

In a final rule published March 29, 2002 (67 FR 15102), the FHWA said it was preparing to issue a notice of proposed rulemaking (NPRM) to consider an extension from three inches (the current U.S. exclusion standard) to four inches in the distance that non-property carrying devices could protrude from the sides of commercial motor vehicles. The NPRM was eventually published under FHWA Docket No. 2001-10370 on July 29, 2002 (67 FR 48994).

Because of concerns raised by several respondents to this NPRM, in particular the absence of research on the effects of such an increase, the FHWA determined it appropriate to issue a supplemental notice of proposed rulemaking (SNPRM). On March 12, 2004, the FHWA published an SNPRM requesting further public comment on the proposal under Docket No. FHWA-2003-16164 (65 FR 11997). By issuing the SNPRM, the FHWA sought to obtain information that would document the experience of others in undertaking similar changes to vehicle width exclusion standards or monitoring and evaluating vehicle crashes caused by contact with width exclusive devices. Our goal was to ascertain whether there might be any known operating or safety repercussions that could result from the one-inch increase.

The FHWA received 3 comments in response to the SNPRM. None of these provided any more definitive information to make the required determination that the proposed expansion of the width exclusion is needed to promote commercial motor vehicle safety and efficiency. We received comments from an individual, the Truck Manufacturers Association (TMA), and the Advocates for Highway and Automobile Safety (AHAS).

Discussion of Comments

The individual commented that a Federal rule requiring all States to allow an extra inch on each side of commercial motor vehicles (CMVs) for non-cargo carrying devices on the National Network (NN) and reasonable access routes would be more efficient than each State issuing its own overwidth permits. Nevertheless, she opposed such a rule because issuing a special permit would be different than allowing a whole class of "humongous" vehicles. It appears that her objection was not so much directed at an extra inch for safety or energy conserving devices, but at the overall size of trucks, which is beyond the scope of this rulemaking action.

The TMA stated that the FHWA would be unable to find answers

concerning possible effects of allowing the additional inch for excluded devices. It noted that this situation was not surprising, given the "obscure and essentially unresearchable nature of the underlying question—namely, will one inch of additional width of a vehicle, all things else being equal, cause more crashes?" It noted that the proposed change would not increase the width dimensions of the vehicle per se, but only the attached, excludable non-cargo carrying devices. The TMA stated that the change in "encroachments" of these devices would be "extremely small," would make "researching the crash cause and effect relationship" very difficult, and would "not [be] readily identifiable in crash data bases." The TMA concluded that, "given the de minimus nature" of the change, and the benefits to NAFTA harmonization efforts, it would support the one-inch increase proposed in the NPRM and SNPRM.

Repeating its earlier objections to the NPRM, the AHAS again opposed the proposal for the one-inch change in the exclusion provisions. Referring to the FHWA's request for information in the SNPRM, it concluded that "the FHWA has acknowledged [in the SNPRM] the need to make a specific safety finding on the safety consequences of allowing an additional inch of width on each side of a commercial motor vehicle." The AHAS also challenged the FHWA's reliance upon sources claiming no knowledge about the "precise safety effects of vehicle width increases" as an "application of agency expertise." The AHAS indicated that such reliance would not allow the FHWA to "draw well-crafted and strongly supported conclusions from the facts entered into the record."

It further noted that the references cited in the SNPRM are no substitute for making "specific safety findings about the consequences of change in policy," and demanded that the agency employ "empirical" research, rather than rely upon sources that can offer no insight into the safety consequences of the suggested change. The AHAS reminded the FHWA that the requirement for such empirical research grows out of a "statutory obligation to measure the safety impact of such changes" that cannot be satisfied merely by "expressions of ignorance or a priori argument."

The AHAS further stated that adding an extra inch in the width of excluded devices is not a de minimus change in the current limitation. It also noted that there are many highways on the NN with less than 12-foot wide lanes where

the one-inch increase could have safety implications.

Conclusion

The FHWA is unable to determine at this time that there is a need for an increase in the existing width exclusion applicable to safety and energy conservation devices. The administrative record of this rulemaking action has failed to identify any specific devices that would need the proposed expansion of the width exclusion in order to promote commercial motor vehicle safety and efficiency. In addition, there is no evidence that the lack of harmonization is adversely affecting NAFTA implementation or that harmonization in this area is otherwise necessary. Therefore, the FHWA is withdrawing this rulemaking and closing the docket.

Authority: 23 U.S.C. 127 and 315; 49 U.S.C. 31111 through 31115; 49 CFR 1.48(b)(19) and (c)(19).

Issued on: October 20, 2004.

Mary E. Peters,

Federal Highway Administrator.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01-04-133]

RIN 1625-AA11

Navigation and Waterways Management Improvements, Buzzards Bay, MA

AGENCY: Coast Guard, DHS.

ACTION: Advance notice of proposed rulemaking; notice of public meetings.

SUMMARY: The Coast Guard is considering amending the existing Regulated Navigation Area for navigable waters within the First Coast Guard District, to require additional navigation safety measures within Buzzards Bay, including tug escorts and use of Recommended Routes. This advance notice of proposed rulemaking seeks public comment on the merits, advantages, and disadvantages of any amendment to the currently-existing RNA that would require tug escort of tank barges transiting Buzzards Bay, Massachusetts. In addition, the Coast Guard seeks comments on the merits of formally designating the existing Recommended Route in Buzzard's Bay.

DATES:

1. Comments are due on or before December 27, 2004.
2. Public hearings will be held at 7:30 p.m. on November 16, 2004, and at 7:30 p.m. on November 17, 2004.

ADDRESSES: The Commanding Officer, U.S. Coast Guard Marine Safety Office Providence maintains the public docket for this ANPRM. Comments and documents will become part of this docket and will be available for inspection and copying at the same address between 8 a.m. and 3 p.m. Monday through Friday, except Federal holidays. You may submit comments and related material by:

(1) Mail or delivery to Commanding Officer, U.S. Coast Guard Marine Safety Office Providence, 20 Risho Avenue, East Providence, RI, 02914-1208.

(2) Fax to 401-435-2399.

(3) Electronically via e-mail at EleBlanc@msoprov.uscg.mil.

The public hearing locations are:

(1) New Bedford Whaling Museum, 18 Johnny Cake Hill, New Bedford, MA; and

(2) Massachusetts Maritime Academy, 101 Academy Drive, Buzzard's Bay, MA.

FOR FURTHER INFORMATION CONTACT: If you have questions on this ANPRM, address mail to, or call, e-mail, or fax, Mr. Edward G. LeBlanc, c/o Commanding Officer, U.S. Coast Guard Marine Safety Office Providence, 20 Risho Avenue, East Providence, RI 02914-1208, telephone 401-435-2351, or e-mail at EleBlanc@msoprov.uscg.mil, or fax 401-435-2399.

SUPPLEMENTARY INFORMATION:**Request for Comments**

We encourage you to participate by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this ANPRM (CGD01-04-133), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by mail, hand delivery, fax, or electronic means to the project officer at the addresses or phone numbers listed under **FOR FURTHER INFORMATION CONTACT**, but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached U.S. Coast Guard Marine Safety Office Providence, please enclose a stamped, self-addressed postcard or envelope. We will consider

all comments and material received during the comment period.

Public Meetings

We intend to hold two public meetings to receive comments on this ANPRM. The times, dates, and locations for these meetings are:

(1) 7:30 p.m., Tuesday, November 16th, 2004, New Bedford Whaling Museum, 18 Johnny Cake Hill, New Bedford, MA; and

(2) 7:30 p.m. Wednesday, November 17th, 2004, Massachusetts Maritime Academy, 101 Academy Drive, Buzzards Bay, MA.

Background and Purpose

Congress designated Buzzards Bay as an Estuary of National Significance in 1985, one of only five estuaries in the U.S. so designated. The Bay has some of Massachusetts' most productive shellfish beds. It interacts with three very different marine systems, the Atlantic Ocean to the south, Vineyard Sound to the east, and Cape Cod Bay to the north. In 2002, there were nearly 10,000 commercial vessel transits and over 1200 tank barge transits in Buzzards Bay, and an estimated 80% of those tank barges were single hull vessels. Since 1969 there have been several significant incidents of tank barge groundings and tank barge groundings with oil spills in Buzzards Bay, including the grounding of the tank barge Florida in 1969 with a spill of approximately 175,000 gallons of No. 2 fuel oil; the grounding of the tank barge Bouchard in 1977 with a spill of approximately 81,000 gallons of No. 2 fuel oil; the grounding of the tank barge ST-85 in 1986 with a spill of approximately 119,000 gallons of gasoline; the grounding of the tug Marie J. Turecamo and its asphalt-laden barge in 1999; the grounding of the tug Mary Turecamo and its barge Florida in 1999 carrying 4.7 million gallons of No. 6 fuel oil; and the grounding of the barge B-120 in April 2003 with a spill of No. 6 oil estimated to be of approximately 22,000 to 98,000 gallons. Groundings or collisions of tank barges could lead to a significant discharge or release of oil or other hazardous materials, as demonstrated by the incidents noted above, with potentially significant adverse impacts on the coastal and maritime environment, and the local economy. The purpose of examining strategies for navigation and waterways management improvements in Buzzards Bay is to reduce the likelihood of another accident that might result in the discharge or release of oil or hazardous material into the navigable waters of the United States.

After a previous oil spill from the tank barge North Cape off of Point Judith, Rhode Island, in 1996, the Coast Guard chartered a Regional Risk Assessment Team (RRAT), comprised of government, commercial, and environmental entities, to examine navigation safety issues within New England waters. The RRAT recommended, and the Coast Guard implemented, a Regulated Navigation Area (RNA) that imposed certain requirements on single-hulled tank barges transiting New England waters, including Buzzards Bay. Subsequent to an oil spill in Buzzards Bay in April, 2003, noted above, the Coast Guard sponsored a Ports and Waterways Safety Assessment (PAWSA), which was conducted by a cross-section of key Buzzards Bay waterways users and stakeholders, resulting in numerous suggestions for improving navigation safety in the Bay. The PAWSA report suggested, in part, that the risk for oil or hazardous material discharge in Buzzards Bay is relatively high, and that one method of reducing that risk, among many that were suggested, might be to "establish requirements for escort tugs." (The PAWSA report is available in docket CGD01-04-133. See **ADDRESSES** above on procedures to access the docket.) The PAWSA also recommended that Recommended Routes be established to help assist vessel traffic and provide safer transit routes for commercial vessels. Additionally, in a letter from several members of the U.S. Congressional delegation from Massachusetts, the Coast Guard was asked to consider measures similar to those recommended in the PAWSA, specifically: Assist tugs, Recommended Routes, and an Automatic Identification System (AIS). This letter, along with the Coast Guard's response, is available in the public docket.

AIS is currently the subject of a separate Coast Guard rulemaking process. See docket USCG-2003-14878, 68 FR 39369, or at <http://dms.dot.gov/>. Under the AIS rule, tank barges, among others, transiting Buzzards Bay would be required to carry AIS, although an implementation date for that carriage requirement has not yet been established, except for certain vessels on international voyages. Additionally, the Coast Guard Marine Safety Office, Providence, RI, has requested that Buzzards Bay be designated a Vessel Movement Reporting System under 33 CFR 161 to monitor the movements of certain vessels, including tank barges under tow, within Buzzards Bay. That request is currently under review by

Coast Guard headquarters in Washington, DC. A copy of this request is available in the public docket for this ANPRM (CGD01-04-133).

The National Oceanic and Atmospheric Administration (NOAA), at the request of the Coast Guard, has already indicated Recommended Routes on navigational charts for Rhode Island Sound, Narragansett Bay, and Buzzards Bay. These recommended Routes are currently included on all new editions of charts 13205, 13218, 13221, and 13230. Currently, an escort tug is required in Buzzards Bay only for single hull tank barges, unless the single hull tank barge is being towed by a primary towing vessel with twin-screw propulsion and with a separate system for power to each screw. Consequently, the vast majority of tug and barges transiting Buzzards Bay (of which most barges are single hull) employ tugs with twin screws and twin engines, but with no additional positive control. The Coast Guard is considering a regulation that would require a tug escort of all tank barges carrying oil or hazardous material regardless of the towing vessel's propulsion configuration, to ensure positive control of the tank vessel.

Discussion of Proposed Regulation

The Coast Guard is considering a regulation that would require tug escorts of all laden tank barges. The Coast Guard is also seeking comments on the merits of formally designating the existing Recommended Route, currently in place in Buzzards Bay.

For the purposes of this Notice, the following terms are as defined in 46 U.S.C. 2101:

Tank vessel is defined as "a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue."

Barge is defined as a non-self-propelled vessel.

Oil is defined as "oil of any type or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes except dredged spoil."

Hazardous material is defined as "a liquid material or substance that is flammable or combustible; designated a hazardous substance under section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1231); or designated a hazardous material under 49 U.S.C. 5103(a)".

For the purposes of this Notice, "*tank barge*" is a non-self-propelled vessel constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue.

For the purposes of this Notice, the following term is as defined in 33 CFR

165.100, "Regulated Navigation Area: Navigable waters within the First Coast Guard District:"

Tug escort is an escort or assist tug "of sufficient capability to promptly push or tow the tank (vessel) away from danger of grounding or collision in the event of a propulsion failure; a parted towing line; a loss of tow; a fire; grounding; a loss of steering; or any other casualty that affects the navigation or seaworthiness of either vessel."

For the purposes of this Notice,

Buzzards Bay is the body of water east and north of a line drawn from the southern tangent of Sakonnet Point, Rhode Island, in approximate position latitude 41°27.2' N, longitude 70°11.7' W, to the Buzzards Bay Entrance Light in approximate position latitude 41°23.5' N, longitude 71°02.0' W, and then to the southwestern tangent of Cuttyhunk Island, Massachusetts, at approximate position latitude 41°24.6' N, longitude 70°57.0' W, and including all of the Cape Cod Canal to its eastern entrance, except that the area of New Bedford harbor within the confines (north of) the hurricane barrier, and the passages through the Elizabeth Islands, would not be considered to be Buzzards Bay.

Recommended Route is the light green-shaded route contained on the most recent editions of NOAA navigational charts 13230 and 13218, and accompanied by a "Note" on each chart which reads "Recommended Routes for deep draft vessels (including tugs and barges) entering and departing Rhode Island Sound, Block Island Sound, Narragansett Bay, and Buzzards Bay. While not mandatory, deep draft commercial vessels (including tugs and barges) are requested to follow the Recommended Routes at the master's discretion. Other vessels, while not excluded from these Recommended Routes, should exercise caution in and around these areas and monitor VHF channel 16 or 13 for information concerning deep draft vessels (including tugs and barges) transiting these routes. See U.S. Coast Pilot Section 2, Chapter 5, 6 or 7 as appropriate." These Recommended Routes are not part of the internationally recognized and approved Narragansett Bay Traffic Lane and Buzzards Bay Traffic Lane in Rhode Island Sound, and have not been formally adopted by the Coast Guard.

Questions

We invite the public to answer the following questions. Any additional information provided on this topic is welcome. In responding to each question, please identify the question to which your response applies, and

explain your reasoning as fully as possible so that we can carefully weigh the consequences and impacts of any future regulatory actions the Coast Guard may take.

In preparing your responses to these questions, please indicate your position in the maritime industry, if applicable.

Tug Escorts

1. What would constitute an effective "tug escort?" Does the definition in this ANPRM suffice?

2. What would be the costs, if any, to tank barge owners, operators, and consumers, of requiring a tug escort for all tank barges transiting Buzzards Bay?

3. What would be the economic impact to small entities, if any, of a requirement that all tank barges have tug escorts? "*Small entities*" is as defined by Regulatory Flexibility Act [5 U.S.C. 601], and generally refers to an enterprise or business that "is independently owned and operated and which is not dominant in its field of operation."

4. Would a requirement that all tank barges have tug escorts cause a shortage of tug availability in the Buzzards Bay or Northeast U.S. areas? If so, what are the likely, potential economic impacts? Would rates for hiring tugs in the Buzzards Bay or Northeast U.S. areas change significantly as a result of such a requirement? If so, how much would rates change?

5. Are there alternatives to tug escorts, such as increased manning or pilotage requirements on tugs, or double hulls on barges, that would provide an equivalent or improved level of navigational safety in Buzzards Bay?

Vessel Routing

6. Would a requirement that tank barges under tow, and with tug escort, use the Recommended Route in Buzzards Bay currently displayed on NOAA charts have any adverse economic or navigation safety impacts?

7. Are there other alternatives to required routing that would enhance navigational safety in Buzzards Bay, such as a Recommended Route approved by the International Maritime Organization? If so, should such a route differ from the Recommended Route currently shown on navigational charts?

Comments are not limited to the preceding questions and are invited on any aspect of the proposed regulation.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on state or local governments and would either preempt State law or

impose a substantial direct cost of compliance on them. The U.S. Supreme Court, in the cases of *United States v. Locke*, 529 U.S. 89 (2000) and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) has ruled that certain categories of regulation issued pursuant to the Ports and Waterways Safety Act of 1972, as amended, are reserved exclusively to the Coast Guard, and that state regulation in these areas is preempted.

On August 4, 2004, the Commonwealth of Massachusetts enacted Chapter 251 of the Acts of 2004, an Act Relative to Oil Spill Prevention and Response in Buzzard's Bay and Other Harbors and Bays of the Commonwealth. It is the view of the Coast Guard that several provisions of the Massachusetts Act touch categories of regulation reserved to the Federal Government and are preempted per the rulings in *Locke* and *Ray*. It is likely that any regulations promulgated as a result of this advance notice of proposed

rulemaking would likewise touch categories of regulation reserved to the Federal Government, thus becoming further indicia of preemption.

Section 17 of the Massachusetts Act purports to impose a state pilotage requirement on certain vessels engaged in the coastwise trade. It is the view of the Coast Guard that this provision is void by operation of law pursuant to 46 U.S.C. § 8501. Coast Guard regulations promulgated as a result of this advance notice of proposed rulemaking may also address pilotage.

Because of the preemption issues described above, the Coast Guard will conduct a Federalism analysis pursuant to E.O. 13132 for any rules promulgated as a result of this notice. Sections 4 and 6 of E.O. 13132 require that for any rules with preemptive effect, the Coast Guard shall provide elected officials of affected state and local governments and their representative national organizations the notice and opportunity for

appropriate participation in any rulemaking proceedings, and to consult with such officials early in the rulemaking process. Although it is the view of the Coast Guard that certain sections of the Massachusetts law are preempted for reasons independent of any potential rulemaking action here, in order to comply with the spirit of E.O. 13132, the Coast Guard has already begun consultations with the state government of Commonwealth of Massachusetts. We invite other affected state and local governments and their representative national organizations to indicate their desire for participation and consultation in the rulemaking process by submitting comments to this notice.

Dated: October 14, 2004.

David Pekoske,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

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