Comments of the

World Shipping Council

Submitted to the

Department of Homeland Security

United States Coast Guard

In the matter of

Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard; Proposed Rule

Docket Number:
USCG-2008-1259

March 27, 2014
The World Shipping Council (WSC or the Council) files these comments in response to the Coast Guard’s Notice of Proposed Rulemaking (NPRM) in Docket No. USCG-2008-1259, published on December 27, 2013 (78 Fed. Reg. 70242). The World Shipping Council is a non-profit trade association that represents over twenty-nine liner shipping companies that carry over 95% of the United States’ international containerized trade. WSC’s member companies operate more than 5,000 ocean-going liner vessels, of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.

As the NPRM properly emphasizes, consistency of regulation for vessels in international service is essential to the smooth functioning of world trade. Oceangoing vessels call ports all over the globe, and vessels are regularly moved from one trade lane to another in response to changes in market conditions and customer demand. In order for vessels and shipping companies to provide their customers with the efficiencies that come from being able to deploy vessels to the most appropriate trades in any given economic or competitive environment, vessels must be able to meet applicable regulatory requirements everywhere they call by adhering to consistent manning, equipment, safety, and operational standards.

Equally important, compliance with safety, security, and environmental standards is enhanced when those standards are clear. An important aspect of that clarity is consistency and predictability. Common sense dictates that a vessel making port calls all over the world cannot fundamentally change the equipment, personnel, and operating practices employed on that vessel each time the vessel calls a different country. The challenge of differing regulations is only compounded if multiple jurisdictions in a given country (such as States in the United States) overlay national requirements with additional sub-national requirements.

Given the critical role that maritime regulatory consistency plays in supporting world trade and the safe and environmentally protective operation of vessels, the Council fully supports the Coast Guard’s effort to clarify its approach to federal preemption of state laws and regulations applicable to vessels in international and interstate trades. Although the Congress and the courts have recognized situations in which state regulations designed to meet unique local conditions may be permissible if they do not unduly burden trade or undermine federal objectives (including the objective of uniformity), those situations must remain limited if the constitutionally mandated federal supremacy in regulating maritime commerce is to be maintained. The proposed rule is a good first step in clarifying the primacy of federal regulation in the maritime field.

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1 Liner vessels operate on fixed schedules among pre-determined ports. The Council’s member lines operate containerships, roll-on/roll-off, car carrier, and heavy-lift vessels. A list of the Council’s members may be found at [www.worldshipping.org](http://www.worldshipping.org).
The Council agrees with the Coast Guard’s assessment of the preemptive effect of its existing regulations as set forth in the NPRM. However, there are areas in which the analysis would benefit from expansion both in terms of the subject areas covered and in terms of the rationale stated for preemption.

The first issue on which additional guidance in the final rule would be useful involves situations in which the Coast Guard is responding to acute or emergency situations that must be addressed through direct exercise of statutory authority, rather than through rulemaking. These situations include vessel-specific security situations and requests for a place of refuge. The second area in which the Council encourages the Coast Guard to expand its discussion in the final rule is with respect to application of and the preemptive effect of the Maritime Transportation Security Act. Finally, we urge the Coast Guard to broaden its treatment of preemption with respect to vessels “subject to inspection” under 46 U.S.C. Chapter 33 to clarify that field preemption applies regardless of the purpose for which the State seeks to regulate.

We address these points in order below.

1. **Circumstances in Which the Coast Guard Exercises its Statutory Authority Directly Rather Than Through Regulations.**

The NPRM provides detailed lists of the preemptive status of existing regulations, and describes the preemption analysis that the agency will employ in future rulemakings. Both exercises are useful and appropriate. In addition to these rulemaking activities, however, there are instances in which the Coast Guard acts directly, without rulemaking, to implement its authority to regulate the movement and operations of vessels.

   a. **Vessel-Specific Security Situations**

One example of a non-rulemaking situation with preemption implications is the case in which a single vessel, whether because of an issue with respect its cargo, crew, or prior port calls, is viewed as presenting a security threat that requires special measures. One such incident occurred in 2004 with respect to the Vessel RIO PUELO. The government received what turned out to be fraudulent information indicating that certain containers on the vessel contained a dangerous substance. In an abundance of caution, the vessel was held offshore for many days as the situation was assessed by a large number of federal agencies. Part of that assessment reportedly included extensive consultation with New Jersey and New York state officials about the landing of the suspect containers and the docking of the vessel.

WSC’s purpose in raising this example is not to second-guess or criticize the processes employed in that incident. Instead, the point is that similar circumstances will likely arise at some point in the future, and it would be useful for all parties involved to understand where
the ultimate authority for resolving such situations resides. That authority rather clearly resides with the federal government, and it would be useful to make that point clear in the final rule. That is not to say that states should not be part of the decision-making process; they most certainly should be consulted, as is current practice. State authorities have local knowledge and represent critical interests of local populations and industries. At the end of the day, however, someone must make a decision on how to resolve a given vessel security situation, and that decision must be made at the federal level. It would be useful to make that clear through this rulemaking.

b. Place of Refuge Requests

A second example of situations in which crew safety, environmental protection, and public safety decisions must be based on the particular facts of the situation (and thus are not suitable for treatment through rulemakings) are requests for a place of refuge. Like the example of situations reflecting unusual security issues, place of refuge requests are fortunately rare. When they arise, however, they tend to be acute, and complicated facts must be evaluated quickly. WSC is aware that the Coast Guard has issued Commandant Instruction 16451.9 (July 17, 2007), and that the National Response Team issued its Guidelines for Places of Refuge Decision-Making on July 26, 2007.

Both of those documents make clear that the Coast Guard has the ultimate authority to make place of refuge decisions. See COMDTINST 16451.9 at page 7; Guidelines at page 9. It would be appropriate also to address the preemptive effect of federal decisions on place of refuge requests in the final rule in this docket.


The NPRM is organized in part according to the various statutory authorities that the Coast Guard exercises in fulfilling its duties. The authorities cited in the NPRM include, among others, the Ports and Waterways Safety Act (PWSA), the Act to Prevent Pollution from Ships (APPS), and Chapter 33 of Title 46 of the United States Code (covering vessels “subject to inspection”). In particular, the NPRM places heavy emphasis on the PWSA. The emphasis on the PWSA is appropriate, because that law provides much of the broad authority under which the Coast Guard regulates the navigation and operation of vessels. That said, the Council urges the Coast Guard in its final rule to expand its statutory analysis to include an additional statute.

Specifically, WSC encourages the Coast Guard to more specifically recognize the role of the Maritime Transportation Security Act of 2002 (MTSA) in its preemption analysis. The MTSA and the amendments to it are the basis of 46 U.S.C. Chapter 701. Chapter 701, along with 33
U.S.C. §§ 1226 and 1231, is cited by the Coast Guard as authority for its regulations at 33 C.F.R Parts 101, 103, 104, 105, and 106. Despite that fact, the discussion of the preemptive effect of 33 C.F.R. Parts 101, 103, 104, and 105 only speaks in terms of the PWSA as the statutory source of state preemption by the Coast Guard’s substantial maritime security regulations.

While WSC agrees with the PWSA preemption analysis as set forth at page 79245 of the NPRM, we request that the Coast Guard include a reference to and a discussion of the preemptive role of the MTSA with respect to its maritime security regulations found in Subchapter H of 33 C.F.R. (Parts 101, 103, 104, 105, and 106). That inclusion is especially important given the clear preemption statement the Coast Guard made when it issued those regulations. For example, in the preamble to its interim final rule adding 33 C.F.R. Part 101, the Coast Guard stated:

“Additionally, the Coast Guard has reviewed the MTSA with a view to whether we may construe it as non-preemptive of State authority over the same subject matter. We have determined that it would be inconsistent with the federalism principles stated in the Executive Order to construe the MTSA as not preempting State regulations which conflict with the regulations in this rulemaking. This is because owners or operators of facilities and vessels that are subject to the requirements for conducting vulnerability assessments, planning to secure their facilities and vessels against threats revealed by those assessments and complying with the standards, both performance and specific construction, design, equipment and operating requirements, must have one uniform, national standard which they must meet.” 68 Fed. Reg. 39240, 39277 (July 1, 2003).

Well said, and worth repeating in this rulemaking.


WSC’s final point involves the breadth of preemption under 46 U.S.C. Chapter 33. WSC agrees with the statement at page 79246 of the NPRM that:

“[T]he regulatory regime created by 46 U.S.C. 3306 in the areas of design, construction, alteration, repair, operation, superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electrical installations, accommodations for passengers and crew, sailing school instructors, sailing school students, lifesaving equipment and its use, firefighting equipment, its use and precautionary measures to guard against fire, inspections and tests related to these areas and the use of vessel stores and other supplies of a dangerous nature covers fields that are foreclosed from regulation by a State. These
fields are foreclosed from State regulation regardless of whether the Coast Guard has issued a particular regulation on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation.”

WSC respectfully suggests that it would be useful to add to this discussion in the final rule a statement that the purpose for which a State may seek to regulate, for example, vessel equipment or design, is not relevant to the field preemption analysis. The subjects that are field preempted by 46 U.S.C. Chapter 33 are preempted in large part because they address fundamental structural, functional, and operational aspects of vessels that cannot be changed as the vessel moves from jurisdiction to jurisdiction. That physical fact applies whether a State regulation is designed to address crew safety, vessel structural integrity, or control of water discharges or air emissions.

One reason that additional clarity on this point would be useful is that State regulatory proposals continue to arise that seek to mandate the use or configuration of certain vessel equipment in pursuit of State vessel discharge/emission limitation goals. Such proposals are often mandated by State statute, leaving State regulatory agencies in the position of moving forward with proposed regulations that are plainly preempted. A clear and forceful statement that the subject matter in 46 U.S.C. 3306 is preempted regardless of the purpose of the State regulation has the potential to avoid a great deal of wasted effort on the part of State governments, the federal government, the regulated industry, and other stakeholders.

4. Conclusion.

The World Shipping Council fully supports the Coast Guard’s efforts to clarify and memorialize its preemption analysis. As the NPRM recognizes, the primary federal role in the regulation of navigation dates back to the founding of the United States. The Coast Guard’s explanation and codification of preemption principles provides a useful resource for all affected stakeholders, and serves to maintain a regulatory system for America’s international commerce that is clear, uniform, and predictable.