

Richard C. Hiscock

29 March 2000

RADM Robert C. North, USCG
Commandant (M)
U.S. Coast Guard
2100 Second Street SW
Washington DC 20593-0001

Docket Management Facility
(USCG-1999-5040)
U.S. Department of Transportation, Room PL-401
400 Seventh Street SW
Washington DC 20590-0001

Re: Notice of Proposed Rule Making (NPRM) USCG-1999-5040
“Safety of Uninspected Passenger Vessels Under the Passenger Vessel Safety Act of 1993 (PBSA).”
65 FR 42, 2 March 2000, 11410-11454

Dear Admiral North:

I am writing to you directly regarding the above captioned rulemaking because I respect your dedication to the Coast Guard’s Marine Safety Program and its goals, and I because I hope that you will take my comments to heart. (I will send another copy to the Docket Manager for consideration.)

This Notice of Proposed Rulemaking (NPRM) is illustrative of everything that is wrong with both the marine safety statutes as promulgated by Congress, and the marine safety program as administered by the United States Coast Guard. The statutes are archaic and the regulatory process continues to permit the use of equipment that has been outdated for half a century.

Recommend that Coast Guard, “require that all passenger vessels [whether inspected or uninspected] except ferries on river routes operating on short runs of 30 minutes or less have primary lifesaving equipment that prevents immersion in the water for all passengers and crew.” [NTSB 1989]
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IS THERE SOMETHING WRONG WITH THIS PICTURE?

After almost a century of tinkering with the statutes there are now three classes of passenger vessels in the U.S. each with its own sub-class or classes, they are –

- ‘Passenger vessel’ (those over 100 gross tons carrying 12 or more passengers);
- Several classes of ‘small passenger vessel’ (those of less than 100 gross tons carrying more than 6 passengers, those chartered with either 6 or 12 passengers, depending on whether the charter includes a crew); and,
- ‘Uninspected passenger vessels’ (those less than 100 gross tons carrying not more than 6 passengers and those over 100 gross tons carrying not more than 12 passengers).

How this came about is part of the long and tangled story of passenger vessel safety in the United States – beginning with the first efforts to inspect steam boilers. It is much like the proverbial story of the little Dutch boy sticking his finger in the dike to try to hold back the sea.

Most of this story was written by *Congress* with the help of the Coast Guard (and its predecessor organizations), and begins in the early days of the 20th Century. What are today known as ‘uninspected passenger vessels’ began life in 1910 when Congress adopted the first “Motor Boat Act” (P.L. 61-201, 36 Stat. 462). That act required that motorboats carrying passengers be operated by someone with a ‘license,’ but there were no specific requirements for obtaining the license. ‘Motorboats’ were defined as ‘a vessel propelled by machinery other than steam.’ Motorboats over 15 gross tons carrying passengers were subject to inspection regardless of length. The Motorboat Operator License was born.

In 1936 Congress passed reform legislation requiring that all passenger vessels (regardless of means of propulsion) of 100 gross tons and over be *inspected*. (P.L. 74-626, 49 Stat. 1380) These are ‘H vessels’, so called because the regulations are found in Subchapter H of 46 Code of Federal Regulations (CFR).

In 1940 the Congress adopted a new ‘Motor Boat Act’ of 25 April 1940 (P.L. 76-484, 54 Stat. 163) requiring that a ‘...motorboat while carrying passengers for hire, shall be operated or navigated except in charge of a person duly licensed for such service ...’, added were specific requirements for documentation of experience, habits of life, and character and an oral exam. Again motorboats were defined as a vessel propelled by machinery – other than steam – not more than 65 feet in length.

It was not until after World War II that the obvious ‘loophole’ in the statutes was realized – vessels of less than 15 gross tons could carry any number of passengers and were not subject to inspection. After a number of tragic casualties – including the *Jack* and the *Pelican* both in 1951, resulting in the loss of 56 lives – Congress decided to act. In May 1956, it passed the “Small Passenger Vessel Act” (P.L. 84-519) requiring the *inspection* of ‘small passenger vessels’ – that is: mechanically propelled vessels of 15 gross tons and less, and those of more than 15 gross tons and less than 100 gross tons that did not exceed 65 feet in length; sail vessels of 700 gross tons and less; and barges of 100 gross tons and less. This Act is also known as the “T-Boat Act,” so named because the regulations for vessels less than 100 gross tons carrying more than 6 passengers are found at Subchapter T of 46 CFR. But, exempt from the provisions of this act were mechanically propelled vessels carrying 6 or less passengers. Thus the origin of the ‘six-pack.’

In 1963 the scope of the regulations was broadened to included vessels more than 65-feet in length, but still measuring less than 100 gross tons. Thus was born the division of T-Boats into T-S ‘Small’ (those less than 65-feet) and T-L ‘Large’ (those over 65-feet but less than 100 gross tons).

In 1971 the Congress further confused the issue of ‘six-pack’ vessels when it adopted the ‘Federal Boating Safety Act of 1971’ (P.L. 92-075) – often referred to as the FBSA-71 – defining ‘boat’ to include vessels “engaged in the carrying of six or fewer passengers for hire.” Thus many of the provisions of the FBSA-71 are applicable to ‘six pack’ vessels, particularly the ‘construction’ requirements, including Hull Identification Number; Safe Loading, Safe Powering, and Level Flotation; certification of fuel and electrical systems; ventilation; backfire flame arresters; and start in gear protection for outboard engines. But, there has been little enforcement of these requirements, thus many passengers have been carried on vessels that were not built in compliance with the regulations promulgated under the FBSA-71.

In 1983 Congress codified all the previously adopted marine safety statutes into Subtitle II of 46 U.S.C. The four remaining provisions of the MBA-40 can now be found at Chapter 41 – Uninspected Vessels, and the provisions of the FBSA-71 (with the exception of the numbering provisions and the Boating Safety Advisory Committee) are at Chapter 43 – Recreational Vessels.

The 1983 codification also contains new definitions for 'recreational vessel' (means a vessel (A) being manufactured or operated primarily for pleasure; or (B) leased, rented, or chartered to another for the latter's pleasure) and "uninspected passenger vessel" (means an uninspected vessel carrying not more than 6 passengers). Section 4105 makes it clear that the provisions of Chapter 43 (the provisions of the 'old FBSA-71') apply to "uninspected passenger vessels." Since the codification in 1983, the Coast Guard has neglected to bring Subchapter C of 46 CFR and Subchapter S of 33 CFR into complete compliance with the codified statutes in 46 U.S.C.

Licensing of maritime personnel was completely 'reformed' in the 1980's, as well. What was previously a Motor Boat Operators License, normally with a very restrictive route, became an Operator of Uninspected Passenger Vessels license – on near coastal waters, restricted to 100 miles from land. But, in fact it is possible for an individual with a Master, Near Coastal License to take an Uninspected Passenger Vessel of less than 100 gross tons out 200 miles from land! Were that individual to have a Master, Near Coastal License endorsed for up to 200 gross tons, it would be possible for the individual to take an Uninspected Passenger Vessels OVER 100 gross tons, carrying up to 12 passengers out 200 miles. In other words the License issued by the Coast Guard is the ONLY limiting factor for the operation of Uninspected Passengers Vessels.

By the 1980's it became obvious that the small passenger vessel fleet was changing – included in the fleet were many large excursion vessels and vessels with overnight accommodations, as well as passenger ferries, and whale watch vessels. And 'small passenger vessels' – through use of 'creative admeasurement' – were getting larger and larger. Some were over 200-feet overall – we know of one that was 212' – some carrying more than 1000 passengers. A far cry from the small family operated 'party boats' of the 1950's.

Because of the changing nature of the fleet and because of changes in the statutes that eliminated the distinction between 'small' and 'large' small passenger vessels the Coast Guard began, in 1985, a review of the 'standards for small passenger vessels,' a project that resulted in a complete rewrite of the 'small passenger vessel rules' and it took until 1997 to complete. This rulemaking divided small passenger vessel into two Subchapters in the CFR – K for 'vessels carrying more that 150 passengers or having overnight accommodations for more than 49 passengers,' and T for all other small passenger vessels.

But there was still the problem of bareboat charters. Savvy owners figured out that they could bareboat charter – to any number of people – their less than 100 gross ton vessels provided they did not provide a crew. The vessel would be considered a 'recreational vessel,' under existing statutory definitions. Also, a vessel of over 100 gross tons could be bareboat chartered and still be considered a 'recreational vessel' as long as no crew was provided. The Passenger Vessels Safety Act of 1993 was designed to fix these problems, and to a certain extent it did.

But, it also created a class of 'uninspected passenger vessels' of 100 gross tons and OVER – those carrying 12 or fewer passengers for hire and those chartered with a crew provided when there are 12 or fewer passengers. Thus a new class of 'uninspected passenger vessels' was born.

What started out as a rule requiring a licensed operator on a motor vessel of less than 15 gross tons has grown to include vessels of 100 gross tons or more carrying 12 or fewer passengers that can operate out to 100 miles!

It would appear that there is something wrong with the way 'we' go about regulating 'passenger vessels' – and it is getting worse. There must be a better way.

I believe Congress should authorize the Coast Guard to ‘make all vessels safe,’ leaving the details of the ‘breakpoints’ to the Coast Guard. There are many (even I at times) who argue against this approach, feeling – with some justification – that if given the blanket authority to make all vessels safe (similar to authority that the FAA has for aircraft) that the Coast Guard would not exercise that authority with vigilance. But, the majority of those who oppose such an approach fear that given that much authority the Coast Guard would – with little experience or expertise – adopt ‘heavy handed’ Draconian regulations. There is merit to both arguments.

There are also those who believe that the Coast Guard prefers to have the Congress tell them what to do, that way they don’t have to be the ‘bad guy’ – they can point to Congress and say “they made us do it.”

But, it is time to try such an approach, and I can think of no better place to start than with passenger vessels. The Congress has provided solid definitions of ‘consideration’ and ‘passenger for hire’; it is now time for the Coast Guard to request from the Congress the authority to make all passenger vessels safe – by ‘inspection’ or other means appropriate to the size, route and number of passengers – and Congress should grant it.

It is not likely that Coast Guard will make such a request. Why? Because they think the current statutes are perfectly adequate. How do I know? Because several years ago I asked the Coast Guard the following question –

Has the Coast Guard – or the Department of Transportation – ever considered seeking broad legislative authority to ‘make all vessels safe’, similar to the authority granted to the Federal Aviation Administration (FAA) to regulate all types of aircraft?

The answer from the Coast Guard –

The Coast Guard believes that Title 46 of the United States Code adequately addresses (your question).

One would think that the Coast Guard would relish the flexibility to sensibly regulate vessel safety, free of all the artificial ‘breakpoints’ imposed by Congress. I guess not.

LIVES AT RISK

Now comes the real tragedy of this NPRM – the lifesaving equipment requirements, particularly the survival craft requirements.

As far back as World War II the need for out-of-the-water survival craft was recognized, yet today the Coast Guard continues to ‘approve’ devices such as **rigid liferafts, life floats, and buoyant apparatus**. In the NPRM the Coast Guard admits, in discussing the loss of the uninspected passenger vessel *Cougar*, that **buoyant apparatus** provide “**no protection from exposure to cold water.**”

It has been understood – since at least World War II – that out-of-the-water survival craft provide much need protection for survivors in the water, cold or warm. In 1944 the Navy Department’s Emergency Rescue Equipment Section (the predecessor the Air-Sea Rescue Agency), in a By-Weekly Report (dated 12 February), makes the following observations about “Balsa ‘Doughnut’ life floats” sometimes known as ‘Carley floats’ for Horace Carley who designed them in 1901!

... this type of rectangular canvas covered balsa-wood ‘doughnut’ with net-suspended platform or grating has been in general use by the Navy and Merchant Marine.

This type of float has a serious drawback in that the survivors are partially immersed. As a consequence, the time allowance for rescue is cut to a minimum because it is virtually impossible to survive for any length of time in cold waters, particularly those found above and below the equatorial belt.

With this in mind three new float designs ... are now under consideration. They are all so designed that survivors may sit up on a deck **out of the water**.*

In his gripping book *Bloody Winter*, Captain John M. Waters, Jr., USCG (Ret)** makes the following observation in the caption for a photograph of survivors opposite page 165 –

Sixteen survivors of the MALLORY wait on a merchant marine type raft for rescue by the [CGC] *BIBB*. **This type of raft provided far more protection than the Navy doughnut type.**

In 1973 both the Coast Guard and the National Transportation Safety Board (NTSB) investigated the loss of the M/V *Comet* off Point Judith, Rhode Island resulting in the loss of 16 lives. The NTSB examined carefully the issue of ‘lack of Protection in Cold Water’ and concurred with the Coast Guard’s Marine Board recommendation that **primary lifesaving devices should keep people out of the water when water temperature is expected to be 60°F or less**. The Commandant rejected this recommendation, and has been rejecting similar recommendations ever since.

This was not the first time that the NTSB investigated the impact of cold water on survival, nor would it be the last. They had done so two years earlier in the case of the M/V *Maryland* that foundered in Albemarle Sound, North Carolina in December of 1971, and they continue to make similar – and stronger – recommendations right up to the present day. In their 1989 study entitled “Passenger Vessels Operating From U.S. Ports” the Board recommended that the U.S. Coast Guard:

Require that **all** passenger vessels except ferries on river routes operating on short runs of 30 minutes or less have primary lifesaving equipment that prevents immersion in the water for **all** passengers and crew.

In December 1989, shortly after the NTSB issued its Study, the “small passenger vessel” *Bronx Queen*, a “head-boat”, sank near the entrance to New York harbor with 19 persons on board. Two passengers died and four were injured, despite immediate response of rescue resources. The Coast Guard conducted a thorough investigation of the casualty. The vessel was carrying ‘life-floats’ (buoyant apparatus) for 68 persons. The investigating officer concluded – among other things –

... that buoyant apparatus which do not provide out-of-the-water capabilities do not provide adequate protection for people in cold water operations.” He recommended, “that the Coast Guard promulgate regulations requiring that primary life saving equipment for small passenger vessels operating in cold water be of a **type which provides out-of-the-water protection**.”

In December 1993 the charter-fishing vessel *El Toro II* foundered in Chesapeake Bay with 23 people on board. The vessel had ‘life-floats’ (buoyant apparatus) on board for only 20 people. Two passengers and one crewmember died, from the effects of hypothermia. The NTSB reiterated its recommendation that the Coast Guard “require that **out-of-the-water survival craft** for **all** passengers and crew be provided on board small passenger vessels on **ALL** routes.”

* An original plan for one of these out-of-the-water designs hangs on the wall in my office.

** Considered by many to be the ‘father’ of modern Search and Rescue.

Now comes a proposal **from the Coast Guard** for survival craft – not on inspected vessels but on UNINSPECTED vessels – that continues to permit ‘six pack’ vessels (vessels that are less than 100 gross tons carrying 6 or fewer passengers) to operate UP TO 100-MILES OFFSHORE WITHOUT ANY SURVIVAL CRAFT.

AND, under this proposal ‘12 pack’ vessels (the new class of uninspected vessels over 100 gross tons carrying 12 or fewer passengers) would be permitted to operate with **life floats** or **buoyant apparatus** of an approved type. (See proposed §25.25-17, Survival craft requirements for uninspected passenger vessels of at least 100 gross tons.)

How many more must die before it is recognized that for a ‘survival craft’ to be worthy of the designation it must provide **out-of-the-water** protection for survivors. The Coast Guard is proposing to sanction the operation of uninspected passenger out to 100 miles without any survival craft at all, or with antiquated equipment that fails to provide the protection necessary for successful survival and rescue. This proposal ignores decades of recommendations of investigators from inside and outside the Coast Guard, specifically to the contrary. Why is the Coast Guard proposing such a thing?

I urge you to reconsider the requirements for survival craft on these vessels, and to give serious consideration to the need for more flexible authority to ‘make all vessels safe.’

Best regards,

/signed/

Richard C. Hiscock

pc: Chairman and Ranking Member
The Subcommittee on Coast Guard & Maritime Transportation,
House Committee on Transportation & Infrastructure

Addendum
15 March 2004 / rch

Note: On May 15, 2002 the Coast Guard published the Final Rule – Safety of Uninspected Passenger Vessels Under the Passenger Vessel Safety Act of 1993 (PVSA).

Under “Discussion of Comments and Changes” the Coast Guard says:

(6) One comment stresses the importance of getting disaster survivors out of the water as quickly as possible, and asks us to delete buoyant apparatus and life floats for the proposed 46 CFR 24.15-17. We agree and will make this change. We believe that because these vessels are uninspected and for the most part capable of extended ocean voyages, a higher level of safety equipment is required.

(more)

The regulation [46 CFR 25.25-17](#) states:

Survival craft requirements for uninspected passenger vessels of at least 100 gross tons.

(a) Each uninspected passenger vessel of at least 100 gross tons must have adequate survival craft with enough capacity for all persons aboard and must meet one of the following requirements:

(1) An inflatable liferaft must be approved under 46 CFR part 160, subparts 160.051 or 160.151, and be equipped with an applicable equipment pack or be approved by another standard specified by the Commandant. Inflatable liferafts must be serviced at a servicing facility approved under 46 CFR part 160, subpart 160.151.

(2) An inflatable buoyant apparatus must be approved under 46 CFR part 160, subpart 160.010 or under another standard specified by the Commandant. An inflatable buoyant apparatus must be serviced at a servicing facility approved under 46 CFR part 160, subpart 160.151.

(b) If the vessel carries a small boat or boats, the capacity of the small boat or boat(s) may be counted toward the survival craft capacity required by this part. Such small boat or boat(s) must meet the requirements for safe loading and floatation in 33 CFR part 183.

A small victory for safety at sea!