerto Rican Oil Spill," The Journal of Commerce, Vol. 399, No. 28,142, January 13, 1994, p. 8B;  
 Turner, Kernan, "Cleanup Crews Go In Upper Hand on Oil Spill Off Puerto Rico," The Journal of Commerce, Vol. 399, No. 28,140, January 11, 1994, p. 8B;  
 National Transportation Safety Board, Marine Accident Brief No. DCA94MM008, Washington, D.C., undated;  
 United States Coast Guard, "Investigation into the Circumstances Surrounding the Grounding the of Tank barge MORRIS J. BERMAN at Punta Escambron, Puerto Rico on January 7, 1994, with Major Pollution and No Personnel Injuries or Loss of Life", Washington, D.C., November 4, 1994.

<sup>5</sup> Abrams, Alan, "Oil Still Dirties San Juan Beaches Two Months After Spill," The Journal of Commerce, Vol. 399, No. 28,181, March 11, 1994, pp. 1A and 8A;  
 Abrams, Alan, "Puerto Rico Spill Taps \$10 Million From U.S. Fund," p. 1B;  
 Abrams, Alan, "U.S. to Get Bill for Spill Cleanup in Puerto Rico," The Journal of Commerce, Vol. 399, No. 28,143, January 14, 1994, pp. 1A and 8A.

escorts were to be used as auxiliary propulsion to prevent tank ships from grounding. Unfortunately, that was not the case in Puerto Rico where the tug EMILY provided the main propulsion used to transport the grounded tank barge.

These three accidents were not the only marine casualties to occur between May 28, 1993 and January 7, 1994 which involved tugs and towboats; however, these were the focus of public attention. All were subject to investigation by the Coast Guard and the National Transportation Safety Board (NTSB). The investigations determined that there was evidence of negligence on the part of the licensed operators.<sup>6</sup> The severity of these casualties caused by human factors provided the impetus for legislative initiatives discussed in chapter 4. Casualty reporting and investigation are reviewed in chapter 3. Prior to delving into casualty investigations and recent legislative efforts, it is important to become familiar with five government and industry organizations: U. S. Coast Guard; NTSB; TSAC; MERPAC and AWO.

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<sup>6</sup> United States Coast Guard, November 4, 1994, p. 20.  
National Transportation Safety Board, June 7, 1994, p. 36;  
National Transportation Safety Board, September 19, 1994,  
p. 59.



## **CHAPTER 2: ORGANIZATION FAMILIARIZATION**

### **U. S. COAST GUARD**

Much like "Fortune 500" businesses, the Coast Guard has a long history of mergers and the acquisition of new maritime responsibilities. It originated in 1790 when Congress authorized the construction of ten boats to be used under the Department of the Treasury to guard against smugglers.<sup>7</sup> Previously known as the Revenue Marines and then Revenue Cutter Service, the organization was renamed the Coast Guard by the Act of January 28, 1915 when it merged with the Lifesaving Service.<sup>8</sup>

The Coast Guard's Marine Safety program is rooted in 1838 as the Steamboat Inspection Service. Congress enacted legislation to preserve and protect the public from preventable accidents. Subsequent to the sinking of the S.S. TITANIC, the Steamboat Inspection Service was moved under the new Department of Commerce. After merging with the Bureau of Navigation and reorganization, it was eventually renamed the Bureau of Inspection and Navigation. The Coast Guard absorbed responsibility for the Bureau of

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<sup>7</sup> Smith, Horatio D., "Early History of the United States Revenue Marine Service or (United States Revenue Cutter Service) 1789-1849", A Coast Guard Bicentennial Publication, Washington, D.C., 1989, p. 1.

<sup>8</sup> Browning, Dr. Robert M., "Moments in History", U.S. Coast Guard Public Affairs Staff, Washington, D.C., p. 24

Inspection and Navigation in 1946.<sup>9</sup> Concluding 177 years in the Treasury Department, the Coast Guard was transferred to the newly created Department of Transportation on April 1, 1967.<sup>10</sup>

On February 18, 1871, Congress enacted 16 Stat. 440 to reorganize the Steamboat Inspection Service. That statute defined the types, duties and hierarchy of marine inspectors. The hierarchy included the Board of Local Inspectors who were empowered and required to investigate acts of incompetence and misconduct committed by licensed officers while acting under the authority of their licenses, and to revoke or suspend such license if any provision of applicable law had been violated. The present day responsibilities of the Board of Local Inspectors is vested in the Officer in Charge of Marine Inspection.<sup>11</sup> To provide immediate direction to Coast Guard law enforcement activities within an assigned area, the Commandant may

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<sup>9</sup> Johnson, Robert E., "Guardians of the Sea: History of the U.S. Coast Guard 1915 to present", Naval Institute Press, Annapolis, Maryland, 1988, p. 19 & 22; Eldridge, F. R., "Historical Sketch of the U.S. Coast Guard 1790-1946", U.S. Coast Guard Headquarters, Washington, D.C., reprinted July, 1953, p. 38.

<sup>10</sup> Johnson, p. 343.

<sup>11</sup> U.S. Coast Guard Marine Safety Manual Volume I, Administration and Management, COMDTINST M16000.6, Washington, D.C., May 5, 1986 as amended through February 8, 1995, p. 2-6 and 2-7.

designate any officer as Captain of the Port.<sup>12</sup> More will be said about Captain of the Port Authority and current Coast Guard investigation initiatives.

#### **NATIONAL TRANSPORTATION SAFETY BOARD**

Previously it was mentioned that both the Coast Guard and the NTSB investigated the maritime focusing events. The National Transportation Safety Board (NTSB) is an independent agency of the United States.<sup>13</sup> The board was created twenty years ago under the Independent Safety Board Act of 1974 (49 U.S.C. app. 1901).<sup>14</sup> NTSB's primary function is to promote safety in transportation.<sup>15</sup> The organization and functions of the Board and delegations of authority are outlined in Title 49 Code of Federal Regulations Part 800.

"The Board consists of five Members appointed by the President with the advice and consent of the Senate. One of the Members is designated by the President as Chairman with the advice and consent of the Senate, and one as Vice Chairman."<sup>16</sup>

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<sup>12</sup> Title 14 United States Code 634(a)

<sup>13</sup> Title 49 Code of Federal Regulations Section 800.2.

<sup>14</sup> Title 49 United States Code app. 1901; U.S. Coast Guard Marine Safety Manual Volume V, Investigations, COMDTINST M16000.10, Chapter 3, B. 16, Washington, D.C., February 27, 1989.

<sup>15</sup> Title 49 Code of Federal Regulations Section 800.3(a).

<sup>16</sup> Title 49 Code of Federal Regulations, Section 800.2.

"The Board's staff is comprised of the following principal components: Office of the Managing Director; Office of Government and Public Affairs; Office of the General Counsel; Office of Administrative Law Judges,; which conducts all formal proceedings arising under the Federal Aviation Act of 1958; the Bureau of Accident Investigation, which conducts investigations of all major transportation accidents and other marine, pipeline, and hazardous materials accidents within the Board's jurisdiction; the Bureau of Field Operations; the Bureau of Technology, which provides technical advice and services, conducts research, and carries out analytical studies and tests on all aspects of the Board's accident investigation, accident prevention, and safety promotion activities, including safety recommendations, studies, and special investigations; the Bureau of Safety Programs; and the Bureau of Administration."<sup>17</sup>

#### **TOWING INDUSTRY**

The towing industry consist of more than 6,200 towing vessels of various sizes; employing more than 32,000 crew persons.<sup>18</sup> Towing vessels constitute the second largest population of self-propelled vessels in the U. S. commercial fleet, after fishing vessels.<sup>19</sup> There are many modes of towing and each mode may involve tugs and towboats of

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<sup>17</sup> Ibid.

<sup>18</sup> Evaluation of Casualty Incidents for the U.S. Towing Industry 1981 - 1990, Prepared for the American Waterways Operators by Mercer Management Consulting Inc., Lexington, MA, August 10, 1994, p. II-1.

<sup>19</sup> Ibid.

varying designs, sizes and capabilities. Furthermore, towing configurations may differ depending upon the service provided.<sup>20</sup>

Tugs may be used to provide vessel escort and assist ships with docking or undocking. Others may be employed in the offshore oil industry carrying equipment and supplies or moving specially equipped barges. Salvage tugs serve to provide a remedy for vessels that are aground and stranded; involved in fire; in danger of sinking; or have suffered a loss of power or steering. Yet others simply deliver cargo between ports.<sup>21</sup> More than 2,870 tugboats operate in harbor, bays, the Great Lakes and upon the oceans.<sup>22</sup> Another 3,350 towboats push barges along the inland waterways.<sup>23</sup>

A towing vessel's crew size is determined by the operating company, except that most towing vessels over 26 feet in length must be operated by a person licensed to operate that type of vessel in the particular geographic area, under prescribed regulation.<sup>24</sup> As bizarre as this may

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<sup>20</sup> Brady, Edward M., Tugs, Towboats and Towing, Cornell Maritime Press, Inc., Cambridge, Maryland, 1967, p. 1, 21, 107 and 141.

<sup>21</sup> Reid, George H., Primer of Towing, Cornell Maritime Press, Centreville, Maryland, 1992, p. 146, 174, 179.

<sup>22</sup> Evaluation of Casualty Incidents for the U.S. Towing Industry 1981 - 1990, p. II-1.

<sup>23</sup> Ibid.

<sup>24</sup> Title 46 United States Code Section 8904(a).

seem, towing vessels of less than 200 gross tons engaged in the offshore oil industry are exempt from requirements for licensed operators if the vessel has offshore mineral and oil industry sites or equipment as its ultimate destination.<sup>25</sup> The number of towing vessels operated without licenses under the exemption is unknown.

Licensing exemptions are not the only oddity. Following the derailment of the SUNSET LIMITED, an Associated Press headline stated, "Towboat Pilot In Worst Amtrak Disaster Failed Exam Seven Times".<sup>26</sup> There was no limit as to the number of times an individual could retake a failed exam to obtain an operator's license. Did it matter? After all, some towing vessel operators were not required to be licensed at all. What would the headlines have said about a casualty involving a towboat operator without a license? The news of such a casualty might be as disturbing as the MAUVILLA's involvement with the derailed SUNSET LIMITED. Additionally, it may be equally unacceptable to learn that federal law and regulation exempted some towing vessel operators from licensing requirements.<sup>27</sup> Following the AMTRAK incident, the Towing Vessel Safety Act of 1993 proposed equipping towing vessels with radar and other

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<sup>25</sup> Title 46 United States Code Section 8905(a).

<sup>26</sup> Associated Press, "Pilot in Amtrak Disaster Failed Test Seven Times", The Journal of Commerce, Vol. 399, No 28,158, February 7, 1994.

<sup>27</sup> Title 46 United States Code Chapter 89.

navigational safety equipment. It seems reasonable to believe that an unlicensed operator may lack the necessary skills to use the proposed radars and other navigation safety equipment. Perhaps a review of recently proposed towing vessel safety legislation will shed some light on how industry influences legislation and how these loopholes evolve.<sup>28</sup> The timing and necessity for the Towing Vessel Safety Act will be discussed in greater detail.

Towing vessels are prone to be involved in marine casualties. Currently, an operator's work hours may be limited by law; however, the hours may differ depending upon the length of the voyage, area of operation or existing emergencies. The towing industry's crew personnel account for nearly 90 million on-duty hours.<sup>29</sup> In the United States, towing vessels move 32,000 barges used to transport 750 million tons of cargo annually.<sup>30</sup> Additionally, tugs are used to assist more than 110,000 ships in vicinity of U. S. ports.<sup>31</sup> The only constant condition in towing seems to be the hazards involved. The height, width and length of tow may change regularly in a single trip. The very nature of towing involves making frequent contact with other self-

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<sup>28</sup> Title 46 United States Code Section 8104.

<sup>29</sup> Evaluation of Casualty Incidents for the U.S. Towing Industry 1981 - 1990, p. II-1 and II-2.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

propelled and non-propelled vessels or fixed structures.<sup>32</sup> Adding to the risk of casualty is an unfriendly operating environment. Towing requires continuous maneuvering of varying size tows in waterways that are highly restrictive. Obstacles and elements which must be overcome include: narrow channel widths, shallow channel depths; bends in the channel; high winds; river currents; tidal currents; restricted visibility; passing other tows or ships; bridges; and, other shoreside structures.<sup>33</sup> In 1981, it was estimated that there were 25,543 miles of waterway usable for commercial navigation in the United States.<sup>34</sup> Only 4,666 miles had a depth of 14 feet and over.<sup>35</sup> The Army Corps of Engineers determined that 9,868 miles had a depth of 9 feet and less.<sup>36</sup> The overall setting is ripe for groundings, allisions and collisions. Between 1981 and 1990, groundings and collisions accounted for 75% of all towing vessel casualties.<sup>37</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid., p. V-8.

<sup>34</sup> Waterways of the United States Chart, Compiled from information supplied by the Corps of Engineers, U.S. Army, Published by the American Waterways Operators, Inc., 1981.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Evaluation of Casualty Incidents for the Towing Industry 1981-1990, p. III-5.



The towing vessel safety regulation is based upon registered length. Personnel licensing is based upon a vessel's registered gross tonnage. On the other hand, towing is marketed using a vessel's horsepower. This assumes that the greater the horsepower, the greater the tug's capability compared to tugs with lesser horsepower ratings. Hence, charges for a tug are also based upon the horsepower provided. Unfortunately, there are a variety of methods used to measure horsepower. Tug owners have a tendency to list their vessels using the highest figures attainable. After all, it is in their best economic interest to do so.

In the United States, the strength of a tug may be listed as either the number of tons bollard pull, indicated horsepower or brake horsepower. Bollard pull means that one ton of pull equals 100 horsepower. "Horsepower comes from the steam engine, whose power was found through a system known as taking and reading of indicator cards."<sup>38</sup> Brake horsepower is a reading taken when the engine is new and on a manufacturer's test block. Owners often choose to use an engine manufacturer's full power and no load test results.

A bollard pull test certificate issued for tugs by classification societies may be the best measurement, provided that each society uses a uniform set of criteria. Det Norske Veritas (DNV) uses a bollard pull test which

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<sup>38</sup> Blank, John S., Modern Towing, Cornell Maritime Press, Inc., Centreville, Maryland, 1989, p. 123 - 124.

stipulates that a continuous bollard pull be maintained for at least 10 to 15 minutes to determine the tug's true pulling power.<sup>39</sup> While each towing industry is in economic competition with similar businesses, the diverse industry's overlapping interest and concerns are addressed in a cooperative approach by the American Waterways Operators.

#### **THE AMERICAN WATERWAYS OPERATORS (AWO)**

The American Waterways Operators (AWO) is a national trade association which represents the inland and coastal barge and towing industry in addition to small and medium sized shipyards which build and repair tugs, barges and other vessels. AWO serves the interest of the domestic commercial navigation industry. "Association membership is comprised of more than 300 member companies, including bulk commodity transportation; fleet and harbor service operators; fueling, bunkering, and lightering service operators; second-tier domestic shipyards; and affiliated service members."<sup>40</sup>

AWO was organized in 1944 in Washington, D.C. to represent the inland barge and towing industry. In 1969, the mission and scope were expanded to include the coastal

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<sup>39</sup> Ibid.

<sup>40</sup> American Waterways Operators, Facts at a Glance, undated.

sector of the industry. The American Waterways Shipyard Conference (AWSC), which represents the interests of U.S. commercial shipyards, was organized within AWO in 1978.

"AWO is a member-driven organization."<sup>41</sup> In 1993, the Board of Directors consisted of 50 members. Fourteen of the members serve as the AWO Executive Committee. There are a total of six AWO committees. Four standing committees address the issues of concern to particular industry segments. The Inland Dry Sector Committee identifies the issues affecting dry cargo carriers and emphasizes the regional, national, and international role of dry cargo carriers by providing safe, economical, efficient, and environmentally sound bulk transportation.

The Inland Liquid Sector Committee represents the legislative, regulatory, and public interests of tank barge operators throughout the U. S. The Coastal Sector Committee has focused on GATT negotiations, as well as responding to Coast Guard proposals for structural and operational modifications to existing single-hulled tank vessels over 5,000 gross tons. The Harbor Services Sector Committee has dealt with federal rulemaking for tug escorts which are mandated by the Oil Pollution Act of 1990. Additionally, the Common Issues Council (CIC) focuses on issues which cross committee boundaries. The Public Affairs Committee develops media and public strategies to support the

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<sup>41</sup> Ibid., undated.

Association's regulatory and legislative initiatives.<sup>42</sup>

Another organization which represents the towing industry's interest within federal government is the Towing Vessel Safety Advisory Committee.

#### **TOWING VESSEL SAFETY ADVISORY COMMITTEE**

Congress authorized "the establishment of a system governing the creation and operation of advisory committees in the executive branch of the Federal Government."<sup>43</sup> As noted in Public Law 92-463, Congress found that there were numerous committees, boards, commissions, councils, and similar groups which were established to advise officers and agencies in the executive branch of the Federal Government. It was recognized that they were frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

The Congress further found and declared that --

- "(1) the need for many existing advisory committees had not been adequately reviewed;
- (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
- (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
- (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

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<sup>42</sup> American Waterways Operators, 1993 Annual Report, undated, pp. 7-9.

<sup>43</sup> Public Law 92-463, Section 2, October 6, 1972.

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved."<sup>44</sup>

The Towing Vessel Safety Advisory Committee (TSAC) was established subsequent to the enactment of Public Law 92-380 on October 6, 1980.<sup>45</sup> The Committee was to be terminated on September 30, 1990. This termination date was extended by Public Law 101-225 to September 30, 1995 at which time the Committee shall be terminated unless extended by subsequent Act of Congress.<sup>46</sup>

TSAC is codified within Title 33 United States Code 1231 which is known as the Ports and Waterways Safety Act. The Committee consists of sixteen members with particular expertise, knowledge, and experience regarding shallow-draft inland and coastal waterway navigation and towing safety as follows:

- (1) seven members from the barge and towing industry, reflecting a regional geographic balance;
- (2) one member from the offshore mineral and oil supply vessel industry; and

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<sup>44</sup> Ibid.

<sup>45</sup> Public Law 96-380, October 6, 1980.

<sup>46</sup> Public Law 101-225, Title I Section 105(b), December 12, 1989.

- (3) two members from each of the following:
- (a) port districts, authorities, or terminal operators;
  - (b) maritime labor;
  - (c) shippers (of whom at least one shall be engaged in the shipment of oil or hazardous materials by barge); and
  - (d) the general public.

The members of the Committee are appointed by the Secretary of the department in which the Coast Guard is operating. Currently, the Coast Guard operates under the Secretary of Transportation. Upon request by the Secretary of Transportation, the Secretary of the Army and the Secretary of Commerce may designate representatives to participate as observers on the Committee.

Both the Committee and Secretary of Transportation have been delegated responsibilities by law. "The Committee shall advise, consult with, and make recommendations to the Secretary on matters relating to shallow-draft inland and coastal waterway navigation and towing safety."<sup>47</sup> Additionally, "the Secretary shall consult with the Committee before taking any significant action affecting shallow-draft inland and coastal waterway navigation and towing safety."<sup>48</sup> The Committee is also "authorized to make

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<sup>47</sup> Title 33 United States Code Section 1232a.

<sup>48</sup> Ibid.

available to Congress any information, advice, and recommendations which the Committee is authorized to give to the Secretary."<sup>49</sup>

The Towing Safety Advisory Committee has a mission statement which states that:

"TSAC's mission is to work in partnership with the U. S. Coast Guard in order to:

1. help ensure a safe, environmentally responsible, and productive industry;
2. Ensure sound public policy through reasonable and enforceable regulation;
3. Proactively identify significant issues which deserve attention; and
4. Integrate private sector expertise into the governmental process to help the Coast Guard accomplish its missions."<sup>50</sup>

The Coast Guard is designated as the sponsor and agency providing support. TSAC reports to the Secretary of Transportation through its sponsor.<sup>51</sup> Not all federal advisory committees are established by an Act of Congress.

#### **MERCHANT VESSEL PERSONNEL ADVISORY COMMITTEE (MERPAC)**

Unlike TSAC, the Merchant Vessel Personnel Advisory Committee (MERPAC) was established at the request of the

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<sup>49</sup> Ibid.

<sup>50</sup> U.S. Department of Transportation, United States Coast Guard, TSAC Member Handbook, May 1993, no page numbers.

<sup>51</sup> U.S. Department of Transportation, Charter, Towing Safety Advisory Committee, pursuant to Federal Advisory Committee Act, Washington, D.C., Filed May 19, 1993.

Commandant of the Coast Guard.<sup>52</sup> The committee has no operating authority or responsibility. MERPAC serves as a "deliberative body to advise the Secretary of Transportation via the Commandant on matters"<sup>53</sup> "concerning personnel in the U.S. merchant marine, including but not limited to: training, qualifications, certification documentation and fitness standards."<sup>54</sup> The committee is designed to consist of no more than 19 members, from the following groups:

- "a. Nine active U.S. merchant mariners, including:
- (1) three deck officers two of whom shall be licensed for oceans any gross tons, one whom shall be licensed for inland or river route with a limited or unlimited tonnage, two of whom must have masters or operators of uninspected towing vessel (OUTV) licenses, and one of who must have significant tanker experience; and, to the extent practicable, one of these deck officers should represent the point of view of labor and another should represent a management perspective;
  - (2) three engineering officers two of whom shall be licensed as chief engineer any horsepower, one of whom shall be licensed as either a limited chief engineer or a designated duty engineer; and, to the extent practicable, one of these engineers should represent a labor point of view and another should represent a management perspective;
  - (3) two unlicensed seaman, including one Able Bodied Seaman, and one Qualified Member of the Engine Department; and
  - (4) one Pilot.

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<sup>52</sup> U.S. Department of Transportation, United States Coast Guard, Merchant Vessel Personnel Advisory Committee Handbook, Washington, D.C., June 1994, no page numbers.

<sup>53</sup> U.S. Department of Transportation, Charter, Merchant Marine Personnel Advisory Committee, pursuant to Federal Advisory Committee Act, Washington, D.C., Filed January 24, 1994 as amended December 6, 1994, p. 1.

<sup>54</sup> Ibid.



- b. six marine educators, including
  - (1) three from Maritime Academies, two of whom shall be associated with State Maritime Academies; and
  - (2) three from other maritime training institutions, one of whom should be associated with the small vessel industry.
- c. two individuals from shipping companies employed in ship operation management.
- d. two from the general public."<sup>55</sup>

Since the committee was not established by an act of Congress, the charter remains in effect for only two years unless terminated sooner.<sup>56</sup>

MERPAC's third meeting was held on June 15, 1994. The minutes of that meeting indicated the existence of a Towing Vessel Safety Group.<sup>57</sup>

Even though the Committee was not established by an Act of Congress, it is governed by the Federal Advisory Committee Act. Unlike TSAC, MERPAC does not have the authority to report directly to Congress. The Act states that: "Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect

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<sup>55</sup> Ibid., p. 2 & 3.

<sup>56</sup> Ibid., p. 4;  
Public Law 92-463, Section 14 (a)(2), October 6, 1972.

<sup>57</sup> Minutes of the Merchant Marine Personnel Advisory Committee, Meeting Wednesday, June 15, 1994, Washington, D.C., p. 6 through 9.

to matters upon which an advisory committee reports shall be made solely by the President or an officer of the Federal Government."<sup>58</sup>

Having completed a brief introduction to the five organizations who focus on towing vessel safety issues, it is time to address towing vessel safety in a sequential order of events occurring after a towing vessel casualty happens; starting with casualty reporting, investigation and follow-on statistics.

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<sup>58</sup> Public Law 92-463, Section 9(b).

### **CHAPTER 3: CASUALTY REPORTING, INVESTIGATION & STATISTICS**

#### **MARINE CASUALTY REPORTING**

Specified marine casualties must be reported to the Coast Guard by the towing vessel industry. Title 46 U. S. Code Section 6101 provides the authority for the Coast Guard to require notice and reporting of marine casualties.<sup>59</sup> The implementing regulations are found in Title 46 Code of Federal Regulations Part 4. They require giving notice as soon as possible and submission of a written report of casualties within five days to the Coast Guard.<sup>60</sup>

Reportable casualties include:

- "(a) all accidental groundings and any intentional grounding which also meets any of the other reporting criteria or creates a hazard to navigation, the environment, or the safety of the vessel; the death of an individual; serious injury to an individual; material loss of property; or material damage affecting the seaworthiness or efficiency of the vessel.
- (b) Loss of main propulsion or primary steering, or any associated component or control system, the loss of which causes a reduction of the maneuvering capabilities of the vessel. Loss means that systems, component parts, sub-systems, or control systems do not perform the specified or required function;
- (c) An occurrence materially and adversely affecting the vessels seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure or damage to fixed fire extinguishing systems, lifesaving equipment, auxiliary power generating equipment, or bilge pumping systems;
- (d) Loss of life;

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<sup>59</sup> Title 46 United States Code Section 6101.

<sup>60</sup> Title 46 Code of Federal Regulations Sections 4.05-1 and 4.05-10

(e) Injury which requires professional medical treatment beyond first aid and, in the case of a person engaged or employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties.

(f) An occurrence not meeting any of the above criteria but resulting in damage to property in excess of \$25,000. Damage cost includes the cost of labor and material to restore the property to the service condition which existed prior to the casualty, but does not include the cost of salvage, cleaning, gas freeing, drydocking or demurrage."<sup>61</sup>

Upon receipt of information of a marine casualty or accident, an investigation is initiated "as may be necessary in accordance with the regulations."<sup>62</sup>

#### **MARINE CASUALTY INVESTIGATION**

"The degree of formality in unit level investigations varies, from a formal investigation that follows marine board procedures to a simple review of the notice of marine casualty."<sup>63</sup> "Procedures for routine investigations are dependent upon the significance of the case and the availability of witnesses and resources."<sup>64</sup> Routine investigations are not always conducted on scene. "Facts may be elicited by correspondence, telephone or personal interviews, signed or unsigned statements, interrogatories

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<sup>61</sup> Title 46 Code of Federal Regulations Section 4.05-1

<sup>62</sup> U.S. Coast Guard Marine Safety Manual Volume V,  
Chapter 3.D.1,

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

that may or may not be taken under oath, or other means"<sup>65</sup> before or after written notification of the casualty has been received. The Marine Safety Information System (MSIS) is a database maintained by the Coast Guard as required by Title 46 United States Code Section 3717.<sup>66</sup> Among other things, MSIS is "designed to capture and report basic data relevant to marine casualty investigations".<sup>67</sup> Unlike a focusing event, most casualties are not a unique event. However, a history "may suggest a pattern involving repeated vessel or equipment failures. Investigators should use the information available in MSIS to uncover repeat occurrences or patterns of similar casualty incidents."<sup>68</sup>

Prior to May 1992, investigations were conducted to determine the apparent cause of the casualty. Apparent cause implied "a simple statement of how and why the casualty occurred, without regard to the more restrictive connotation of proximate cause."<sup>69</sup> The apparent cause of the casualty was electronically filed by the Coast Guard in a computer database known as CASMAIN between 1981 and 1992. A new database known as the Marine Investigation Module

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<sup>65</sup> Ibid.

<sup>66</sup> Title 46 United States Code Section 3717.

<sup>67</sup> U.S. Coast Guard Marine Safety Manual Volume V, Chapter 3.B.5, February 27, 1989.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., Chapter 3.E.1.e.

(MINMOD) provides improved capability to understand the interrelationship of multiple causal-enabling factors which result in marine casualties, including human factors.<sup>70</sup> MINMOD is a product within the Marine Safety Information System.<sup>71</sup>

A standard classification scheme provides a structure to data collection and may provide some consistency across investigations.<sup>72</sup> This suggests that the apparent cause of a casualty as determined by each of these routine investigations is later provided equal credence in the Marine Safety Information System even though the degree of inquiry and accuracy of the facts may vary considerably.

The U. S. Coast Guard and the National Transportation Safety Board share responsibility to investigate marine casualties. Coast Guard investigations are conducted to determine the cause of the casualty under Title 46 U. S.

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<sup>70</sup> Booth, Richard L., "Human Factors Study Staff Memorandum", U. S. Coast Guard Marine Investigations Division, Washington, D.C., February 23, 1994.

<sup>71</sup> Byers, James C., Susan G. Hill and Anita M. Ruthblum, "U.S. Coast Guard Marine Investigation and Reporting: Analysis and Recommendations for Improvement", Interim Report prepared for U.S. Coast Guard, available through National Technical Information Service, Springfield, VA, August 1994.

<sup>72</sup> Booth, Richard L., Susan G. Hill, James C. Byers and Anita Rothblum, "Gathering and Recording Human-Related Causal Data in Marine and other Accident Investigations", Proceedings of the Human Factors and Ergonomics Society 38th Annual Meeting, Vol. 2, Santa Monica, CA, July 14, 1994, p. 5.

Code Chapter 63.<sup>73</sup> Coast Guard authority to investigate marine casualties involving any ship on U. S. navigable waters or any U. S. ship operating anywhere is provided by Title 46 Code of Federal Regulations Section 4.07-5.<sup>74</sup> The National Transportation Safety Board may investigate, or cause to be investigated, major marine casualties and casualties involving public and nonpublic vessels. It may also investigate any "other accident which occurs in connection with the transportation of people or property which, in the judgement of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy"<sup>75</sup> of the Act.

The National Transportation Safety Board has responsibility to conduct investigations of major marine casualties and certain public/nonpublic vessel casualties. Therefore, the Commandant of the Coast Guard must notify the National Transportation Safety Board when a preliminary investigation reveals that a casualty meets one of the following criteria:

- (1) A major marine casualty which involves a vessel other than a public vessel and results in the loss of six or more lives: the loss of a mechanically-

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<sup>73</sup> Title 46 United States Code Chapter 63.

<sup>74</sup> Title 46 Code of Federal Regulations Section 4.07-5.

<sup>75</sup> U.S. Coast Guard Marine Safety Manual Volume V, Chapter 3.B.16.

propelled vessel of 100 or more gross tons;  
property damage initially estimated at \$500,000 or  
more; or is a serious threat to life, property, or  
the marine environment by hazardous materials.

- (2) Involves a public and a nonpublic vessel and at  
least one fatality or \$75,000 in property damage.

When requested by the NTSB, the Coast Guard conducts these investigations on behalf of the NTSB.<sup>76</sup> Joint regulations of the National Transportation Board and the Coast Guard for the investigation of marine casualties is found in Title 49 Code of Federal Regulations Part 850. "The Coast Guard's responsibility to investigate marine casualties is not eliminated or diminished by the regulations".<sup>77</sup> Where the Coast Guard has responsibility "under R.S. 4450 (46 USC 239)" the proceedings are conducted independently, but so as to avoid duplication.<sup>78</sup>

Currently, reference made to 46 USC 239 in the text of 49 CFR 850 is erroneous. This reference has been outdated for more than 11 years. On August 26, 1983, Title 46 USC 239 was revised and recodified by Public Law 98-89. RS 4450

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<sup>76</sup> U.S. Coast Guard Marine Safety Manual, Volume V, Chapter 3.A.2.

<sup>77</sup> Title 49 Code of Federal Regulations Part 850.

<sup>78</sup> Ibid., Section 850.3.



is now codified under Title 46 USC Sections 7701 to 7705.<sup>79</sup> "Responsibility under RS 4450 (46 USC 239)"<sup>80</sup> now equates to the responsibility to conduct personnel investigations and suspension and revocation proceedings under Title 46 USC Chapter 77.

Essentially any marine casualty involving U. S. vessels manned by licensed personnel and/or the holder of a merchant mariner's document has the potential to result in a personnel investigation. Dependent upon the findings in that investigation, a personnel investigation may subsequently result in suspension and revocation action against licenses, certificates of registry and merchant mariner documents under 46 USC Chapter 77. This means that any casualty involving a U. S. vessel should be conducted independently by the Coast Guard. Personnel investigations and suspension and revocation action will be discussed in Chapter 5.

#### **SELECTED RECENT CASUALTY STATISTICS (1992-1993)**

The MINMOD database shows that a combined two year total of 24,335 reportable marine casualties involving shore facilities and vessels occurred in the United States between

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<sup>79</sup> Title 46 USCA Shipping, Table I showing disposition of all sections of Title 46, 1990 Pamphlet, West Publishing Company, St Paul, Minn, p. XIX.

<sup>80</sup> Ibid.

1992 and 1993.<sup>81</sup> There were 17,869 vessel casualties of which 14,390 involved U. S. vessels.<sup>82</sup> Earlier it was reported that 6,200 U. S. towing vessels are in operation. Towing vessels accounted for 2,647 of the 14,930 reported U. S. vessel casualties.<sup>83</sup>

Groundings accounted for 1,977 or 14% of the 14,390 casualties involving U. S. vessels.<sup>84</sup> Towing vessels were involved in 763 or 39% of the 1,977 groundings involving U. S. vessels in U. S. waters.<sup>85</sup> Human factors were a causal factor in 1,583 or 80% of the 1,977 groundings involving all types of U. S. vessels.<sup>86</sup> Human Factors were a causal factor in 600 or 79% of the 763 groundings involving U. S. towing vessels in U. S. waters.<sup>87</sup> This indicates that nearly 5% of the towing vessel population was involved in groundings where human factors were a causal factor in 1992 and 1993. When an accidental grounding occurs, a presumption of negligence exist. Groundings and a presumption of negligence will be addressed in chapter 5.

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<sup>81</sup> U.S. Coast Guard, Commandant (G-MMI-3), U.S. Coast Guard letter 16732 to LCDR Paul Cormier, December 5, 1994.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

## HUMAN FACTORS

Thus far, reference to human factors was undefined. Within vessel operations, a human factor is defined as "a manned action that should have been done which either was not done or not done properly, or a manned action that should not have been done, but was."<sup>88</sup> "Human Factors is also the design of equipment, work environments, and procedures so as to make them compatible with human capabilities and limitations."<sup>89</sup>

The American Bureau of Shipping reports that:

". . . In almost all cases, the initiating event of catastrophic accidents can be traced to compounding of human and organizational errors.

There are a number of factors that can result in human errors, ranging from willful acts or omissions to a lack of adequate experience, training, knowledge, or communication. These errors are magnified and compounded in times of stress and panic. Human performance levels vary between individuals depending upon knowledge, attitude, and training, organizational dynamics and pressures, and the complexity of the system which they are operating. Performance deteriorates when pressure levels are either too low or too high. In addition, errors are influenced by cultural and moral values, management responsibilities, individual training, and integrity."<sup>90</sup>

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<sup>88</sup> Booth, "Human Factors Study Staff Memorandum", p. 2.

<sup>89</sup> Ibid.

<sup>90</sup> Moore, William H. and Steven R. McIntyre, The Human Element in Marine Safety, Surveyor, Volume 25, Number 2, Democrat Press, Inc., June, 1994, p. 7.

American Waterways Operator's extracted and analyzed 13,154 towing vessel casualties from CASMAIN which occurred between 1981 and 1990. That study indicated that 7,628 or 58% of the cases had personnel related causes.<sup>91</sup>

The top 10 personnel related causes of towing vessel casualties were: Operator Error, Error in Judgment, Failed to Account for Current, Failed to Ascertain Position, Inattention to Duty, Failed to Establish Passing Agreement, Improper Mooring/Towing, Carelessness, Failed to Account for Tide/River Segment, and Failed to Keep Proper Lookout.<sup>92</sup> These personnel-related causes accounted for ninety percent of all personnel-related causes.

The Marine Safety Information System MINMOD provides the decision support and reporting mechanism for the basic elements of the Marine Casualty Program.<sup>93</sup> There are four causal or enabling factors that are those combination of factors that either cause or enable a casualty to occur: equipment factors; hazardous materials; operating environmental factors; and human factors. These factors

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<sup>91</sup> Evaluation of Casualty Incidents for the U.S. Towing Industry 1981-1990, Exhibit III-3, p. III-6

<sup>92</sup> Ibid.

<sup>93</sup> U.S. Coast Guard Marine Safety Manual, Volume V, Chapter 3.B.5.a, Pp. 3-11.

explain why a casualty happened.<sup>94</sup> The Marine Investigation Module's Marine Casualty Human Factors Supplement is used to capture information on the human element. Specific classes of human factors include: communication, knowledge, proficiency, management practice, mental influences, physical influences, compliance with rules, regulations, and policy, equipment status signals, and indicators. These factors are used to further describe why an incident occurred.<sup>95</sup>

Each of the eight human factor classes has a specific subclass.

CLASS: COMMUNICATION

Subclass: Clarity  
Language  
Phraseology

CLASS: KNOWLEDGE/PROFICIENCY

Subclass: Damage Control  
Draft/Air Draft  
Emergency Procedures  
General Knowledge  
Job/Task Responsibility  
Maneuvering  
Route/Environment  
Rules, Regulations Policies  
Stability/Trim  
System/Equipment Operations  
Vessel Operations

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<sup>94</sup> U.S. Coast Guard Marine Safety Information System, Draft Marine Casualty Guide, revised December 4, 1994, provided by Mr Jim Law, U.S. Coast Guard Office of Marine Safety, Security and Environmental Protection, Marine Casualty Investigation Division, Washington, D.C., p. 98.

<sup>95</sup> United States Coast Guard, Marine Investigation Module, Draft Guide to Coded Fields, February 16, 1994, provided by Mr Jim Law, Coast Guard Office of Marine Safety, Security and Environmental Protection, Marine Investigation Division, Washington, D.C., pp. 131-140.

**CLASS: MANAGEMENT**

Subclass: Discipline  
Job Description  
Personnel Coordination  
Personal Qualifications  
Personal Sufficiency  
Personnel-Task Match  
Personnel Training Policy  
Supervision  
Task Loading  
Tests/Drills

**CLASS: MENTAL INFLUENCE**

Subclass: Anxiety  
Apprehension  
Boredom  
Complacency  
Deliberate Misaction  
Distraction  
Equipment Confidence  
Expectancy  
Habit Interference  
Inattention  
Interpersonal Relationships  
Mental Capacity  
Management-Induced Pressure  
Motivation  
Panic  
Perception  
Self-Confidence  
Self-Discipline  
Self-Induced Pressure

**CLASS: PHYSICAL INFLUENCE**

Subclass: Alcohol  
Chronic Fatigue  
Drugs  
Hearing Problem  
Medication  
Illness  
Short-Term Fatigue  
Toxic Substance  
Visual Problem

**CLASS: RULES, REGULATIONS, POLICY**

Subclass: Availability  
Clarity  
Currency  
Sufficiency

**CLASS: STATUS OF SIGNALS/INDICATORS**

Subclass: Accuracy  
Clarity  
Consistency  
Credibility  
Discrimination  
Resolution<sup>96</sup>

Many would agree that "it is time to deal with the fact that human error is a major factor in 80 to 85 percent of all vessel casualties."<sup>97</sup>

**COAST GUARD CASUALTY PREVENTION AND RESPONSE**

The primary purpose of conducting marine casualty investigations is to obtain information that can be used to prevent similar casualties from occurring, as far as practicable. The process of preventing casualties was illustrated by the Business Plan for the Coast Guard's marine safety, security and environmental protection program. The plan identified two strategic goals:

- (1) "Eliminate deaths, injuries, and economic loss associated with commercial and military marine transportation."<sup>98</sup>

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<sup>96</sup> Ibid.

<sup>97</sup> Novak, Bruce, "Cleaner Seas and Safer Ships . . . through maritime regulatory reform", Proceedings of the Marine Safety Council, Volume 51, No. 5, Washington, D.C., September-October, 1994, p. 11.

<sup>98</sup> U.S. Coast Guard Business Plan for Marine Safety, Security and Environmental Protection, COMDTINST 16000.26, Washington, D.C., January 26, 1994.

(2) "Eliminate environmental damage associated with marine transportation."<sup>99</sup>

The goals were to be achieved through response and prevention. The field model for goal achievement through a response mode involved:

- (1) detection and surveillance as a means of finding out about pollution as well as significant operational risks, to permit quick response and mitigation.
- (2) response when the safety system fails and accidents are not prevented
- (3) conducting investigations to provide principle feedback on casualties
- (4) targeting and analyzing different populations based upon industry composition and risk on a local and regional level.

There was also a field model for goal achievement through a prevention mode which included: education, inspection, enforcement and analysis. Enforcement action included personnel investigation and subsequent action. Furthermore, the Coast Guard headquarters' model for goal achievement is a program management mode. It overlaps the field model at the analyze step where national risk are targeted, in lieu of local and regional. Following analysis, standards are developed, policy and operational support are coordinated, and resources are allocated to

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<sup>99</sup> Ibid.



address both the response and prevention modes in the field model. The primary purpose of conducting marine casualty investigations and the Coast Guard business plan appear to have been overlooked by the 103rd congress when the Towing Vessel Safety Act was proposed.

### **CONGRESSIONAL NOTIFICATION OF CASUALTIES**

The 103rd Congress included a House Committee on Merchant Marine and Fisheries. Subordinate to the Committee were five subcommittees: (1) Coast Guard and Navigation; (2) Environment and Natural Resources; (3) Fisheries Management; (4) Merchant Marine; and, (5) Oceanography, Gulf of Mexico, and the Outer Continental Shelf. At the time of the aforementioned focusing events, Representative Tauzin was the Chairman of the Subcommittee on Coast Guard and Navigation.<sup>100</sup> Congress previously mandated that they receive notification of major marine casualties. Title 46 U. S. Code Section 6307 requires that the Secretary notify Congress of any hearing conducted to investigate a major marine casualty involving death.<sup>101</sup> It is not clear how or when Congress was notified about the aforementioned disasters in 1993, but it is self evident that some form of notification did occur. On October 12, 1993, the subcommittee on Coast Guard and Navigation conducted a hearing to investigate inland tug and barge safety. The

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<sup>100</sup> Congressional Index, 103rd Congress 1993 - 1994, Vol. 2, Commerce Clearing House, Inc. 1993.

<sup>101</sup> Title 46 United States Code Section 6307.

investigation is referred to as "the subcommittee's investigation of the AMTRAK SUNSET LIMITED tragedy."<sup>102</sup>

On October 14, 1993, Representative Tauzin introduced the Towing Vessel Navigation Safety Act of 1993. During the introduction he stated that, "It was disturbing to learn that the MAUVILLA's operator was attempting to navigate the tug without the benefit of a marine chart of the area being transited. But, it was unacceptable to learn that federal regulations did not require the MAUVILLA's operator to have a chart of the area navigated."<sup>103</sup>

Representative Tauzin implied that applicable regulations were inadequate. His comments raised important questions. What government agency would normally prescribe navigation safety regulations that govern the uninspected towing industry? Furthermore, did that agency have the authority to prescribe regulations governing navigation safety on uninspected towing vessels?

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<sup>102</sup> Tauzin, Billy, U.S. Representative, "H.R. 3282" statement accompanying the introduction of The Towing Vessel Navigation Act of 1993, Congressional Record, October 14, 1993, para. 2.

<sup>103</sup> Tauzin, para. 3.

## **CHAPTER 4: LEGISLATION**

### **REGULATORY AUTHORITY FOR INSPECTED & RECREATIONAL VESSELS**

The Secretary of Transportation is mandated by law to prescribe safety regulations for inspected and recreational vessels. These mandates are illustrated in two sections of Title 46 United States Code (USC). First, Title 46 USC Section 3306 applies to vessels subject to inspection. This law states that, "To carry out this part and to secure the safety of individuals and property on board vessels subject to inspection, the Secretary shall prescribe necessary regulations to ensure the proper execution of, and to carry out, this part in the most efficient manner."<sup>104</sup> This appears to be a broad authority to prescribe safety regulations as may be deemed necessary by the Secretary of Transportation. Second, Title 46 USC 4302 applies to recreational vessels. The law says that, "The secretary may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard . . ."<sup>105</sup> This section includes authority for the Secretary to require the installation, carrying and use of associated safety equipment on recreational vessels.<sup>106</sup> The

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<sup>104</sup> Title 46 United States Code Section 3306.

<sup>105</sup> Ibid., Section 4302.

<sup>106</sup> Ibid.

authority to prescribe regulations for inspected commercial and uninspected recreation vessels is broad. However, neither of the aforementioned sections of law apply to uninspected towing vessels.

#### **REGULATORY AUTHORITY FOR UNINSPECTED TOWING VESSELS**

A close examination and comparison of the applicable laws clearly show that the Secretary is provided less authority to prescribe safety equipment regulations for uninspected commercial towing vessels than inspected commercial vessels and uninspected recreational vessels.

Title 46 USC Section 4502 enumerates specific safety equipment and directs the Secretary to prescribe regulations which require that each vessel to which the chapter applies be equipped with the listed equipment."<sup>107</sup> Effectively, the Secretary's authority to write regulations is limited to the requirements imposed by the law, except those regulations governing operating stability which is determined by technical expertise.

Additionally, the law governing safety onboard uninspected vessels except uninspected commercial fishing industry vessels is found in Title 46 U. S. Code Section 4104. The law simply states that, "The Secretary shall prescribe regulations to carry out this chapter".<sup>108</sup> The Secretary is not directed to determine what safety equipment

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<sup>107</sup> Ibid., Section 4502.

<sup>108</sup> Ibid., Section 4104

is needed. Nor is the Secretary authorized to prescribe regulations as may be deemed necessary to improve safety. Section 4102 contains the specific requirements for safety equipment. This section specifies that fire extinguishers, life preservers or other lifesaving equipment, flame arrestor for carburetors, vents for bilges, and emergency positioning indicating radio beacons (EPIRBs) shall be carried.<sup>109</sup> There is no authority for the Secretary to add to the law. Therefore, the regulations prescribed by the Secretary simply parrot the law. In effect, Congress has prescribed the safety regulations which in the words of Representative Tausin were "unacceptable".<sup>110</sup>

Representative Tausin also stated that "federal regulations neglected to require towboats to be equipped with a compass, a radar, a fathometer, or any other navigational tools".<sup>111</sup>

Title 33 USC 1223 provides authority to establish vessel operating requirements in the interest of safety. The law does not restrict applicability except for fishing vessels and recreational vessels.<sup>112</sup> However, the

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<sup>109</sup> Ibid., Section 4102.

<sup>110</sup> Tausin, para. 3.

<sup>111</sup> Ibid.

<sup>112</sup> Title 33 United States Code Section 1223.

navigation safety regulations which currently implement the law do not apply to self-propelled vessels less than 1,600 gross tons.<sup>113</sup>

The Ports and Waterways Safety Act (33 USC 1223) states that:

"the Secretary . . . may require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device . . . which is necessary in the interests of vessel safety: Provided, That the Secretary shall not require fishing vessels under 300 gross tons or recreational vessels of 65 feet or less to possess or use the equipment or devices required by this subsection solely under the authority of this Act"<sup>114</sup>

A limiting factor in the Ports and Waterways Safety Act is found in Section 1231 which states that "the Secretary shall issue and may from time to time amend or repeal regulations necessary to implement"<sup>115</sup> the Act. In the exercise of this regulatory authority the Secretary "shall establish procedures in consulting with, and receiving and considering the views of all interested parties, including:

- 1) interested Federal departments and agencies;
- 2) officials of State and local governments;
- 3) representatives of the maritime community;
- 4) representatives of port and harbor authorities or associations;
- 5) representatives of environmental groups;
- 6) any other interested parties who are knowledgeable or experienced in dealing with problems involving vessel safety, ports and waterways safety, and protection of the marine environment; and

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<sup>113</sup> Title 33 Code of Federal Regulations Part 164.

<sup>114</sup> Title 33 United States Code Section 1223(a).

<sup>115</sup> Ibid., Section 1231

- 7) advisory committees consisting of all interested segments of the public when the establishment of such committees is considered necessary because the issue involved are highly complex or controversial."<sup>116</sup>

#### **CONTINUING LIMITED AUTHORITY OVER TOWING VESSELS**

The trend of limiting navigation safety regulatory authority over uninspected commercial towing vessels may continue, despite recent casualties. The Towing Vessel Navigation Safety act of 1993 would have directed the Secretary of Transportation to issue regulations prescribing navigational publication and equipment requirements under Title 46 USC Section 4102(f). The amendments sought to require equipping uninspected towing vessels with: "(1) marine charts of the area being transited; (2) navigational publications for the area being transited; (3) compasses; (4) radar; and (5) a fathometer".<sup>117</sup> Once again the Secretary would not have been provided any discretion, except to enumerate the size of charts required and the names of the navigational publications. However, the authority to expound upon the law in this manner wasn't exactly clear.

It appears that congressional micro-management of uninspected commercial towing vessels will continue. This is not necessarily wrong; however, there may be inherent problems with the approach. When Representative Tauzin

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<sup>116</sup> Ibid.

<sup>117</sup> H.R. 3282, 103rd Congress, 1st Session, Congressional Record, October 14, 1993.

introduced The Towing Vessel Navigational Safety Act of 1993 on October 14, 1993, he stated that, "on October 12, the subcommittee on Coast Guard and Navigation held a hearing to investigate the causes of two towing vessel accidents."<sup>118</sup> He also stated that, "the Amtrak SUNSET derailment was primarily caused by the human error of an individual towboat operator."<sup>119</sup> The Amtrak SUNSET derailed on September 22, 1993. Just twenty days later, the one day investigation of two accidents was conducted by the subcommittee. Additionally, only one day passed between the day of the investigation and the day that H.R. 3282 was introduced proposing legislation to improve safety.

The Towing Vessel Navigation Safety Act of 1993 was actually drafted before the hearing on October 12, 1993. Prior to receiving testimony at the hearing, Representative Tauzin stated that "I am going to initiate the process toward improving safety of our inland waterways. This afternoon I will introduce The Towing Vessel Navigation Safety Act of 1993. The bill was drafted to fill gaping holes in the regulation of uninspected towing vessels."<sup>120</sup> Perhaps the hearing was just a facade; a superficial

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<sup>118</sup> Tauzin, paragraph 2

<sup>119</sup> Ibid., para 8.

<sup>120</sup> Hearing before the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries, House of Representatives, One Hundred Third Congress, October 12, 1993, Serial 103-73, U.S. Government Printing Office, Washington, D.C., 1994.



prerequisite used to validate the need for legislation before Congress. It seems that testimony was solicited to support Congressional conclusions.

#### **PROMPT LEGISLATIVE PROPOSAL?**

There is evidence that this legislation was a knee jerk reaction to the devastating casualty on September 22, 1993. During the hearing before the Subcommittee on Coast Guard and Navigation on October 12, 1993, Rear Admiral James C. Card, Commander of the Eighth Coast Guard District, provided testimony regarding both the Judge Seeber Bridge collision and the Amtrak derailment. He stated that the Judge Seeber Bridge collision occurred after the towboat CHRIS' operator left the pilot house unattended for five minutes while the port engine was operating and clutched in the forward position. Prior to the operator leaving the pilot house, the CHRIS and the hopper barge DM3021 were intentionally pushed up (grounded) against the canal bank. Grounding the barge while waiting for the lock to open is common practice for towboats. However, the operator pleaded no contest at an administrative hearing when charged with negligence. Admiral Card did not speculate as to the cause(s) of the Amtrak derailment. Furthermore, testimony from George Reagle, Director, Office of Surface Transportation, National Transportation Safety Board indicated that both accidents were under investigation.<sup>121</sup>

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<sup>121</sup> Ibid.

It is difficult to understand how Representative Tauzin determined that additional safety equipment would have prevented these casualties from occurring. At the time of the hearing, there was no indication that the navigation safety equipment called for by HR 3282 would have prevented either of the two aforementioned marine casualties from occurring.

#### **PREMATURE LEGISLATIVE PROPOSAL?**

When the legislation was proposed, two separate federal investigations were ongoing. Admiral Card testified that the AMTRAK SUNSET LIMITED derailment was currently under investigation by a National Transportation Safety Board (NTSB) Marine Group which included a Coast Guard investigator to determine the cause of the casualty. Additionally, a criminal task force, which includes a Coast Guard representative, was investigating all aspects of the casualty for possible criminal involvement. Admiral Card also stated that the Coast Guard was waiting for the results of both investigations before determining what administrative or civil penalty actions will be initiated against any of the involved parties.<sup>122</sup> Yet, a day after this testimony, a bill was introduced by Representative Tauzin who declared that, "the subcommittee's investigation of the Amtrak SUNSET LIMITED tragedy resulted in the prompt

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<sup>122</sup> Ibid.

introduction of this bill".<sup>123</sup> The bill was prompt, but considering that two investigations of the Amtrak derailment were ongoing at the federal level, the bill may have been introduced prematurely. There may have been more to learn from these casualties.

There was no need to rush legislation. In Representative Tauzin's own words, "I introduced HR 3282 to require all towing vessels to carry the basic navigational tools which the vast majority of safe, responsible, towboat operators already consider as standard equipment".<sup>124</sup> Must a prudent mariner be required by law to carry standard equipment? Representative Tauzin's comments indicated that proposed legislation did not provide immediate impact on improving safety; thereby eliminating justification for prompt legislation. The perplexing reasons for rushing legislation may be better addressed by a college level course in Federal Ocean Policy and will not be answered in this paper.

#### **UNNECESSARY LEGISLATION?**

On December 10, 1993 it was reported that the American Waterway Operators quickly endorsed Representative Tauzin's proposed legislation to require the carriage of standard

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<sup>123</sup> Tauzin, paragraph 2, October 14, 1993.

<sup>124</sup> Ibid., para. 4

equipment.<sup>125</sup> After the grounding of the tank barge MORRIS J. BERMAN, AWO amended their initial position. In testimony prepared for presentation before the House Merchant Marine and Fisheries Committee on March 3, 1994, Thomas A. Allegretti, president of the American Waterways Operators, said that due to the "diversity of towing industry operations . . . a particular navigation aid may add value in some locations, but have limited utility in others."<sup>126</sup> He further stated that, "Establishing navigation requirements which apply to all towing vessels, in all circumstances, can be problematic."<sup>127</sup> In response an unidentified subcommittee aide was quoted as saying, "We're open to suggestion to improve the bill,"<sup>128</sup> "but we're not interested in watering it down."<sup>129</sup>

Perhaps AWO anticipated additional Congressional scrutiny. On March 16, 1994, Representative Gerry Studds introduced another bill, the Towing Safety Act, to improve towing vessel safety. During the 103rd Congress, Representative Studds served as both the Chairman of the House Committee on Merchant Marine and Fisheries and as

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<sup>125</sup> Boyd, John, "Barge Accidents a Way of Life on Rivers", The Journal of Commerce, Vol.398, No. 28,120, December 10, 1993, Pp. 1A & 4A.

<sup>126</sup> DiBenedetto, William, "Hearings Begin on Barge Safety and Equipment Use", The Journal of Commerce, Vol. 399, No. 28,175, March 3, 1994, p. 8B.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

Chairman of the Subcommittee on Environment and Natural Resources. Representative Studds was quoted as saying he wants to "bring manning and inspection requirements into the 20th century"<sup>130</sup> Among other focusing events, Representative Studds cited the 600,000 gallon oil spill off San Juan, Puerto Rico. The Studds Bill expanded upon the Tauzin Bill. The Studds Bill addressed vessel inspection, manning including a requirement for able seaman to possess merchant mariner documents, in addition to basic navigation equipment called for by the Tauzin Bill.

After the Studds Bill was introduced, the American Waterways Operators said that they would fight the measure. Debra Colbert of the AWO stated that "it was an overreaction to a serious issue".<sup>131</sup> "The towing barge industry will continue to push for quick enactment of legislation backed up by Representative Tauzin."<sup>132</sup> She noted that "three previous attempts to impose inspection and manning requirements have been unsuccessful."<sup>133</sup>

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<sup>130</sup> DiBenedetto, William, "House Leaders to Push for Towing Standards", The Journal of Commerce, Vol. 399, No. 28,176, March 4, 1994, p. 1B.

<sup>131</sup> DiBenedetto, William, "Barge Industry Hits House Proposal for Towboat Safety", The Journal of Commerce, Vol. 399, No. 28,188, March 22, 1994, p.7B.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

On September 16, 1994, it was reported that Representative Studds and Thomas A. Allegretti were "jockeying for position and looking for common ground".<sup>134</sup> The AWO planned to release its own casualty study, while Representative Studds was planning to offer an amendment to the Tauzin bill that he says was supported by Coast Guard reports. AWO argued that the Coast Guard reports did not call for legislation in the area of manning, inspection, or merchant mariner documents.

On September 19, 1994, it was reported that Representative Studds' staff had dumped the bill and instead was planning to offer amendments to the Tauzin bill. The amendments would have required towboat and barge crewmembers to obtain merchant mariner documents (MMD) similar to those required of oceangoing seaman. Additionally, the bill required a vessel inspection program. The MMD requirement was favored by the Seafarers International Union, but was opposed by both AWO and Representative Tauzin. It was predicted that failure to gain full concurrence from industry and labor could hurt the prospects of getting the bill out by October 8, 1993 which was the House's adjournment date. Members of the House Merchant Marine and

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<sup>134</sup> Roberts, William L., "Dispute Heightens Over Barge Safety As Vote Nears for House Committee", The Journal of Commerce, Vol. 401, No. 28,312, September 16, 1994.

Fisheries Committee received letters from Congressman Studds appealing for their support. It was expected that any controversy would eventually kill the bill in the Senate.<sup>135</sup>

On September 22, 1994, it was reported that barge safety legislation easily won House Committee approval despite industry opposition to its manning and inspection requirements. The House Committee's amended version of the Tauzin Bill was added to the Coast Guard Authorization Act as a floor amendment on September 22, 1994 and passed by the House.<sup>136</sup> Industry lobbyists immediately shifted their attention to the Senate where they believed they had "a good chance of winning over a handful of Senators who could hold up the legislation until industry concerns"<sup>137</sup> were met.

The Foghorn, a newsletter of the Passenger Vessel Association, reported that the Senate was opposed to several provisions of what had become the 250 page document known as H.R. 4852, the Oceans Act of 1994. On October 8, 1994, the

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<sup>135</sup> Roberts, William L., "Barge Industry, House Close Gap On Safety Plan", The Journal Of Commerce, Vol. 401, No. 28,313, September 19, 1994, p. 12B;  
Roberts, William L., "Lawmaker Seeks to Add Inspection Rule to Barge Bill", The Journal of Commerce", Vol. 401, No. 28,314, September 20, 1994, p.1A & 14A;  
Roberts, William L., "Barge Safety Amendment Faces Tight Vote Today", The Journal of Commerce, Vol. 401, No. 28,315, September 21, 1994, p. 8B.

<sup>136</sup> Roberts, William L., "Barge Safety Bill May Pass House As Part of Coast Guard Budget Plan", The Journal of Commerce, Volume 401, No. 28,317, September 23, 1994, p. 8A;  
U.S. Coast Guard Congressional Affairs, Bill Status Report, Washington, D.C., October 14, 1994.

<sup>137</sup> Roberts, William L., "House Leaders Push Vote As Barge Bill Clears Panel", The Journal of Commerce, Vol. 401, No. 28,316, September 22, 1992, p. 1A & 2A.

Senate declined to take up the bill before it recessed. The Foghorn stated that, "It was not uncommon at the end of a Congress to package into one bill a number of measures which, have failed to make it through the legislative process standing alone. This year was no different. In addition to the annual reauthorizing of programs for the Coast Guard, the package included a major regulatory reform bill which would have given the Coast Guard authority to accept foreign government approvals of equipment, class society inspections and certifications, etc., a major towboat safety bill, recreational boating safety legislation, the Unsoeld Passenger Vessel Development Act which would have created incentives to build and operate large cruise ships in the U. S. and almost 50 other Jones Act waivers, among other things."<sup>138</sup>

The power of the American Waterway Operators to influence legislation should not be underestimated. As planned, Congress was winding down without the passage of the House legislation. As of October 6, 1994, the Senate was moving slowly on the barge and towboat safety rules passed by the House.<sup>139</sup> House members backed off from the proposed requirements for Merchant Mariner Documents and were compromising on the terms of a Coast Guard inspection

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<sup>138</sup> "Major Maritime Bills Crash Hours Before Congress Recesses", Foghorn, Arlington, VA, November 1994, Pp. 1 & 10.

<sup>139</sup> "Senate Moves Slowly On Barge Safety Rules", The Journal of Commerce, Vol. 402, No. 28,326, October 6, 1994, p. 1B.



program.<sup>140</sup> "The House twice passed barge safety legislation in the closing days of the 103rd Congress, but the legislation was killed in the Senate by political wrangling over unrelated maritime issues. After failing to pass legislation, some in the barge and towing industry now say new legislation from Congress is not necessary."<sup>141</sup> AWO "believes that safety can't wait for the next Congress to consider again this legislation especially since the additional, controversial provisions make enactment problematic."<sup>142</sup> Furthermore, AWO said that they will "accelerate its work with the Department of Transportation and the Coast Guard to implement through the regulatory process many of the provisions contained in the consensus legislation. The partnership which exists between industry and the agency should lead to final rules which obviate the need for congressional action."<sup>143</sup> Proposed regulations will cover navigation equipment; master, mate and apprentice licensing; and, a requirement for radar training.<sup>144</sup>

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<sup>140</sup> Roberts, William L., "Lawmakers Act to Save Barge Safety Legislation", The Journal of Commerce, Vol. 402, No. 28,327, October 7, 1994, p. 8B.

<sup>141</sup> Roberts, William L., "Coast Guard, Industry Set Barge Safety Regulations", The Journal of Commerce, Vol. 402, No. 28,334, October 19, 1994, p. 1A.

<sup>142</sup> Ibid., p. 8A.

<sup>143</sup> Ibid.

<sup>144</sup> Roberts, William L., "Proposed Regulations to Cover Equipment, Licensing and Training", The Journal of Commerce, Vol. 402, No. 28,334, October 19, 1994, p. 8A.

A Notice of Proposed Rulemaking amending 33 CFR 164 to require towing vessels of 8 meters or more in length to carry specified navigation equipment currently is being drafted and is expected to be published in June 1995.<sup>145</sup> Unfortunately, unlicensed towing vessel operators may not be qualified to operate the radars onboard.

On December 2, 1994, the U. S. House of Representatives' Republican Leadership announced a plan to eliminate the Merchant Marine and Fisheries Committee. The plan was expected to be implemented as part of the House Rule Package for the 104th Congress.<sup>146</sup> The impact on impending legislation was yet to be determined; however, it was a moot point as asserted by the AWO.

A "GOP reform plan eliminated the House Merchant Marine Fisheries Committee that generated barge safety legislation."<sup>147</sup> On January 4, 1995, the 104th Congress passed House Resolution 6 which made changes to the committee system by amending the Rules of the House of Representatives Section 202 (a). The amendment stated that "1. There shall be in the House the following committees, each of which shall have the jurisdiction and related

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<sup>145</sup> U.S. Coast Guard Oil Pollution Act of 1990 Update No. 37, Commandant (G-MS), Washington, D.C., December 15, 1994, p. 7 & 24.

<sup>146</sup> Ibid.

<sup>147</sup> Roberts, William L, "Barge Bill Off Course", The Journal of Commerce, Vol. 403, No. 28,387, January 9, 1995, Supplement to the Journal of Commerce, p. 59.

functions assigned to it."<sup>148</sup> The Committee on Transportation and Infrastructure was assigned the following responsibilities: Coast Guard, including lifesaving service, lighthouses, lightships, ocean derelicts, and the Coast Guard Academy; Inland waterways; Inspection of merchant marine vessels, lights and signals, lifesaving equipment, and fire protection on vessels; Navigation and the laws relating thereto, including pilotage; Registering and licensing of vessels and smallboats; Rules and international arrangements to prevent collisions at sea; Measures relating to merchant marine, except for national security aspects of merchant marine; Oil and other pollution of navigable waters, including inland, coastal, and ocean waters; Marine affairs (including coastal zone management) as they relate to oil and other pollution of navigable waters; Transportation, including water transportation and transportation safety.<sup>149</sup> The Journal of Commerce predicted that it was "unlikely that new legislation mandating tough new safety regulations for the barge industry will see the light of day in the new, Republican-controlled Congress."<sup>150</sup> The Journal of Commerce also pointed out that "the Republican Party, which has been generally anti-regulation and pro-business in its approach to these matters, has

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<sup>148</sup> House Resolution 6, Resolution Adopting the Rules of the House of Representatives, Congressional Record dated Wednesday, January 4, 1995

<sup>149</sup> Ibid., Section 202(a)1(q) as amended

<sup>150</sup> Roberts, January 9, 1995, p. 59.

gained both control of the House and the Senate."<sup>151</sup> In addition, both the barge industry and the Coast Guard have been moving forward with new precautions to address the main safety issues raised."<sup>152</sup> AWO can now boast that four attempts to impose inspection and manning requirements have been unsuccessful.

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<sup>151</sup> Ibid., p. 59.

<sup>152</sup> Ibid., p. 59.

**CHAPTER 5: PERSONNEL INVESTIGATIONS AND SUBSEQUENT ACTION**

AWO's opposition to an inspection program has been documented. There has been a great deal of study and discussion concerning: navigation safety equipment; vessel inspection and boarding programs; manning; licensing; crew training; and, casualty reporting. Throughout these studies, the conclusions point out that human factors serve to cause most marine casualties and that an inspection program is not needed.<sup>153</sup> The studies have not reviewed personnel investigations as a means of prevention through enforcement as referenced in the Coast Guard's Business Plan for Marine Safety and Environmental Protection. Personnel investigations are a proper and effective means to address many marine casualties caused by human factors.

**INITIATING PERSONNEL INVESTIGATIONS**

As previously noted, investigation of marine casualties and the determinations made are for the purpose of taking appropriate measures for promoting safety of life and

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<sup>153</sup> Evaluation of Casualty Incidents for the U.S. Towing Industry 1981 - 1990, p. II -3, III -7, III -14, III -15, Appendix B;  
U.S. Coast Guard Commandant's Action on the Review of Marine Safety, Issues Related to Uninspected Towing Vessels, Washington, D.C., December 6, 1993;  
Towing Vessel Inspection Study, Prepared by U.S. Coast Guard Merchant Vessel Inspection and Documentation Division, Paragraphs II.C, III.b.(2), VII.a, Pp. 2, 3, 4, 10;  
An Assessment of Towing Vessel Manning Requirements, Prepared by U.S. Coast Guard, Office of Marine Safety, Security and Environmental Protection, July 1994;  
Towing Safety Advisory Committee Task Force on Entry Level Training, Washington, D.C., February 7, 1994.

property at sea. They are not intended to fix civil or criminal responsibility. However, the investigation may determine as closely as possible:

"Whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of the law on the part of any licensed or certificated man contributed to the casualty, so that appropriate proceedings against the license or certificate of such person may be recommended and taken."<sup>154</sup>

Additionally, Title 46 CFR Section 5.101(a) states that personnel:

"Investigations may be initiated in any case in which it appears that there are reasonable grounds to believe that the holder of a license, certificate or document issued by the Coast Guard may have:

- (1) Committed an act of incompetency, misconduct, or negligence while acting under the authority of a license, certificate or document;
- (2) Violated or failed to comply with subtitle II of title 46, U.S.C., a regulation prescribed under this subtitle, or any other law or regulations intended to promote marine safety or to protect the navigable waters, while acting under the authority of a license, certificate or document;
- (3) Been convicted of a dangerous drug law violation, or has been a user of, or addicted to the use of, a dangerous drug, so as to be subject to the provisions of 46 U.S.C. 7704."<sup>155</sup>

Title 46 CFR Section 5.105 states that:

"During an investigation, the investigating officer may take appropriate action as follows:

- (a) Profer charges.
- (b) Accept voluntary"<sup>156</sup> permanent "surrender of a license, certificate or document.
- (c) Accept voluntary"<sup>157</sup> temporary "deposit of a license, certificate or document.

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<sup>154</sup> Title 46 Code of Federal Regulations Part 4.

<sup>155</sup> Title 46 Code of Federal Regulations Part 5.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

- (d) Refer the case to others for further action"<sup>158</sup>  
 "(e) Give a written warning."<sup>159</sup> "Refusal to accept  
 the written warning will normally result in a  
 withdrawal of the warning and the referral of  
 charges. An unrejected warning will become a  
 part of the person's record."<sup>160</sup>  
 "(f) Close the case"<sup>161</sup> without further action.

#### INITIATING PERSONNEL ACTION

When an investigating officer profers charges, action is taken to suspend or revoke licenses, documents and merchant mariner documents issued by the U. S. Government. It seems reasonable to believe that the list of appropriate actions will be amended to include a limited, temporary suspension authority as authorized by the Oil Pollution Act of 1990. Temporary Suspension Authority is discussed in greater detail later.

Title 46 United States Code Section 7701 states that, "the purpose of suspension and revocation proceedings is to promote safety at sea."<sup>162</sup> Section 7703 states that a license, certificate of registry, or merchant mariner's document may be

"suspended or revoked if, when acting under the authority of that license certificate, or document, the holder:

- 1) has violated or failed to comply Title 46 United States Code, a regulation prescribed under Title 46 or any other law or regulation intended to promote marine safety or to protect navigable waters.

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Title 46 United States Code Section 7701(a)

- 2) has committed an act of incompetence, misconduct or negligence."<sup>163</sup>

Additionally, Section 7704 states that if it is shown at a hearing that a holder of a license, certificate of registry, or merchant mariner's document:

- "1) has been convicted of violating a dangerous drug law of the U. S. or of a state, the license, certificate or document shall be revoked.
- 2) if the holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry or merchant mariner's document shall be revoked, unless there is satisfactory proof of cure."<sup>164</sup>

Personnel investigations which evolve after a casualty and subsequent personnel actions are tracked in MSIS. The data can be used to evaluate the effectiveness of the Coast Guard's personnel investigation program following casualties where a presumption of negligence exist.

#### **RECENT PERSONNEL ACTION STATISTICS (1992-1993)**

Earlier it was mentioned that the Marine Safety Information System (MSIS) can be used to compile and extract history of marine casualties. MSIS can also be used to extract data to determine both the number of personnel investigations initiated and suspension and revocation (S&R) cases, resulting therefrom. S&R proceedings may involve both holders of merchant mariner documents (MMD), as well as, licensed personnel.

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<sup>163</sup> Ibid., Section 7703

<sup>164</sup> Ibid., Section 7704 as amended by the Oil Pollution Act of 1990, Public Law 101-380, Section 4103, August 18, 1990.



Currently, MSIS methodology does not separate merchant mariner cases from U. S. license cases. Therefore, the total number of S&R cases includes both categories. However, personnel action cases which stem from a towing vessel grounding can be assumed to involve licensed personnel, only. The nature of the casualty would not involve a person who holds an MMD.

Approximately 4% of the personnel investigations initiated in 1992 and 1993 resulted from vessel groundings.<sup>165</sup> During the two year period, 3,500 personnel investigations involving U. S. licensed personnel and MMD holders were initiated.<sup>166</sup> Personnel action was initiated in 2,897 cases. Only 152 personnel investigations were initiated following 1,583 U. S. vessel groundings caused by human factors.<sup>167</sup> This equates to only 10% of the vessel groundings. The 152 personnel investigations resulted in follow-up action taken against 138 licensed personnel.<sup>168</sup> This means that when a personnel investigation was initiated after a grounding, remedial action against a licensed person occurred 91% of the time. However, it is important to remember that personnel investigations were initiated following only 10% of the groundings.

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<sup>165</sup> U.S. Coast Guard Commandant (G-MMI-3) letter 16732 to LCDR Paul Cormier, December 5, 1994.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

It seems odd that 1,977 groundings involving U. S. vessels occurred over two years and that 1,583 of these groundings were caused by human factors, but only 152 resulted in personnel investigations. One might argue that the 1,583 groundings included fishing vessels manned by unlicensed personnel; therefore, personnel action against a license was not an available option. Unfortunately that argument does not suffice because there were 763 groundings in the United States that involved towing vessels of which 600 were caused by human factors; nearly four times the 152 total personnel investigations.<sup>169</sup> Furthermore it is unlikely that all 152 personnel investigations stemmed from towing vessel casualties. It is possible that some of the towing vessel groundings involved persons who were exempted from licensing requirements. If so, this would establish an argument to require all towing vessel operators to be licensed, without exception.

The lack of personnel investigations initiated makes less sense in light of a presumption of negligence that exist when a grounding occurs. Presumption of negligence will be discussed later.

The reasoning for the lack of investigations is not clear but there is room for speculation. Perhaps there is extreme difficulty in pursuing personnel action due to difficulty in obtaining evidence. Due to the nature of

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<sup>169</sup> Ibid.

towboat manning, only one person (operator) is required in the wheel house; hence, there may be no eye-witnesses to the casualty.

Perhaps the rapid turnover of casualty investigators lends itself to overall inexperience and inefficiency. The Coast Guard Marine Safety Officer Training Database for 1993 provides a snapshot of individual assignment histories. The database indicates that 582 officers out of 1,244 records on file had experience as an investigating officer at some point in their career.<sup>170</sup> Together the 1,244 officers possessed 8,396 years of cumulative Marine Safety experience in six specialties: marine inspections; licensing; marine environmental protection; readiness planning; and, investigations.<sup>171</sup> This is an average of 6.8 years of marine safety experience per individual. Although investigations is one of six specialties listed, only 819 years or about 10% of the 8,390 years of marine safety experience was served as an investigating officer.<sup>172</sup> The average time spent as an investigating officer was less than 1 year and 5 months per individual.<sup>173</sup>

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<sup>170</sup> U.S. Coast Guard Marine Safety Officer Training and On-the-Job Training Database for 1993, available from Commandant (G-MP-3), Office of Marine Safety, Security and Environmental Protection, Washington, D.C., 1993

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

Besides a lack of investigative experience, perhaps a low number of inexperienced casualty investigators assigned to investigate a disproportionate number of casualties lends itself to work overload. This may result in conducting more investigations from an armchair behind a desk, than onscene. Although 582 individuals had marine safety investigative experience, only about 115 persons were billeted to perform casualty and personnel investigations at field offices throughout the United States.<sup>174</sup> These figures were obtained from the Coast Guard's Commissioned and Warrant Officer Billet Manual which furnishes a listing of authorized billets. The listing was completely valid only on August 23, 1994 when it was compiled. Billet changes occur regularly through additions, deletions, relocations, upgrading, downgrading, and other personnel allowance actions.<sup>175</sup> These figures can be used to compare personnel resources which were available to investigate the 17,869 vessel casualties in addition to investigating personnel involvement and carrying out personnel action when needed in 1992 and 1993. On average, each investigating officer conducted 77 vessel casualties per year or about 1.5 per week. This is in addition to approximately 15 personnel

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<sup>174</sup> U.S. Coast Guard, Commissioned and Warrant Officer Billet Manual, COMDINST M5320.70, Washington, D.C., September 12, 1994, Enclosure 1 and 3.

<sup>175</sup> Ibid., p. 4-1.

investigations per year or about .2 per week; plus any subsequent personnel action cases and other than vessel casualty investigations which are initiated.

Perhaps there are not enough government vehicles or vessels available to respond to groundings onscene in remote locations. Perhaps insufficient continuous funding needed to operate government cars or reimburse investigators for the use of personally owned vehicles is also a factor. Perhaps groundings that are touch and go, make it difficult for investigating officers to catch up with involved parties making it a necessity to conduct an armchair investigation.

Then again, taking action against licensed personnel can be an arduous task which requires preparation for a hearing and presentation of evidence before an administrative law judge. This task may prove to be overwhelming for inexperienced investigators who are simultaneously tasked to conduct casualty investigations.

The excuses are pure speculation and not supported by numbers. They are offered to show that further research is needed to draw a reasonable and factual conclusion as to why so few personnel investigations are initiated following grounding of towing vessels where a human factor is known to be the cause 79% of the time. Perhaps conducting personnel investigations less than 25% of the time where a presumption of negligence exist is an acceptable practice. A mission performance standard should be established to provide adequate enforcement through personnel action to address the human element.

**ADMONISHMENT, SUSPENSION OR REVOCATION PROCEEDINGS**

Some personnel investigations result in personnel action that involve a hearing before an administrative law judge. Title 5 United States Code Sections 551-559 apply to adjudication proceedings. Title 46 United States Code Chapter 77 authorizes suspending or revoking a license, certificate of registry, or merchant mariner's document in accordance with Title 5 United States Code Section 551 - 559.

It is important to emphasize an administrative hearing is held to pursue action against a License, Certificate of Registry, or Merchant Mariner's Document. It is not an action against the holder or person. Therefore, the outcome of a hearing is decided upon by the preponderance of evidence presented as opposed to proof beyond a reasonable doubt needed to decide the outcome of alleged criminal activity.

Title 46 Code of Federal Regulations (CFR) Part 5 implements 46 USC Chapter 77. 46 CFR 5.1(a) states that "the Administrative Procedure Act, Title 5 U.S.C. Section 551, et seq, requires that hearings held in conjunction with these administrative actions are to be presided over by an Administrative Law Judge.<sup>176</sup>

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<sup>176</sup> Title 46 Code of Federal Regulations Section 5.1(a).

The Commandant of the Coast Guard has delegated "the authority to admonish, suspend with or without probation or revoke a license, certificate or document issued to a person by the Coast Guard under any navigation or shipping law"<sup>177</sup> to Administrative Law Judges.

The reasons for "administrative action against a license are remedial and not penal in nature."<sup>178</sup> The "actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea."<sup>179</sup> Such authority would provide immediate remedial action following marine casualties where no personnel investigation and action is currently taken.

The general flow of functions are as follows:

"In proceedings involving the suspension or revocation of a Coast Guard license, certificate or document issued to an individual, the course and method by which such proceedings are channeled are as follows:

(1) In the United States, the Commonwealth of Puerto Rico, Territory of Guam, the Virgin Islands, and other possessions, the proceedings are initiated by the proferment of charges and specifications against the holder of the Coast Guard license, certificate or document. A Coast Guard Investigating Officer under the supervision of an Officer in Charge, Marine Inspection, or an Officer in Charge, Marine Inspection causes the charges and specifications to be served on the person described therein (person charged) who is a holder of a Coast Guard license, certificate or document. At a hearing the Coast Guard submits evidence to support the charges and specifications, while the person charged may submit evidence in

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<sup>177</sup> Ibid., Section 5.19(a).

<sup>178</sup> Ibid., Section 5.5.

<sup>179</sup> Ibid.

rebuttal or mitigation. The Administrative Law Judge renders a decision on the basis of the evidence adduced at the hearing and the law. The Administrative Law Judge's decision is given to the person charged.

(2) In a case where an appeal is made by the person charged, the notice of appeal is filed with the Administrative Law Judge who heard the case or with any Officer in Charge, Marine Inspection, for forwarding to such Administrative Law Judge."<sup>180</sup>

Hearings are presided over and are conducted under the exclusive control of the Administrative Law Judge (ALJ). The ALJ "shall regulate and conduct the hearing in such a manner so as to bring out all of the relevant and material facts, and to insure a fair and important hearing."<sup>181</sup> The detailed hearing procedures can be found in Title 46 Code of Federal Regulations sections 5.501 through 5.607.

"The procedures below are usually followed:

- (1) Administrative Law Judge's opening statement.
- (2) Appearances of persons at the hearing.
- (3) Verification of currently valid license, certificate and/or document held by respondent.
- (4) The Administrative Law Judge advises the respondent of his or her rights.
- (5) Exclusion of witnesses from the hearing room.
- (6) Preliminary motions, objections and/or corrections to the charges and specifications.
- (7) A reading of the charges with respondent's answer.
- (8) Opening statement of investigating officer.
- (9) Opening statement by or on behalf of the respondent or statements in mitigation if the respondent has admitted to the charge and specification or has answered no contest.
- (10) Submission of evidence.
- (11) Argument by the investigating officer and argument by or on behalf of the respondent.
- (12) The investigating officer and respondent are given the opportunity to submit proposed findings and conclusions.

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<sup>180</sup> Ibid., Section 1.01-25(c).

<sup>181</sup> Ibid., Section 5.501(a).



- (13) The Administrative Law Judge renders findings and conclusions.
- (14) Submission of prior record of the respondent and evidence in aggravation or mitigation.
- (15) The Administrative Law Judge renders an order.
- (16) The Administrative Law Judge serves complete written decision.
- (17) The Administrative Law Judge advises the respondent of the right to appeal.
- (18) The Administrative Law Judge declares that the hearing is closed."<sup>182</sup>

It is important to note that, during the submission of evidence, admissions made by a person during a casualty investigation under 46 CFR Parts 4 and 5 may not be used against that person in a suspension and revocation proceeding. This rule exists to promote full disclosure and to facilitate determinations as to the cause of marine casualties. This is clearly stated in Title 46 CFR Section 5.103(b).<sup>183</sup> Since only one person is required to be in the vessel's wheel house, there may be no witnesses when an allision or grounding occurs except for the person responsible for the casualty. In *UNITED STATES v. SORIANO*, the trial court failed to establish the location of the casualty due to insufficient evidence. On appeal, judgement for respondent ruled that a presumption of negligence does not arise until the libellant "produces evidence which should lead the court to find that the casualty occurred at a place which should give rise to the presumption."<sup>184</sup>

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<sup>182</sup> Ibid., Section 5.501(d).

<sup>183</sup> Ibid., Section 5.103(b).

<sup>184</sup> *UNITED STATES v. SORIANO*, 366 F.2d 699 (9th Cir. 1966)

When the location of the grounding can be established, the "presumption of negligence" is an important rule that can be applied when charges are proffered against an operator of uninspected towing vessels following an allision or grounding where there may not be any witnesses to the casualty, but the vessel is observed to be aground after the fact.

#### **PRESUMPTION OF NEGLIGENCE - ALLISIONS AND GROUNDINGS**

It has long been established that a presumption of negligence may exist in the case of groundings and allisions. A presumption of negligence is a concept which is also applied within admiralty jurisdiction of the federal courts. The concept of fault presupposes a standard of care. In collision cases, the standard of care is provided by specific statutory provisions and other concepts such as custom, reasonable care and good seamanship. "The rule creating a presumption of fault against a vessel that violates a statutory rule or a regulation having the force of statute is universally known as the Pennsylvania Rule."<sup>185</sup> "The strictness of the application of these statutory standards is magnified by the Supreme Court's decision that violation of a statutory standard of care, establishing that vessel's fault, also shifts the burden on the proximate cause issue to the one violating the statutory rule to prove

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<sup>185</sup> Healy, Nicholas J. and David J. Sharpe, "Admiralty Case and Materials", West Publishing Company, St. Paul, Minnesota, 2nd ed., 1986, p. 603

that the violation could not have been one of the causes of the accident."<sup>186</sup> "It is a matter of law, no longer in dispute, that when a moving vessel strikes a stationary object, a presumption of negligence arises, and a heavy burden is placed on the operator of a vessel if he is to rebut the presumption."<sup>187</sup>

An allision is a strong indicator that negligence may have contributed to the cause of an accident. "No general standard of conduct need be addressed in the event of an allision in order to establish a rebuttable presumption of negligence."<sup>188</sup> "Implicit in the presumption is the standard of care to which an operator is held, i.e., prudently navigated vessels do not allide with fixed, charted structures."<sup>189</sup>

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<sup>186</sup> The Steamship Pennsylvania v. Troop, 86 U.S. 125, (1873); Arabian Oil Co. v. Hellenic Lines, LTD, 633 F. Supp. 659 (S.D.N.Y. 1986)

<sup>187</sup> United States of America U.S. Coast Guard v. License No. 005802 (Oldow), Decision of the Vice Commandant on Appeal No. 2373, October 16, 1984, p. 6;  
The OREGON, 158 U.S. 186, 193 (1984);  
The CLARITA and the CLARA, 23 Wall 1, 13 (1874);  
BROWN and ROOT MARINE OPERATORS v. ZAPATA OFFSHORE CO., 377 F.2d 724 (CA. 5, 1967)

<sup>188</sup> United States of America, U.S. Coast Guard v. License No. 26468 and Merchant Mariners Document No. 438-78-4714 (Goyneaux), Decision of the Vice Commandant on Appeal No. 2288, February 24, 1983, p. 16.

<sup>189</sup> Ibid.

A grounding is also an indicator that negligence may have contributed to the cause of an accident.<sup>190</sup> "The rationale for the presumption is elementary. Ships under careful navigation do not run aground or strike fixed objects in the ordinary course of events."<sup>191</sup>

In U.S. Coast Guard v. License No. 499864 Issued to David Rabren, it was found that the appellant was guilty of negligence in that he wrongfully grounded the SS GULF TIGER in Tampa Bay, Florida, while serving as pilot under the authority of License No. 499864 on or about August 13, 1978. On appeal, the order of the Administrative Law Judge was vacated and the charges dismissed. However, the opinion of the U.S. Coast Guard Vice Commandant strongly supported the notion of rebuttable presumption of negligence.

Rebuttal evidence may be introduced which supports the conclusion that an appellant acted prudently under the circumstances. Unless the conditions were such that they "could not have been foreseen by the exercise of the kind of judgement which good seamanship requires, the burden of disproving negligence has not been met."<sup>192</sup> When substantial

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<sup>190</sup> SANDERS v. MYERSTEIN, 124 F.Supp. 77, (D.C. E.D. N.C. 1954)

<sup>191</sup> United States of America, U.S. Coast Guard v. License No. 005802 (Oldow), p. 7.

<sup>192</sup> PATTERSON OIL TERMINALS v. The PORT OF COVINGTON, 109 F. Supp. 953,955 (E. D. Pa 1952), aff'd 208 F.2d 694 (3rd Cir 1953)

evidence is adduced showing the lack of fault of the party charged, presumption alone is no longer sufficient to prove a case of negligence.<sup>193</sup>

A presumption does not disappear merely because contrary evidence is offered. "Rebuttal merely returns to the Investigating Officer the burden of going forward with the case."<sup>194</sup> Inexperienced Investigating Officers may not always have the ability to move the case forward.

In the case of RABREN, the investigating officer failed to go forward with the case after a presumption was rebutted. The Vice Commandant's opinion stated that, "Unfortunately, the Investigating Officer, perhaps infected with the confusion permeating the proceeding, failed adequately to elaborate the conditions of the speed, momentum and constriction of maneuvering area which may well have rendered Appellant's 'sheer' defense meaningless with regard to the ultimate grounding."<sup>195</sup> The burden of establishing substantial evidence of a reliable and probative character of the elements of the offense charged was not successfully met by the Coast Guard. Perhaps the ALJ whose decision was overturned on appeal was equally confused or sympathetic to the Investigator's cause.

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<sup>193</sup> *BISSO v. INLAND WATERWAYS CORP*, 114 F.Supp. 713 (E.D.La. 1959)

<sup>194</sup> *United States of America, U.S. Coast Guard v. License No. 499864 (Rabren)*, Decision of the Vice Commandant on Appeal No. 2235, February 9, 1981, p. 9.

<sup>195</sup> *Ibid.*

Lessons learned in the RABREN case prove that a presumption of negligence is rebuttable. This shifts the onus to the Investigating Officer. Without testimony of witnesses or the individual charged, and without the ability to use admissions previously made by a person during an investigation, the Investigating Officer may be forced to drop charges. Knowing this in advance may deter the Investigating Officer from initiating proper investigations. The odds seem to be stacked in favor of Operators of Uninspected Towing Vessels and against the investigating officer.

Ultimately, this may result in a lower number of proffered actions or no action against an operator of uninspected towing vessels when action should be pursued. A lesser action may be the issuance of a written warning by the Investigating Officer. However, the operator may refuse to accept the written warning, leaving the Investigating Officer with two options. First, the Investigator may withdraw the warning and profer charges in a case where confidence in presenting evidence is lacking. The alternative is to close the case without action even though a presumption of negligence existed.

If an Investigating Officer profers charges and presents what appears to be substantial evidence of a reliable and probative nature, the Administrative Law Judge's decision may be overturned on appeal as in the case of RABREN. Appeals will be discussed in chapter 6..

## CHAPTER 6: APPEAL PROCESS

### **APPEALS TO COMMANDANT**

RABREN demonstrates that even if the Investigating Officer succeeds in proving a case, the respondent may find cause to appeal the Administrative Law Judge's decision. The detailed procedures for appeal are found in Title 46 Code of Federal Regulations Part 5, Subpart J:

"A Respondent against whom a finding of proved has been rendered may appeal such decision to the Commandant."<sup>196</sup>

"The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. The only matters which will be considered by the Commandant on the appeal are:

- (1) Rulings on motions or objections which were not waived during the proceedings;
- (2) Clear errors on the record;
- (3) Jurisdictional questions."<sup>197</sup>

"The Commandant may affirm, reverse, alter, or modify the decision of the Administrative Law Judge, or may remand the case for further proceedings. The Decision of the Commandant on Appeal is the final agency action in the absence of a remand."<sup>198</sup>

Both the Commandant and the Administrative Law Judge take official notice of previous Commandant's decision on appeals. Judicial notice is known as "the recognition of facts by a court as true without proof of evidence, because

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<sup>196</sup> Title 46 Code of Federal Regulations Section 5.701(b)

<sup>197</sup> Ibid.

<sup>198</sup> Ibid., Section 5.705(a).

they are well known, easily ascertainable, or so related to the official character of the court that it is sensible to recognize them."<sup>199</sup>

"In addition to other rules providing for judicial notice, the Commandant and the Administrative Law Judges will consider,"<sup>200</sup> Commandant's decisions in all appeal and review cases "without requiring the investigating officer or the respondent to submit them in evidence".<sup>201</sup>

"These Decisions are issued seriatim and are public records."<sup>202</sup> Commandant decisions on appeal may also be appealed to another level.

#### **SUBSEQUENT APPEALS TO NTSB**

The Commandant's Decision on Appeal may be appealed to the National Transportation Safety Board. "The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of licenses, certificates, or documents are in 49 CFR part 825. These rules give the party adversely affected by the Commandant or his attorney of the decision to file a notice of appeal with the Board."<sup>203</sup>

The only issues that may be considered on appeal by NTSB are:

- "(a) A finding of a material fact is erroneous;
- (b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;

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<sup>199</sup> U.S. Coast Guard Marine Safety Manual Volume V, Chapter 1.G.3.C.

<sup>200</sup> Title 46 Code of Federal Regulations Section 5.541(a)

<sup>201</sup> Ibid., Section 5.541(a)(4).

<sup>202</sup> Ibid., Section 5.711(a).

<sup>203</sup> Ibid., Section 5.713(a).



(c) A substantial and important question of law, policy, or discretion is involved; or

(d) A prejudicial procedural error has occurred."<sup>204</sup>

"On review by the Board, if no reversible error is found in the Commandant's decision on appeal, that decision will be affirmed."<sup>205</sup>

"On review by the Board, if reversible error is found in the Commandant's decision on appeal, the Board may:

(1) Set aside the entire decision and dismiss the charges if it finds the error incurable; or

(2) Set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration if it finds the error curable."<sup>206</sup>

When a matter has been remanded to the Commandant, "the Commandant may act in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the administrative law judge of the Coast Guard who heard the case, or to another administrative law judge of the Coast Guard, with appropriate directions."<sup>207</sup>

When a Commandant's decision on appeal is affirmed by the Board, the appellant "may seek further relief from an adverse decision in federal court."<sup>208</sup>

If the Board sets aside the entire decision and dismisses the charge or sets aside the order, conclusion or findings of the Commandant, the respondent may seek an award of attorney fees and other expenses under the Equal Access to Justice Act.

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<sup>204</sup> Title 49 Code of Federal Regulations Section 825.15.

<sup>205</sup> Ibid., Section 825.30.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> United States Coast Guard Marine Safety Manual, Volume V, Chapter 2.H.3.

## ADVERSARY ADJUDICATION

The Equal Access to Justice Act states that "an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."<sup>209</sup>

Adversary adjudication means an adjudication under Title 5 Section 554 "in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license."<sup>210</sup> While proceedings to grant or renew licenses are excluded, "proceedings to modify, suspend, or revoke licenses are covered."<sup>211</sup> This includes Coast Guard suspension or revocation of licenses, certificates or documents.<sup>212</sup> "Coverage of the Act begins at designation of a proceeding or issuance of a charge sheet"<sup>213</sup> by an investigator.

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<sup>209</sup> Title 5 United States Code Section 504(a)(1).

<sup>210</sup> Ibid., Section 504(b)(1)(C).

<sup>211</sup> Title 49 Code of Federal Regulations Section 6.5(a)

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

The implementation of the Equal Access to Justice Act in Agency Proceedings for the Department of Transportation is found in Title 49 Code of Federal Regulations Part 6. "The Act applies to adversary adjudications conducted by the Department of Transportation"<sup>214</sup> in which "the Department's position is represented by an attorney or other representative who enters an appearance and participates in the proceeding."<sup>215</sup> The Secretary of Transportation delegated the authority to take final action, other than rulemaking, on matters pertaining to the Equal Access to Justice Act to the head of each operating administration within the Department of Transportation. Additionally, the head of each operating administration may redelegate the authority.<sup>216</sup>

"Judicial review of final agency decision on awards may be sought as provided in 5 U.S.C. 504(e)(2)."<sup>217</sup> Title 5 United States Code Section 504(c)(2) states that if a party "is dissatisfied with a determination of fees and other expenses made,"<sup>218</sup> that party may "appeal the determination to the court of the United States having jurisdiction."<sup>219</sup>

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<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Title 46 Code of Federal Regulations Section 6.13.

<sup>217</sup> Title 49 Code of Federal Regulations Section 6.37.

<sup>218</sup> Title 5 United States Code Section 504(c)(2).

<sup>219</sup> Ibid.

To avoid adversary adjudication, Coast Guard Investigating Officers must ensure that profering charges against an individual is substantially justified. The value of ensuring that substantial justification exist prior to designating a proceeding was evident in BRUCH v U.S. COAST GUARD.

BRUCH v. U.S. COAST GUARD, 749 F. SUPP. 688, (1990 E.D. PA)

"Administrative Law Judge did not abuse his discretion in determining that dockmasters who had been cited by Coast Guard for allegedly docking boats without requisite license were not entitled to recovery of costs and fees under Equal Access to Justice Act, 5 USCS Sec. 504, where Coast Guard was 'substantially justified' under 5 USCS Sec. 504(a)(1) in issuing citations even though Coast Guard had not formulated nationwide policy governing licensing of dockmasters, because (1) Administrative Law Judge had decided two cases establishing clear legal foundation for issuing citations, and (2) local officials were justified in enforcing consistent interpretation of governing law in region."<sup>220</sup>

Requiring surveyor reports following a towing vessel casualty would provide substantial justification to issue a charge sheet when a mechanical failure is found to be non-existing after a casualty is reportedly caused by mechanical failure. This concept will be addressed in chapter 7.

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<sup>220</sup> BRUCH v. U.S. Coast Guard, 749 F. Supp. 688, (1990 E.D. Pa); United States Code Service Cumulative Supplement, "5 USCS Section 504 Interpretive Notes and Decisions, 14 - Particular Circumstances," Lawyers Cooperative Publishing, New York, May, 1994, p. 8.

## **CHAPTER 7: ADDRESSING SAFETY AND LACK OF EVIDENCE**

### **OTHER PRESUMPTIONS REGARDING LOGBOOKS**

In federal court, "several presumptions relate to log books, including the presumption that a log book contains adverse information if there is an unexplained failure to produce it on request of the attorney for the other party."<sup>221</sup> When a detailed account of a collision is contained in a logbook which fails to "mention a serious fault subsequently charged against another vessel, the court may draw an inference that the fault was not in fact committed."<sup>222</sup> Unexplained erasures in a logbook create an inference that the words erased would be unfavorable to the vessel. "When a mistake is made, a line should be drawn through the words in such a way as to leave them legible."<sup>223</sup>

Title 46 United States Code Chapter 113 contains the requirements for official logbooks. Section 11301(a) states that; "except a vessel on a voyage from a port in the United States to a port in Canada, a vessel of the United States shall have an official logbook if the vessel is-

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<sup>221</sup> Healy, p. 633

<sup>222</sup> Healy, p. 603.

<sup>223</sup> Healy, p. 603.

(1) on a voyage from a port in the United States on the Atlantic Ocean and on the Pacific Ocean."<sup>224</sup>

Section 11301 (b)(12) states that "the master of the vessel shall make or have made in the official logbook the following entries:"<sup>225</sup> . . . "when a marine casualty occurs, a statement about the casualty and the circumstances under which it occurred, made immediately after the casualty when practicable to do so."<sup>226</sup>

Towing vessels on domestic voyages are not required to maintain an official logbook. If a logbook is used, it may be admitted as evidence in an administrative hearing. It is plausible that an Investigating Officer could attempt to assert the aforementioned presumptions. Title 46 Code of Federal Regulations Section 5.545(b) states that, "an entry in any logbook kept on a vessel may be admitted into evidence"<sup>227</sup> at an administrative hearing, "as an exception to the hearsay rule under the Federal Rules of Evidence as a record of regularly conducted activity."<sup>228</sup> The point is that an investigating officer cannot anticipate that a logbook containing detailed accounts of a towing vessel casualty will be available as evidence in an administrative hearing.

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<sup>224</sup> Title 46 United States Code Section 11301(a)

<sup>225</sup> Ibid, Section 11301(b)(12)

<sup>226</sup> Ibid.

<sup>227</sup> Title 46 Code of Federal Regulations Section 5.545(b)

<sup>228</sup> Ibid.

Not only is there a lack of evidence when logbooks are not required; there is also a prohibition from using admissions made during investigation interviews. As previously pointed out, Title 46 Code of Federal Regulations Section 5.551 states that "No person shall be permitted to testify with respect to admissions made by the respondent during or in the course of an investigation under this part or part 4 of this title except for the purpose of impeachment."<sup>229</sup> Fortunately, a presumption of negligence shifts the burden to the respondent when a grounding or collision occurs because otherwise there is very little evidence available when a casualty involving a towing vessel. A surveyor's report following a towing vessel grounding would provide additional evidence at an administrative proceeding while also increasing post casualty navigation safety.

#### **SURVEYOR'S REPORT TO ASSURE SAFETY AND ESTABLISH EVIDENCE**

The Coast Guard's Assessment of Towing Vessel Manning requirements pointed out that "certain causes within the CASMAIN database are considered as personnel related when they represent specific mechanically related issues."<sup>230</sup> Some of the personnel causes cited were "equipment, design

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<sup>229</sup> Ibid., Section 5.551

<sup>230</sup> "An Assessment of Towing Vessel Manning Requirements", United States Coast Guard Office of Marine Safety, Security and Environmental Protection, July 1994, p. 7.

criteria exceeded, and improper maintenance."<sup>231</sup> The Towing Vessel Safety Act's legislative history makes it clear that a towing vessel inspection program is opposed by industry; therefore, it is unlikely that such an inspection program will be established.

When a grounding or collision occurs, it is possible that the cause could be mechanically related and does not include human factors. Mechanical failure also offers a convenient excuse for licensed operators. If towing vessels were inspected, alterations and repairs that involve safety would be subject to inspection by a Coast Guard marine inspector who could confirm or deny that mechanical factors were involved.

Title 46 Code of Federal Regulations Section 2.01-15(a) that no repair or alterations affecting the safety of an inspected vessel or machinery shall be made without Coast Guard approval. Section 2.01-15(b) states that "if repairs to an inspected vessel are necessary, such a vessel may be permitted to proceed to another port for repairs if in the opinion of the marine inspector it can be done with safety."<sup>232</sup>

Towing vessels are not inspected; therefore, they are not currently subject to post casualty inspection. Nevertheless, current regulation does provide the Coast Guard Captain of the Port with the ability to ascertain the

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<sup>231</sup> Ibid.

<sup>232</sup> Title 46 Code of Federal Regulations Section 2.01-15(b)



results of post casualty surveys and repairs. Furthermore, provisions exist which require immediate notice of hazardous conditions.

Earlier it was pointed out that notice and a written report of a casualty must be provided to the Coast Guard. Another regulation requires towing vessels to provide immediate notice of a grounding to the Coast Guard. Title 33 Code of Federal Regulations Section 160.215 states that "whenever there is a hazardous condition on board a vessel, the owner, master, agent or person in charge shall immediately notify the Captain of the Port of destination and Captain of the Port of the port or place in which the vessel is located of the hazardous condition."<sup>233</sup> Section 160.203 defines a hazardous condition as "any condition that could adversely affect the safety of any vessel, bridge, structure, or shore area or the environmental quality of any port, harbor or navigable water of the United States. This condition could include but is not limited to fire, explosion, grounding, leaking, damage, illness of a person, or a manning shortage."<sup>234</sup>

Not only does the Captain of the Port have the ability to control towing vessels subsequent to casualties, an argument can be made that a responsibility to control the vessel exist which dictates exercising the control upon notification that a casualty occurs. This control should be

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<sup>233</sup> Title 33 Code of Federal Regulations Section 160.215

<sup>234</sup> Ibid., Section 160.203

applied until such time that the cause of the casualty can be ascertained through preliminary investigation. Since towing vessels are uninspected vessels, the Coast Guard Captain of the Port should impose a restriction on vessel movements when the cause of a casualty such as an allision or grounding is alleged to be mechanical failure. This should be done to ensure that the towing vessel can proceed safely, while also verifying that mechanical failure is not just offered as an excuse to avoid personnel investigations. Vessel movement can be restricted through a Captain of the Port Order under Title 33 Code of Federal Regulations Section 160.111. The regulation authorizes the "Captain of the Port to order a vessel to operate in a manner directed when it has been determined that such an order is justified in the interest of safety by reason of the condition of the vessel."<sup>235</sup>

Since towing vessels are uninspected and not required to be manned with licensed engineers who could conduct a satisfactory material examination, the order should stipulate that the towing vessel is detained at its current location until such time that the Captain of the Port is provided with a report from a qualified marine surveyor.

The order should require a survey, either general or partial, according to the circumstances. The survey should be extensive enough to ensure that necessary repairs or renewals were effectively completed, that the material and

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<sup>235</sup> Ibid., Section 160.111

workmanship of such repairs or renewals are in all respects satisfactory, to ensure that the vessel is in satisfactory condition and fit for the service for which it was intended. Nothing should be construed as limiting the surveyor from making such test or examinations as deemed necessary to be assured of the safety and seaworthiness of the vessel.

The surveyor's report should clearly state the nature of the mechanical failure; action taken to correct the failure to prevent recurrence; and a statement that the towing vessel is fit for its intended route and service. Only when a surveyor confirms that the unsafe condition has been corrected can the Captain of the Port be assured that the vessel can proceed safely; at which time the order should be rescinded allowing the vessel to proceed. If a marine surveyor determines that mechanical failure was not a factor, the need for a personnel investigation would be self-evident.

The surveyor's material examination would also support a presumption of negligence following a rebuttal by a respondent in an administrative hearing. The surveyor's report would also provide substantial justification to profer charges against the mariner which later could be used to avert adversary adjudication during the appeal process.

An Investigating officer must overcome many obstacles to pursue personnel action following a towing vessel grounding or allision, regardless of a presumption of negligence which is supposed to shift the burden of proof. Temporary suspension authority would provide some relief.

**CHAPTER 8: ADDRESSING BOTH SAFETY AND LACK OF EVIDENCE**

**TEMPORARY SUSPENSION AUTHORIZED BY OPA 90**

In chapter 5 it was mentioned that temporary suspension authority would eventually become a remedial action available to an investigating officer. The Oil Pollution Act of 1990, Section 4103(a)(1) amended Title 46 United States Code Section 7702(d) which states that:

"(1) The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner's document held by an individual if, when acting under the authority of that license, certificate, or document --

(A) that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and

(B) there is probable cause to believe that the individual--

- (i) has performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;
- (ii) has been convicted of an offense that would prevent the issuance or renewal of the license certificate, or document; or
- (iii) within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982."<sup>236</sup>

"(2) If a license, certificate, or document is temporarily suspended under this section, an expedited hearing shall be held within 30 days after the temporary suspension."<sup>237</sup>

Almost five years later, this section of law has not been implemented by Federal regulation. It is anticipated

<sup>236</sup> Title 46 United States Code Section 7702(d), as amended by the Oil Pollution Act of 1990, Public Law 101-380, Section 4103, August 18, 1990.

<sup>237</sup> Ibid.

that a Notice of Proposed Rulemaking (NPRM) will be published in the Federal Register during May, 1995. While the law provides authority for temporary suspension, the authority has been used sparingly thus far. The Coast Guard's informal policy is to avoid using this enforcement tool until after implementing regulations have been formalized.<sup>238</sup> The potential for adversary adjudication, alone, justifies delaying implementation of this law without additional regulations. Depending upon the pending regulation, adversary adjudication could burden the Coast Guard until such time that consistent policy and use is established. Although the potential for adversary adjudication alone should not deter its use. Actually, temporary suspension is a new concept which should be applied whenever a presumption of negligence can be established.

#### **PROPOSAL TO EXPAND TEMPORARY SUSPENSION AUTHORITY**

Temporary suspension is an innovative enforcement tool which could prove to be beneficial if it were authorized for other charges in addition to the violation of law or Federal regulation regarding use of alcohol or a dangerous drug. Certainly, legislation would be a prerequisite to such authority. Justification for such authority does exist.

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<sup>238</sup> Grossetti, Mark A., Lieutenant Commander, Chief, Personnel Action Branch, U.S. Coast Guard Office of Marine Safety, Security and Environmental Protection, Marine Investigations Division (G-MMI-2), Tel. (202)267-2215 interview with Paul Cormier on November 10, 1994.

Title 46 United States Code Section 7702(d)(1)(B)(i) allows for temporary suspension when there is probable cause to believe that the individual has performed the safety-sensitive function in violation of law or Federal regulation regarding use of alcohol. A temporary suspension can occur even though the use of alcohol may only temporarily impair an individual's ability to perform the safety-sensitive function.

Using alcohol while performing a safety-sensitive function seems to be an unreasonable act which may not recur. Even if its an isolated incident, the law allows for the temporary suspension of a license, certificate of registry or merchant mariner's document for as long as 45 days prior to a hearing before an Administrative Law Judge. Additionally, it's interesting to note that the Secretary can temporarily suspend a license for an unreasonable act, such as using alcohol while performing a safety-sensitive function which may, but does not, contribute to the cause of a marine casualty.

This use of alcohol while performing a safety-sensitive function may be an isolated incident. Merely a temporary impairment which does not result in a reportable marine casualty, but does justify a temporary suspension. Ironically, the Secretary does not have the authority to temporarily suspend a license for an unreasonable action or inaction in the performance of a safety-sensitive function which does contribute to the cause of a marine casualty.

Committing an unreasonable action or failing to perform an act which results in a grounding or allision may be an isolated situation, just like the case where alcohol is used. This simply could be referred to as a temporary impairment. The difference is that in the first instance where alcohol is involved, there is no marine casualty involved but immediate remedial action is available. In the second case there is a marine casualty, but there is no provision for immediate remedial action.

The second case appears to be a worst-case scenario, which cannot be dealt with in the same swift and decisive manner as the case where using alcohol did not contribute to a marine casualty. Both situations indicate that a problem exists which requires remedial action to prevent recurrence.

Committing an unreasonable action or failing to perform an act is a human factor which may also be classified as negligence. Negligence is defined as "the commission of an act which a reasonable and prudent person of the same station under the same circumstances would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform."<sup>239</sup>

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<sup>239</sup> Title 46 Code of Federal Regulations, Part 5.29.

As previously mentioned, negligence is a chargeable offense under Title 46 Code of Federal Regulations Part 5, whereby administrative action may be taken against a mariner's license, certificates or documents issued by the Coast Guard.

When a person does not act reasonably in the circumstances presented, the actions cannot be excused as an error in judgment. "Error in judgment is distinguishable from negligence. On an occasion when an individual is placed in a position, not of his own making, where he must choose between two apparently reasonable alternatives, and the individual responds in a reasonable fashion using prudent judgment in choosing an alternative that hindsight shows was a poor choice under the circumstances he is not negligent. But hindsight is not the measure of compliance."<sup>240</sup>

As previously mentioned, there is a presumption of negligence in the case of groundings and allisions. In these situations a casualty has occurred which was the result of an unreasonable action or a failure to perform an act that a reasonable and prudent person would not fail to perform. Unlike groundings and allisions, alcohol cases do not carry a rebuttable presumption which would shift the burden of evidence to the respondent. Therefore, the burden of proof rest with the Coast Guard Investigating Officer who

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<sup>240</sup> United States of America, U.S. Coast Guard v. License No. 545675 (Payne), Decision of the Vice Commandant on Appeal No. 2325, September 29, 1993.



must present evidence from the onset to win a case where alcohol was present and no casualty occurred. This is not an argument to eliminate temporary suspensions for operating while intoxicated; instead, it is an argument to grant similar powers whenever a presumption of negligence exist. Furthermore, since the courts have upheld a presumption of negligence in grounding and allision cases which shifts the burden of proof rest to the respondent; temporary suspension should not require a follow-up administrative hearing within 45 days as is required for alcohol cases. The suspension should be a final action subject to appeal, but not a hearing. Ultimately, such authority would serve to address human causal factors following towing vessel groundings and allisions where the record shows that enforcement efforts have been lacking.

## CONCLUSIONS AND RECOMMENDATIONS

(1) The record shows that legislation proposed by members of the 103rd Congress was well intended, but ill conceived.

(a) The proposed law was premature. The cause of the AMTRAK disaster was not conclusive when the legislation was proposed. It is recommended that any future legislation intended to prevent recurrence of a casualty stem from a thorough investigation performed by the executive branch of government as required by law and regulation.

(b) The introduction of legislation was prompt, but only in relationship to the amount of time that passed between the date of the casualty and the date that legislation was proposed. Hasty introduction of The Towing Vessel Safety Act of 1993 may have resulted in a lack of both substance and public support. It is recommended that any future legislation intended to prevent recurrence of a casualty stem from a thorough investigation performed by the executive branch of government as required by law and regulation.

(c) The legislation was overdue. Legislation did not prevent the towboat CHRIS from striking the Judge Seeber Bridge. Nor did it prevent the similar AMTRAK disaster from occurring; therefore, it is obvious that any legislation that might have prevented recurrence was overdue.

Unfortunately, anyone can speculate as to the ability of proposed legislation to prevent similar casualties from recurring. While legislation may not adequately prevent similar casualties from occurring, legislation could prevent similar causal factors. It is recommended that any future legislation intended to prevent recurrence of a casualty stem from a thorough investigation performed by the executive branch of government as required by law and regulation.

(d) The proposed legislation's content was not necessary, but Congressional scrutiny was necessary. While AWO argues that the legislation was unnecessary, the threat of legislation caused the towing industry to seek a proactive partnership with government. The public debate over proposed legislation opened a dialogue between the Towing Vessel Industry and the Coast Guard. Effectively, the navigation safety equipment requirements suggested in the Towing Vessel Safety Act of 1993 will be promulgated as regulation under the authority of the Ports and Waterways Safety Act. Current plans to improve safety through prevention of casualties include: proposing regulations to develop a master, mate and apprentice scheme for towing vessels and require radar endorsements. In retrospect, the proposed legislation was helpful. The law instilled a fear of a regulatory watershed. Where industry support for new regulations now exist, it did not before the proposed laws. No recommendation.

(e) Law that exempts some towing vessels from licensing requirements runs counter to the regulatory plan. It is recommended that the Coast Guard task MERPAC and TSAC with reviewing the exemption's overall impact. Since MERPAC's membership is primarily licensed personnel representing management and labor, it is anticipated that they would suggest repealing the exemption. It is difficult to anticipate what TSAC's opinion might be. It is recommended that Congress repeal the exemption clause which allows towing vessels under 200 gross tons to operate with unlicensed operators engaged in the offshore mineral and oil industry upon receipt of a recommendation from the Coast Guard and endorsements from MERPAC and TSAC.

2. The Coast Guard did not adequately address the human factor in groundings in 1992 and 1993. It is not known if similar casualties have occurred as a result of not initiating personnel investigations. Additionally, it is not known if remedial action would have resulted from personnel investigations during that time period. To maintain standards of competence and conduct essential to promotion of maritime safety, the Coast Guard should initiate a personnel investigation and take appropriate remedial action following all towing vessel groundings and collisions. When a grounding or collision is caused by a human factor, there is probable cause to initiate a personnel investigation. While there may be a presumption of negligence in these cases, a personnel investigation may reveal that no personnel action is necessary. Subsequent to

conducting personnel investigations where personnel action is warranted, the Investigating Officer should initiate remedial action.

(a) It is recommended that the Coast Guard conduct an internal audit to determine why personnel investigations were not initiated in 75% of the towing vessel groundings involving human causal factors in 1992 and 1993.

(b) It is recommended that the Coast Guard establish a national policy requiring personnel investigations whenever a presumption of negligence may exist. Any personnel action taken can be used later as evidence in aggravation or mitigation in any personnel action involving the same respondent.

(c) Whereas the Ports and Waterways Safety Act will be used to regulate navigation Safety Equipment, it can and should also be used to control the movement of towing vessels subsequent to groundings and allisions. Issuing Captain of the Port Orders requiring a surveyor's examination and report is justified to ensure that a towing vessel can proceed safely after a casualty. Requiring a surveyor's report may also benefit the Coast Guard's personnel investigation program. It is recommended that the Coast Guard establish a national policy that requires a surveyor's examination and report following a towing vessel grounding or allision, whenever, the alleged causal factor is mechanical in nature.

(d) OPA 90 introduced temporary suspension authority. The application of this innovative concept should be expanded to address some casualties caused by human factors. The Investigating Officer should be provided authority to summarily suspend licenses where a presumption of negligence exist. Unlike the authority provided by OPA 90, the licensed operator should have the opportunity to reject the temporary suspension. This is similar to the operator's right to reject an Investigating Officer's letter of warning. Upon rejection of summary suspension, an Investigating Officer could choose between preferring charges for negligence, issue a letter of warning or close the case without action. Unlike the OPA version which requires a hearing within 30 days; no further hearing should be required after acceptance of a summary suspension. The summary suspension should be added to the respondent's record which can be submitted and considered as evidence in aggravation or mitigation in any future suspension and revocation proceeding. The impact of this authority can serve to deter acts of negligence which result in groundings and allisions; ultimately reducing the occurrence of the these marine casualties. It is recommended that the Coast Guard propose legislation which can provide immediate remedial action following personnel investigations where the presumption of negligence exist.

3. TSAC's charter is currently scheduled to expire on September 30, 1995.

(a) It is recommended that the Coast Guard propose legislation to extend the termination date now, so that new legislation is approved before the 104th Congress concludes.

4. This paper noted that reference made to 46 USC 239 in the text of 49 CFR 850 is erroneous and has been outdated since August 1983.

(a) It is recommended that the Coast Guard and NTSB take action to amend 49 CFR 850 to reflect a reference to Title 46 USC Section 7701 to 7701 vice Title 46 USC 239.

In summary, focusing events influence the regulatory process. To date, much has been said but little has been done to prevent towing vessel casualties from occurring. The challenge ahead requires implementing new towing vessel safety initiatives which adequately investigate and address human factors in towing vessel casualties whenever a presumption of negligence exist.

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