

# Gulf Coast Mariners Association



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## WHICH AGENCY REGULATES UNINSPECTED TOWING VESSELS?

Until recently, few mariners questioned the Coast Guard's authority to regulate uninspected towing vessels. However, several years ago, the Gulf Coast Mariners Association (GCMA) issued Investigative Report #R-276 that compared the regulations that govern "inspected" vessels with those that governed "uninspected" towing vessels of comparable size. The comparison is shocking in that many of the protections routinely available to mariners on inspected vessels simply do not exist on uninspected towing vessels! We did this because GCMA members serve on a variety of vessels of less than 1,600 gross register tons, some inspected and some uninspected. We are committed to improving health, safety and working conditions on the nation's fleet of 5,200 uninspected towing vessels.

The Jan. 9, 2002 Supreme Court decision in *Chao v. Mallard Bay Drilling Inc.* (GCMA Report #R-300) brought the conflict between regulations enforced on uninspected vessels by the USCG and OSHA to the public's attention. However, the Supreme Court did not resolve the problem. Since both Executive Branch agencies (i.e., USCG & OSHA) are unwilling and/or unable to undertake expensive new programs without direction from Congress, we believe a final solution will be left to Congress by default.

We advised Coast Guard officials that now is time for leadership on this issue; without it confusion will result and will affect mariners on over 5,200 towing vessels. On October 28, 2002 we requested a Legislative Change Proposal (LCP) from the Coast Guard that would take the lead by asking Congress for authority to inspect towing vessels. We previously suggested that the inspection follow guidelines we initiated in GCMA Report #R-276 as modified by discussions in the Regulatory Review Subcommittee of the Towing Safety Advisory Committee (TSAC). We believe in utilizing existing regulations familiar to many mariners rather than reinventing the regulatory wheel.

The matter of whether the Coast Guard or the Occupational Safety and Health Administration (OSHA) regulations will prevail brought forth these opinions at a recent conference sponsored by [www.marine.org](http://www.marine.org).

**EXPERTS DEBATE IMPACT OF OSHA JURISDICTION OVER VESSEL WORKPLACES**  
*[Source: The Waterways Journal, Oct. 21, 2002, pgs. 7, 13.]*  
By Bill Evans

*Chao v. Mallard Bay Drilling, Inc.*, a legal case stemming from a Louisiana drilling barge accident in which four workers died, became the most significant development in admiralty law in the past year with the U.S. Supreme Court ruling that the Occupational Safety and Health Administration (OSHA) can regulate uninspected vessels, an admiralty attorney told participants in the Greater New Orleans Barge Fleeting Association's (GNOBFA) 2002 River and Marine Industry Seminar in New Orleans last month.

In holding that OSHA has authority over uninspected vessels, the Supreme Court justices reconciled earlier, inconsistent decisions among federal appellate courts, said Todd M. Powers of Schroeder, Maundrell, Barbieri & Powers, Cincinnati.

The decision leaves marine operators accustomed to Coast Guard regulation "facing some pretty daunting possibilities," said Donald R. Abaunza, president, managing partner and head of the admiralty and offshore section of the New Orleans law firm Liskow & Lewis. Abaunza served as moderator of a GNOBFA seminar panel examining future roles of the Coast Guard and OSHA in the maritime workplace.

Heretofore, operators of uninspected vessels in navigation, such as towboats and most inland barges, have dealt with Coast Guard regulations, a "relatively few pages involving such things as lifesaving equipment and firefighting equipment," said panelist James W. Calhoun, senior vice president, Bisso Marine Company Inc., New Orleans, and a retired Coast Guard officer.

"But if you look at the OSHA regs that are now going to be applicable (29 CFR Part 1910), you're looking at a pretty substantial body of regulations," said Calhoun.

Not only are OSHA regulations voluminous, but they were written primarily for landside industrial operations. Coast Guard regulations are developed specifically for vessels by a marine regulatory agency, the Coast Guard, and the governed (marine) industry has an opportunity to comment, said Calhoun. "Now you've got a body of regulations that was written pretty much for shoreside operations," he said.

OSHA regulations for confined-space entry procedures, machinery guards, pathogen exposure control plans, keeping of injury logs, painting tripping hazards such as coamings, information-posting requirements, requirements for ladders and rails, a catch-all "general duty clause" saying a vessel has to be a safe workplace- "It could present a real problem on a very small tug," said Calhoun.

What does the marine operator do? "I'm not quite sure at this juncture," said Calhoun. "Our approach might be to go through these regs and simply try and come out with what we think might be applicable and do the best we can."

The OSHA Inspection. Marine business operators should consider in advance what their response will be visited by an OSHA compliance officer. "It's a little different than the typical Coast navigation safety boarding," said Calhoun. "... When OSHA shows up at doorstep you have very likely been targeted for that inspection. A compliance officer can

take pictures, measurements, examine records and so forth. You need to develop a course of action.

"You may admit the compliance officer and begin the inspection," said Calhoun. "Or you may require the compliance officer get a warrant, an administrative warrant. Of course you might risk irritating that officer, but I think you might find it will be worth it."

A third response might be to ask the OSHA officer to "come back tomorrow," said Calhoun. "You need to buy yourself some time. You need to contact your attorney. You might want to get a video camera so you can also video the inspection. You're going to want to notify your employees that the inspection is coming (assuming advance knowledge) and records have to be examined, so be ready to do that."

"If you fail this inspection it could easily cost you thousands of dollars, even with some relatively minor violations," he said.

Courtroom Impact. Perhaps an even more serious impact of the application of OSHA regulations and inspection to uninspected vessels long term may be found in the courtroom, predicted Calhoun. "When you have an accident and you get into court and that plaintiffs attorney latches onto this body of (OSHA) regulations and their application to your 75-foot uninspected towing vessel, you've got a problem," he said. "I think they'll have a field day."

Calhoun's concern over potential ramifications of OSHA's involvement with uninspected vessels was shared by G.C. "Butch" Slawson, attorney with Liskow & Lewis.

Business operators facing OSHA inspection should decide who will speak for the company, said Slawson. They should ask for and review the credentials of OSHA representatives, should request an "opening conference" to establish general parameters prior to commencement of the inspection, should accompany the compliance officer and note what is said and done, should take photographs and samples duplicating any taken by OSHA personnel, should hold a closing conference with the inspector and should document the inspection, he said.

If cited for a workplace hazard, an employer must post notice of the citation for employees to see, said Slawson. A business operator cited for violation should seek an informal meeting with OSHA representatives in an effort to settle the matter or to seek modification of the citation or penalty, he said. If that fails, the businessman may file a notice of contest and can seek a hearing before an administrative law judge. An unfavorable decision by an administrative law judge can be appealed to the Occupational Safety and Health Review Commission, to a federal appellate court and ultimately to the U.S. Supreme Court, said Slawson.

Attention to Detail. When dealing with OSHA regulations, "attention to detail is very critical," Michael W. Rushing, manager, and senior consultant, Rushing Marine Service LLC, Jackson, Mo., consultants and publishers of the *Regulation Handbook for Uninspected Towing Vessels*, told the GNOBFA seminar audience. Employers should inspect their workplace with an eye toward identifying hazards, then should "do something about those hazards," he said.

"It could be training, it could be administrative, it could be limiting someone's time in a high-noise area or engineering controls to eliminate hazards," said Rushing. "If you do those kinds of things and if nobody gets injured, nobody's health is impaired, you're in a lot better position when OSHA shows up. Even though you may not be in compliance with every little detail in the regulations, if your

results are good," inspectors are more prone to look favorably on the workplace.

"The goal is to keep people safe and healthy," said Rushing. "If we're working in that direction, we're off to a really good start."

OSHA maintains its authority over uninspected vessels is not new. The *Chao v. Mallard Bay Drilling* decision and another case, *Chao v. Transocean Offshore Inc.* involving shipyard workers working aboard an inspected drilling vessel, "were just a reaffirmation" of OSHA's regulatory authority, said John B. Miles Jr., regional administrator, OSHA Region VI, head-quartered in Dallas, Texas.

"We don't do a lot of inspections on uninspected vessels," said Miles. "We primarily go out on complaints and fatalities. We have not targeted the inspection in that area. I don't think you're going to see a major change in the way we do that."

"To think we are going to start looking at all these vessels is not really in the realm of possibility," he said, adding there are 7.5 million work sites in the United States. Miles said there are 170 compliance officers in his region, which covers Texas, Oklahoma, Arkansas, Louisiana and New Mexico. "unless you come up on our targeting system, you're not going to see us."

#### A MARINER'S POINT OF VIEW

For years, GCMA believes the Coast Guard turned a deaf ear to mariner complaints on towing vessels claiming that Congress never gave them authority to "inspect" towing vessels. Thirty years ago, they did ask for this authority, but business interests used their influence to defeat the measure in Congress. After that, the Coast Guard appears not to have pushed the issue. In fact, in 1994, the Commandant Kramek pointed out that inspecting the uninspected towing vessels would not be the best use of the Coast Guard's limited resources. Soon thereafter, the Coast Guard and the towing industry's trade association formed a safety "partnership." Thereafter, mariner interests promptly took a back seat to business interests. GCMA is simply reasserting the fact that the mariners who serve on uninspected towing vessels have legitimate concerns that need to be addressed. Separately from those of management.

GCMA pointed out (in Report #R-276) the great divide between the regulations that govern "inspected" and "uninspected" vessels. Although the matter is now under discussion in the TSAC, these discussions will not lead to Congress granting the Coast Guard the authority that it may or may not want to inspect towing vessels.

In an attempt to determine the current Coast Guard position on inspecting towing vessels, GCMA formally requested that the Coast Guard initiate a "legislative change proposal" with Congress asking for the authority to inspect towing vessels. If the Coast Guard declines to act, the only route for mariners to follow will be to approach Congress directly. In such an undertaking, Congressmen most likely will be bombarded with a well-documented litany of complaints that will air a great deal of industry and Coast Guard dirty laundry.

[GCMA Comment: We offer our mailbox to mariners as your laundry basket!]

## FOR THE PRESENT: DIVIDED RESPONSIBILITY

The Coast Guard has the authority to enforce certain regulations while the Department of Labor (OSHA) can enforce other regulations. The following excerpt tells how OSHA determines its responsibility according to an internal instruction prepared in 1996 and reproduced with our emphasis by underlining:

### Directive CPL 2-1.20, Nov. 8, 1996...

G. Background. The delineation of OSHA and the U.S. Coast Guard authority over inspected vessels has been unchanged since the signing of a Memorandum of Understanding (reference C.2.) in 1983. The Coast Guard has statutory authority to prescribe and enforce regulations affecting the safety and health of seamen on board vessels inspected and certificated by the agency, (i.e., USCG) and has issued comprehensive standards for working conditions on inspected vessels. Therefore, OSHA may not enforce the OSH Act with respect to "seamen" on inspected vessels including the master, ship's officers and crewmembers.

P. Authority Over Commercial Uninspected Vessels (Other than Commercial Fishing Vessels). The U.S. Coast Guard conducts limited safety checks on "uninspected vessels." The Coast Guard has regulations dealing with, and conducts safety checks of, working conditions on commercial uninspected vessels involving personal flotation devices, lifesaving equipment, fire extinguishing equipment, fire fighting equipment, ventilation of engine bilges and fuel tank compartments, and back-fire traps/flame arresters on inboard engine carburetors using gasoline as a fuel. Any other working condition on board a commercial uninspected vessel is subject to OSHA authority.

2. Towing vessels and tugboats are not listed by the U.S. Coast Guard as "Vessels Subject to Inspection" and are, therefore, uninspected vessels. The two exceptions are steam powered towing vessels and tugboats, and seagoing towing vessels and tugboats over 300 gross tons which operate beyond the Boundary Line and, thus, are inspected vessels. NOTE: If the vessel always operates within U.S. Inland waters then it is not required to be inspected. (i.e., by USCG)

R. OSHA Requirements Enforceable on Uninspected Vessels (Other than Commercial Fishing Vessels). OSHA may exercise its authority to cite all employers for all violative working conditions affecting their employees on uninspected vessels when such violations occur within OSHA's geographical jurisdiction and when such violations are not specifically addressed by a Coast Guard regulation.

1. An owner, operator, agent or master of an uninspected vessel may be cited for hazards to which any employees, including seamen, it employs are exposed if the hazard is not regulated by the U.S. Coast Guard.

a. OSHA compliance officers will ensure compliance with 29 CFR 1910 standards except for ship repair, shipbuilding, and shipbreaking where 29 CFR 1915 standards apply; longshoring and cargo handling operations where 29 CFR 1918 and 1919 standards apply; and marine construction activities where 29 CFR 1926 standards apply.

b. Identified recognized hazardous situations that are causing or are likely to cause death or serious physical harm for which there are no specific standards will be cited under the provisions of Section 5(a)(1) of the OSH Act. (See reference C.12.)

c. A list of the hazards regulated on board uninspected vessels by the Coast Guard is provided in Appendix C of this instruction.

2. The reporting of accidents by employers to OSHA is required for all situations where OSHA has geographical jurisdiction.

## APPENDIX C U.S. COAST GUARD REGULATIONS FOR UNINSPECTED VESSELS

1. Personal Flotation Devices (PFD) and Other Lifesaving Equipment [46 CFR 25.25].

a. An approved and readily available PFD is required to be on board the vessel for each individual on board. An exposure suit is considered to be an acceptable substitute for a PFD. All lifesaving equipment designed to be worn is required to be readily available and in serviceable condition.

b. Each vessel 26 feet or longer must have at least one approved ring buoy which is immediately available. All lifesaving equipment designed to be thrown into the water is required to be . immediately available and in serviceable condition.

c. An approved commercial hybrid PFD is acceptable if worn when the vessel is underway and the intended wearer is not within an enclosed space; labeled for use on uninspected commercial vessels; and used as marked and in accordance with the owner's manual.

d. An approved light is required for all PFDs and exposure suits. Also, all PFDs must have approved retro-reflective material installed.

2. Fire Extinguishing Equipment [46 CFR 25.30].

a. Hand-portable fire extinguishers and semi-portable fire extinguishing systems must be of the "B" type (i.e., suitable for extinguishing fires involving flammable liquids, greases, etc..).

b. Hand-portable fire extinguishers and semi-portable fire extinguishing systems must have a plate listing the name of the item, rated capacity (gallons, quarts, or pounds), name and address of person/firm for whom approved, and manufacturer's identifying mark.

c. Portable fire extinguishers must be inspected and weighed every 6 months.

d. Minimum number of B-II hand portable fire extinguishers required to be on board motor vessels; one if less than 50 tons, two if 50-100 tons, three if 100-500 tons, six if 500-1000 tons, and eight if over 1000 tons.

e. Fixed fire extinguishing systems must be an approved carbon dioxide type and must meet the U.S. Coast Guard requirements. (See reference C.5., Part 25.3015.)

3. Backfire Flame Control [46 CFR 25.35].

Every gasoline engine installed after April 25, 1940, except outboard motors, must be equipped with an acceptable means of backfire flame control.

4. Ventilation of Tanks and Engine Spaces [46 CFR 25.40]. Fuel tanks and engine spaces, using fuel with a flashpoint of 110 degrees Fahrenheit or less, must be provided with adequate ventilation to remove explosive or flammable gases from the fuel tank compartment or bilges.

**REPORTING VIOLATIONS ON UNINSPECTED TOWING VESSELS**

Until "things change," report violations of Coast Guard regulations to the Coast Guard. The types of regulations the Coast Guard enforces are listed above. Report violations to the nearest Coast Guard Marine Safety Office. Refer to the list below.

Report violations of OSHA regulations to the Occupational Safety and Health Administration. Their regulations generally guarantee a worker a safe workplace. Let the "regional administrator" sort out the matter of who

will handle your complaint. Refer to the list below for OSHA regional offices and addresses.

Most mariners working on uninspected towing vessels are not familiar with specific OSHA or USCG regulations. Consequently, we suggest that you report all events or conditions that you believe may be unsafe or violations of regulations to BOTH the Coast Guard and OSHA. This will put the matter on their "radar screen" and target the operation. Explain the situation in detail what conditions exist or what accidents happened IN WRITING by giving full particulars..not by telephone calls that leave no paper trail. If you have the authority to make logbook entries without fear of losing your job, do so. Let the authorities sort out whether any regulations were broken and to what extent. If you write a letter, you are entitled to a written answer from both agencies. If you only make a telephone call, EXPECT NOTHING.

If you are a member of GCMA, make a third copy of your letter and send it to us along with copies of all responses you receive.

**Regional Offices-Occupational Safe and Health Administration**

Address	Administrator	Telephone
Atlanta, GA (61 Forsyth St. SW., 30303) (AL, FL, GA, KY, MS, NC, SC)	Cindy Coe	404-562-2300
Boston, MA (Rm. E-340, JFK Federal Bldg., 02203) (CT, MA, ME, NH, RI)	Ruth McCully	617-565-9860
Chicago, IL (230 S. Dearborn St., 60604) (IL, IN, MI, OH, WI)	Michael Connors	312-353-2220
Dallas, TX (525 Griffin St., 75202) (AR, LA, NM, OK, TX)	John Miles	214-767-4731
Denver, CO (1999 Broadway, 80202) (CO, MT, ND, SD, UT, WY)	Adam Finkel	303-844-1600
Kansas City, MO (1100 Main St., 64105) (IA, KS, MO, NE)	Charles Adkins	816-426-5861
New York, NY (201 Varick St., 10014) (NJ, NY)	Patricia Clark	212-337-2378
Philadelphia, PA (3535 Market St., 19104) (DC, DE, MD, PA, PR, VA, VI)	Richard Soltan	215-861-4900
San Francisco, CA (71 Stevenson St., 94105) (AZ, CA, HI, NV)	Frank Strasheim	415-975-4310
Seattle, WA (11113d Ave., 98101) (AK, ID, OR, WA)	Richard Terrill	206-553-5930

**MARINE SAFETY/MARINE INSPECTION OFFICES**

USCG/Marine Safety Office	P.O. Box 71526	San Juan, PR 00936-8626
USCG/Marine Safety Office	455 Commercial Street	Boston, MA 02109-1045
USCG/Marine Safety Office	20 Risho Avenue	East Providence, RI 02914-1208
USCG/Marine Safety Office	103 Commercial Street	Portland, ME 04101-4726
USCG/Marine Inspection Office	Battery Park Bldg.	New York, NY 10004-1466
USCG/Marine Safety Office	1 Fuhrmann Blvd.	Buffalo, NY 14203
USCG/Marine Safety Office	Kossman Bldg., Ste.1150,100 Forbes Ave.	Pittsburgh, PA 15222-1371
USCG/Marine Safety Office	1 Washington Avenue	Philadelphia, PA 19147-4395
USCG/Marine Safety Office	U.S. Customhouse, 40 S. Gay Street	Baltimore, MD 21202-4022
USCG/Marine Safety Office	Norfolk Federal Bldg., 200 Granby Street	Norfolk, VA 23510-1888
USCG/Marine Safety Office	1415 6 <sup>th</sup> Avenue	Huntington, WV 25701-2420
USCG/Marine Safety Office	1502 N. 23 <sup>rd</sup> Street	Wilmington, NC 28405-1816
USCG/Marine Safety Office	196 Tradd Street	Charleston, SC 29401-1899
USCG/Marine Safety Office	Juliette G. Low Federal Bldg., 100 W. Oglethorpe	Savannah, GA 31401
USCG/Marine Safety Office	7820 Arlington Expy., Ste. 400	Jacksonville, FL 32211-7445
USCG/Marine Safety Office	P.O. Box 01-6940	Miami, FL 33101-6940
USCG/Marine Safety Office	155 Columbia Drive	Tampa, FL 33606-3598
USCG/Marine Safety Office	150 North Royal Street	Mobile, AL 36602

USCG/Marine Safety Office	200 Jefferson Ave., Ste.1301	Memphis, TN 38103-2300
USCG/Marine Safety Office	600 Martin Luther King, Jr. Pl., Room 360	Louisville, KY 40202-2230
USCG/Marine Safety Office	225 Tully Street	Paducah, KY 42003-1582
USCG/Marine Safety Office	The Ohio Bldg., 420 Madison Ave., Ste. 700	Toledo, OH 43604-1209
USCGIMarine Safety Office	1055 East 9 <sup>th</sup> Street	Cleveland, OH 44114-1092
USCGIMarine Safety Office	110 Mt. Elliott Avenue	Detroit, MI 48207-4380
USCG/Marine Safety Office	337 Water Street	Sault Ste. Marie, MI 49783
USCG/Marine Safety Office	2420 S. Lincoln Memorial Drive	Milwaukee, WI 53207-1997
USCG/Marine Inspection Office	57 N. 12 <sup>th</sup> Avenue, P.O. Box 446	Sturgeon Bay, WI 54235-0446
USCG/Marine Safety Office	600 South Lake Ave., Canal Park	Duluth, MN 55802-2352
USCG/Marine Safety Office	215 West 83 <sup>d</sup> Street, Suite D	Burr Ridge, IL 60521
USCG/Marine Safety Office	1222 Spruce Street, Suite 8-104E	St. Louis, MO 63103-2835
USCGIMarine Safety Office	1615 Poydras Street, Suite 605	New Orleans, LA 70112-1254
USCGIMarine Safety Office	800 David Drive	Morgan City, LA 70380-1304
USCG/Marine Safety Office	P.O. Box 446	Galena Park, TX 77547-0446
USCG/Marine Safety Office	Federal Bldg., 2875 Jimmy Johnson Blvd.	Port Arthur, TX 77640-2099
USCG/Marine Safety Office	555 North Carancahua, Suite 500	Corpus Christi, TX 78478
USCG/Marine Safety Office	1001 S. Seaside Avenue, Bldg. 20	San Pedro, CA 90731
USCG/Marine Safety Office	2716 N. Harbor Drive	San Diego, CA 92101-1064
USCGIMarine Safety Office	Bldg. 14, Coast Guard Island	Alameda, CA 94501-5100
USCG/Marine Safety Office	PSC 455, Box 176	FPO AP, Guam 96540-1056
USCG/Marine Safety Office	433 Ala Moana Blvd.	Honolulu, HI 96813-4909
USCG/Marine Safety Office	6767 N. Basin Avenue	Portland, OR 97217-3992
USCG/Marine Safety Office	1519 Alaskan Way South, Bldg. 1	Seattle, WA 98134-1192
USCG/Marine Safety Office	501 L Street, Suite 100	Anchorage, AK 99501-1946
USCG/Marine Safety Office	105 South Clifton	Valdez, AK 99686-0486
USCG/Marine Safety Office	2760 Sherwood Lane, Suite 2A	Juneau, AK 99801-8545
USCG/Marine Safety Office	120 Woodward Avenue	New Haven, CT 06512