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## GCMA REPORT #R-399

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**DANGER ON THE ILLINOIS WATERWAY:  
TOWBOAT PILOT LOSES LICENSE AFTER HE  
ACCEPTS HIGH-RISK ASSIGNMENT**

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### INTRODUCTION

Because the towing industry has been allowed to conduct its business for the past thirty years in a laissez-faire business climate with an absolute minimum of Coast Guard regulation, a "high risk" voyage by a towing vessel is often treated by many towing companies as a routine assignment. "High risk" only becomes evident when the Coast Guard must respond to and subsequently "investigate" an accident ó especially when that accident affects the public and draws media attention. That is what happened in the case described in this report.

When a towboat pilot, and the term may apply to either a Master or a Pilot when he is in control of a towing vessel, accepts a "high risk" piloting assignment, he must understand that he will be held responsible for the consequences if anything goes wrong on his watch ó even events clearly beyond his control. Consequently, a pilot should take all

reasonable steps to protect himself in case something unforeseen happens because he will be judged by a very high standard of both knowledge and competence.

**[GCMA Position: We urge our mariners to take an increasingly conservative approach to accepting a high-risk piloting assignment and carefully consider every possible consequence of your actions if something goes wrong.]**

Before getting underway, a pilot should carefully evaluate whether the assignment is a "high risk" assignment. Many jobs that pilots routinely perform carry a high degree of risk whether that risk is evident or not.

The incident described in this paper was a bridge allision on the Illinois Waterway on May 2, 2003 in the heart of the City of Joliet, Illinois, a Chicago suburb with a population of 105,000.

### THE ILLINOIS WATERWAY

The Illinois Waterway is a 300+ mile waterway that serves as a connecting link between Lake Michigan and the Upper Mississippi River at Grafton, IL. It provides a shallow draft (9 ft.) all-water route between the Great Lakes and the Gulf of Mexico. As a commercial waterway, much of its structure dates back to the 1930s and, in many ways is outdated and too constricted to handle tows of up to 15 barges that often travel as far north as Lamont, IL, at mile 300 about ten miles above the Lockport Lock and Dam. In other words, the upper stretches of the waterway in Cook and Will Counties present many risks for pilots ó risks that are not always plainly evident to waterway users.

The portion of the Illinois Waterway above (i.e., north) of Lockport Lock and Dam is known as the Chicago Sanitary and Ship Canal while the segment immediately below the dam that runs through Joliet Harbor is known as the Des Plaines River.

The Chicago Sanitary and Ship Canal was constructed to keep a 500+ square mile basin including the City of Chicago from flooding during rainstorms and for sanitary purposes. Construction continues on the municipal flood control system within the Chicago metropolitan area. The water collected and held in the canal is released downstream at the Lockport Dam where it plunges over 40 feet and flows southbound into the Des Plaines River. A very limited amount of fresh water is drawn from Lake Michigan and must all be accounted for.

When it rains in the Chicago metropolitan area the regulated water from its watershed is directed south through the Chicago Sanitary and Ship Canal through the Lockport Dam. Joliet, in Will County south of Chicago, lies below the Lockport Lock and Dam in a larger 1,500+ square mile watershed of the Des Plaines River basin. An unregulated portion of that water from the Des Plaines River basin also flows "downhill" into the Illinois Waterway a mile or so below the Lockport Dam. By "regulated" we mean that the gates at the Lockport Dam control the flow of water and measure that flow in cubic feet per second (CFS). Unregulated water from the Des Plaines River joins the

regulated flow a mile or so below the Lockport Lock and Dam and pools behind the Brandon Road Lock and Dam downstream of Joliet. Our story takes place between these two locks.

A heavy rain in Chicago can turn the waters of the Illinois Waterway into a raging torrent that cannot be navigated. Consequently, the safety of navigation in the Joliet area depends upon sensibly and reasonably regulating the flow of water from the Lockport Dam since the water from the Des Plaines River is neither regulated nor monitored (i.e., measured).

The Pilot who assembled his 15-barge tow on the Canal above the Lockport Locks on May 2, 2003 relied upon the Lockmaster to report the water flow over the dam before he assessed the risk of undertaking his voyage. The "typical" regulated flow from the Lockport Dam is about 1,000 CFS. The flow on the day of the accident had dropped from 20,000 CFS (where navigation is impossible and no locking takes place) to a reasonable 2,600 CFS that the Pilot and the Master of the 3,600 horsepower towboat LAURA ELIZABETH deemed through his experience in the area to be a safe flow to kick off his southbound voyage with 9 empty and 6 loaded barges.

Pilots are expected to be knowledgeable of river conditions including currents, depth of water, weather conditions based upon their past experience. At the time, in spite of previous accidents in the area, there were no special Coast Guard regulations covering the passage through Joliet Harbor.

## THE ACCIDENT

The Pilot had considerable previous experience with the Illinois Waterway and with pushing 15-barge tows, the largest on the waterway. In fact, the Pilot had considerably more experience than the Master of the vessel in that particular area and in the hours awaiting the downbound lockage willingly agreed to come to the pilothouse and advise the Master on how to make the passage when the vessel moved into the locks. Consequently, he broke off his afternoon watch early and turned in for several hours of zzz-time as the LAURA ELIZABETH, owned by Southern Towing, Company, waited its turn to descend at the Lockport Lock.

The Master summoned the Pilot as the tow exited the locks and reformed **at 20:15 hours**. In fact, the Pilot stepped up to the pilothouse and prepared to pour a cup of coffee and become oriented. However, instead of "advising" the Master, the Pilot was asked to get "between the sticks" and take control of the tow and accepted the assignment without question as the Master remained with him in the pilothouse. This simple acceptance of control of the tow would be one of the things the Pilot would soon regret. Nevertheless, it was done in the spirit of mutual cooperation that expresses one mariner's willingness to help another and was to his credit.

As he assumed control of the tow, the Pilot asked the Master what water flow the lock reported. The Master said that the Lock had not announced any change in the water flow from the 2,600 CFS rate announced earlier in the day and, in

fact as testimony later revealed, the flow remained at that rate as they departed.

The route through Joliet Harbor is characterized as being "difficult to navigate" and involves considerable risk that could arise from a number of different sources. The channel width through this urban area is limited by a number of drawbridges to 150 feet wide. In addition, the bridges are not aligned in a straight line but contain several bends that restrict the movement of a long tow and prolong its movement through the city. The total length of the tow was 1120 feet long by 105 feet wide. In fact, the tow was longer than the distance between two bridges, a fact that would play a prominent role in the events that were to follow. Specifically, the distance between the upstream Cass Street Bridge and the Jefferson Street Bridge where the allision would take place is 984 feet and is considerably less than the 1120 foot tow.

The flotilla of 15 barges moved slowly, at clutch speed, southbound from the locks through the EJ&E railroad bridge to the Ruby Street Bridge where construction equipment on the bridge had to be removed to allow both leaves of the bascule bridge to open for the large tow.

Next, the nine empty barges followed by six loaded barges were in the process of moving through the Cass Street Bridge and into a bend to starboard without a problem and maintaining a steady clearance of approximately eight (8) feet from the Cass Street fender works. Lookouts were posted on the port and starboard corners of the lead barges with VHF radios and made regular reports to the pilothouse. A third deckhand was coiling lines on deck, the Pilot was between the sticks and the Master was watching the vessel's progress as the flotilla proceeded slowly through the Cass Street bridge at a "slow walk." Suddenly, and unpredictably, the after starboard corner of the last barge slid to the right and rubbed the fender works causing no damage.

The pilot immediately went from dead slow ahead to full astern on both main engines to try to stop the tow with the 3,600 horsepower at his command. Nevertheless, the tow "flattened out" and the lead barge, an empty rake barge riding high in the water swung to starboard, ramming into the unprotected draw works on the right descending leaf of the Jefferson Street Bridge.

The starboard string of barges stopped dead in the water as a result of the allision snapping all couplings and the center and port strings proceeded another 200 feet until stopped by the thrust of the towboat's engines.

State and federal authorities were notified immediately. The Pilot then re-established his tow with soft couplings and proceeded downstream safely and without further incident to drop the damaged barge and await the Coast Guard boarding.

Although the damage did not appear serious at the time, the 74-year old Jefferson Street Bridge, one of the major crossings in downtown Joliet was sufficiently damaged so that the Illinois Department of Transportation closed it to vehicular traffic for six months as a result of the accident. The accident reportedly resulted in a repair bill of approximately \$300,000 that the towing company and its insurer will eventually be expected to pay and economic damages to the community that may never be recovered.

## GCMA – MARINERS HELPING MARINERS

On July 29, 2003, several months after the allision, the Pilot of the M/V LAURA ELIZABETH contacted GCMA to seek advice about the formal "complaint" filed against his license by the Coast Guard Marine Safety Office in Chicago charging him with "negligence" and alleging that he "was negligent" by committing an act or failing to perform an act that contributed to an allision between (the tow of the M/V) LAURA ELIZABETH and (the) Jefferson Street Bridge, in that you as the Master<sup>(1)</sup> failed to safely navigate your vessel and struck the Jefferson Street Bridge, a well charted and fixed object. In that complaint, the Coast Guard proposed a settlement agreement of "3 months outright suspension, in accordance with 46 CFR Table 5.569. [<sup>(1)</sup>Actually while serving as pilot of the vessel and not as its Master. No complaint was filed against the Master although he was the "front watch" watchstander at the time.]

The Pilot explained his case carefully and in considerable detail stating that he did not believe that he had been negligent in any way. The story that started to emerge from the "bare bones" story detailed above turned out to be interesting, complex, and believable and in retrospect, was entirely borne out by 587 pages of testimony in court transcripts.

Because the Pilot denied the factual allegations supporting the charge of negligence he had to select a hearing date when he would appear before an Administrative Law Judge in the future. Since he had never had a chargeable offense before, his question to our Association was basic: "What do I do?"

While the Coast Guard usually makes its "best offer" in a "settlement agreement" in an attempt to save time, effort and taxpayer expense, it's not reasonable to willingly accept a ruling that you were "negligent" when you know that you did everything possible to avoid an accident. In this case, the Pilot, as second in command, offered to take the risk of moving the tow downstream in an area that everybody agreed was "difficult to navigate" and even altered his watch schedule to do so. He did this because he had considerably more experience in running the Des Plaines River and Joliet Harbor than did the Master of the vessel.

**[GCMA Position: The towing company should have checked to determine whether the Master of the vessel was adequately posted before assigning him to work this difficult waterway.]**

The first basic question we asked was whether the towing company was willing to defend the Pilot as an employee or whether he would have to hire his own lawyer? At that time the Pilot told us that the Company had said nothing about defending him and, in fact, had not called him back to work for the three months following the accident. Consequently, at the time he believed that he was "on his own", could not afford to hire a lawyer, and did not have "license insurance."

Since GCMA cannot provide legal services, the only help we could offer was to look into the case and help him accumulate the facts that he could use to defend himself at the hearing before the Administrative Law Judge. We proceeded to do this on a tight schedule.

GCMA contacted three Masters with extensive experience in the Joliet Harbor area of the Illinois Waterway: Captain David Whitehurst, Captain Ray Ashford and Captain Reid Stewart to provide a comprehensive picture of this complex waterway and its principal features. We also called upon the U.S. Army Corps of Engineers, Rock Island District, the Metropolitan Water Reclamation District, and the Coast Guard Marine Safety Office for information.

## GCMA TAKES POSITION ON OVERSIZED TOWS

On August 25, 2003, Captain David Whitehurst, as a member of the GCMA Board of Directors, wrote the following letter on behalf of the Gulf Coast Mariners Association to Captain Raymond Seebald, USCG, Commanding Officer of MSO Chicago. Captain Seebald never responded to the letter and its contents were never added to the Ninth Coast Guard District Docket for Temporary Rulemaking as requested:

Dear Captain Seebald,

I am a member of the Board of Directors of the Gulf Coast Mariners Association that represents the interests and concerns of several hundred "lower-level" mariners working on tugs, towboats, small passenger vessels and offshore supply vessels, primarily in the Eighth Coast Guard District.

I am a heavy tow pilot and have worked on towing vessels since 1965. I received my first towing license on inland waters and western rivers in 1973 and made my first trip up the Illinois Waterway, the Des Plaines River and the Chicago Sanitary and Ship Canal to Lemont, IL, in 1975.

The first tow I piloted on this waterway was a two-barge tow (300-feet long by 54-feet wide) pushed by the 1200-horsepower M/V Luby Guidry owned by Spanier Marine in Harvey, La. I have navigated this waterway with 15-barge tows for American Commercial Barge Lines (ACBL), SCF/Brown Water Towing, Steel City Marine as well as others. Fortunately, I have never had any trouble at any of the bridges or locks on the waterway.

In response to the attached article, in my opinion, piloting a 15-barge tow 1,000 feet long by 105 foot wide through the Joliet Bridges is asking for trouble. The towboat Pilot has only five feet of clearance in some places. Now, I ask you to think about the requirement of pushing a tow of the size of three football fields through the Joliet Bridges without touching a fender. According to 46 CFR 4.05-1(a)(1) I must report to your office "...whenever (my) vessel is involved in a marine casualty consisting in...an unintended strike of (allision with) a bridge..." Such a report could, at the very least, bring a letter of warning or an administrative suspension or revocation of my license. Piloting is my profession; it is where I make my living. I have an obligation to feed my family. I cannot do this if my license is taken away from me. However, the choice is not really mine. It belongs to my employer who issues the orders I must follow.

Trying to thread a tow 105-feet wide through a series of bridges that are not aligned in a straight line without

touching a fender wall it is next to impossible. However, if the company I am working for instructs me to move a 15-barge tow to or from Lockport, I have the experience to do so without damage as long as nothing unexpected happens. Unfortunately, the "unexpected" may take many forms.

As a contract pilot, if I refuse to take the job of moving the 15-barge tow, the company will find another pilot to do so. As long as it is not illegal to move the tow, and it will physically fit in the waterway, somebody will do it. Consequently, I fully support the Coast Guard's "temporary navigation rules" as briefly mentioned in the attached article and urge that tow-size restrictions be made permanent. Since our office does not have a copy of the new rules, here is what I suggest:

That there should be no more than a six-barge tows measuring no more than 600-feet long by 70-feet wide from the Interstate 80 bridge north. Present practice breaks 15-barge tows at mile 292 just above the Lockport lock. I really can't see why these large tows can't be broken five miles away at mile 287 to protect all the bridges in the Joliet area. I can't understand why this was not done years ago.

That smaller tows could traverse the bridges quickly and easily with less damage to the infrastructure and reduce the delays for highway traffic caused by the time large tows often must spend shaping up for the bridges.

That towboat pilots would welcome the change because it would put much less strain on us and reduce our exposure to loss of license and appearances before Administrative Law Judges. A number of years ago, Captain John Sutton as President of the American Inland Mariners Association made a survey in which the lifespan of the average towboat pilot was only 57 years. Collectively, as a group, we do not need, want, or seek the stress of piloting 15-barge tows through downtown Joliet.

In closing, as GCMA's Senior River Pilot, I would like to point out that on the Gulf Intracoastal Waterway (GIWW), a waterway comparable to the Illinois waterway in many ways, the Coast Guard requires "double-wide" (i.e., 70' wide) tows to obtain Coast Guard permits to proceed since these tows take up more than half of the 125-foot width of the waterway.

In reviewing the winners and losers resulting from pushing the canal beyond its design limits, only gain accrues to the carriers and only if the tow reaches its destination with no damage. There is no gain to the general public when road traffic is brought to gridlock. There is no gain for the Pilot involved in the accident. There is no gain for the Pilot from facing hours of stress knowing that his license and livelihood is at stake even if he rubs fenders and creates no lasting damage other than fair wear and tear to the infrastructure. The months spent repairing the damaged bridge will never pay a dime to the inconvenienced residents of Joliet and will merely restore the bridge to its condition prior to the accident.

As expressed in the newspaper article, the Joliet City Manager is right to expect a pilot to know the waterway. Proper manning is a responsibility of the towing company while licensing is a Coast Guard responsibility. However, in

the accident at Jefferson Street on May 2<sup>nd</sup>, the most qualified person on the vessel with many years of pertinent experience was called out after his watch had ended to "make the bridges."

I request that this letter be added to the Docket for the "temporary" rulemaking mentioned in the newspaper article. Sincerely, s/Capt. David Whitehurst, Master of Towing Vessels, 7<sup>th</sup> Issue, Member, Board of Directors, GCMA.

## GOVERNMENT BUNGLING REVEALED

A key to understanding why the starboard corner of the aftermost barge slid into the Cass Street fender works, flattening the tow and sending the lead barge into the draw works of the Jefferson Street Bridge precipitating the accident was the fact that the Lockport Dam doubled the flow of water from 2,600 CFS to 5,200 CFS without providing any notification to the vessels in the pool below. The Pilot only learned about the increased release of water several hours after the accident. The increased flow was introduced shortly after the tow had finished locking and started to move through Joliet Harbor.

Through his past experience in the area, the Pilot knew that the Corps of Engineers Lockmaster at the Lockport Lock broadcast the changes in water flow released from the nearby Lockport Dam. Unfortunately, the Metropolitan Water Reclamation District (MWRD), a local governmental agency, actually controls the flow from the Lockport Dam while the U.S. Army Corps of Engineers, a federal agency, operates the Lockport Lock. These are two separate and distinct government agencies that have not always worked in coordination with each other according to testimony recorded at the Pilot's license hearing in December 2003.

GCMA first confirmed the existence of a problem in our conversation with Mr. Sergio Serafino, Chief Engineer of the Metropolitan Water Reclamation District (MWRD) who told us in essence that they don't have any radios and don't talk to the boats. The Lockmaster and a number of other local parties in interest are supposed to be notified by phone by MWRD personnel whenever they change the flow of water into Joliet Harbor. When he receives this information, the Lockmaster can provide it to vessels waiting above and traveling below the locks "as a courtesy." However, Rick Granados, the U.S. Army Corps of Engineers Operations Manager for the Illinois Waterway for the Rock Island District provided this last tidbit of information in the hearing. He stated: "My organization (USACE) is not making the gate changes (on the dam), so I am not going to be held responsible for notification" (of the towboats).<sup>(1)</sup> The Pilot did not know this at the time, had no reason to question existing practices, and expected timely notification of flow changes. [<sup>(1)</sup> Transcript, p.332.]

On cross-examination by the Coast Guard Prosecutor, Mr. Granados acknowledged that the discrepancies in the communications and notification system of announcements were known not only to MWRD, the Corps of Engineers as well as to the Illinois River Carriers Association and that the problem existed for at least a year and a half and had never been resolved.<sup>(1)</sup> It was not clear whether the Coast Guard had

ever been brought into the discussions. What is clear is that too many cooks were left to stir the pot with no single agency left accepting responsibility for its actions and no regulations effectively governing the waterway. <sup>[<sup>(1)</sup> Transcript, p.333.]</sup>

**[GCMA Position: For the safety of the citizens of Joliet and of the mariners navigating the Des Plaines River, Congress should designate one Federal agency to regulate the flow of water and adequately notify every vessel in the pool of releases of water that could pose problems for waterway users.]**

Both the Pilot and our group of mariners familiar with the Illinois Waterway agree that they would never risk entering the area down river of Lockport L&D with a southbound tow with an initial flow rate of 5,200 cubic feet per second. However, when you are underway in the waterway you have no choice except to work with the hand you are dealt.

### HISTORY OF RECURRING ACCIDENTS AT THE JEFFERSON ST. BRIDGE

Several years earlier on October 22, 1998 the M/V THRUSTON B. MORTON owned by American Commercial Barge Line southbound with 7 loads and 8 empty barges arranged in 3 strings of 5 barges had its starboard lead barge come in contact with the right descending pier of the Jefferson Street Bridge. The very sketchy report on form CG 2692 includes this vague statement: "Damage to the bridge should be obtained by the owners/operators." If anyone learned a lesson from this accident, it is not in the file we received from the Coast Guard under FOIA. Unfortunately, this is not unusual.

On February 22, 2001 the MSO Chicago Investigations Team responded to a bridge allision between the tow of the M/V JANE G. HUFFMAN owned by American Commercial Barge Lines and the Jefferson Street drawbridge in downtown Joliet, Illinois Waterway mile 287.9. The vessel was heading southbound with 15 barges (3 strings of 5 barges) including 5 empty red-flag barges and 10 hopper barges.

The tow struck the Jefferson Street Bridge on the northwest corner of the draw and seriously damaged the track girder rendering the bridge inoperable. The bridge remained open to marine traffic but closed to vehicular traffic. The Bridge Engineer on the scene estimated the total damage to be between \$300,000 and \$400,000 and will take between two to four months to repair. "Tow length 6 1125 feet; width 105 feet; draft 9 feet. Clear visibility. No current."<sup>(1)</sup> <sup>[<sup>(1)</sup> Source: USCG Accident Report obtained under FOIA.]</sup>

The "factual allegations" of negligence (46 CFR 5.29) in the Coast Guard's complaint in the M/V JANE HUFFMAN accident should be of particular interest to our mariners:

É First Specification: In that you while operating under the authority of (your license) did on or about February 21, 2001 wrongfully strike the Jefferson Street Bridge near MM 287.9 on the Des Plaines River while operating the M/V JANE G. HUFFMAN.

É Second Specification: In that you while operating under the authority of (your license) did on or about February 21,

**2001 engage in an unsafe industry practice by pushing an excessive tow length in the Des Plaines River through Joliet Illinois.**

**[GCMA Comment: The Coast Guard recognized that this was an "unsafe industry practice" yet took no steps to use the rulemaking process to regulate this unsafe practice. The Coast Guard clearly demonstrated lack of leadership and failed to take effective action following this accident.]**

The Coast Guard "proposed" that the Master's license be suspended for 15 months. However, the Master of the M/V JANE G. HUFFMAN on the advice of counsel accepted a "settlement agreement" offered by the Coast Guard. The Coast Guard thereby avoided the point that is now clear to many of our mariners as well as to the citizens of Joliet that pushing an excessive number of barges is indeed "**an unsafe industry practice.**" Pushing an 1,120 by 105-foot tow through this narrow waterway is a risky business.

Instead of taking effective action to eliminate the root cause of the problem, the Coast Guard took the easy way out by blaming the Master of the vessel who was just performing the task his employer assigned to him. The mariner and his license is a much easier target than a large towing company with considerable political clout in the nation's capitol.

The Master of the M/V JANE G. HUFFMAN accepted the Coast Guard's settlement agreement on advice of counsel that stated in part: "In light of the Respondent's cooperative attitude and good faith efforts to reach compliance, a mitigated penalty of 12 months suspension: 2 months outright with 10 months remitted on probation will be assessed."

Other terms of the settlement agreement are also significant: "If the respondent fails to satisfactorily complete these conditions by committing acts resulting in additional Suspension and Revocation proceedings then the respondent's license will be suspended for the full 12 months plus any additional assessment awarded as a result of new charges."

### MORE BUREAUCRATIC BUNGLING

Southern Towing Company provided a skilled maritime attorney to defend the Pilot of the M/V LAURA ELIZABETH.

Robert Nienhuis, Esq., carefully examined the background of previous accidents and discovered that following the HUFFMAN accident that the Illinois Department of Transportation (IDOT) working with the Illinois River Carriers Association prepared plans and drawings to build a cell to protect the vulnerable portion of the Jefferson Street bridge. Formal plans had to be submitted, reviewed by all parties including the Coast Guard Bridge Administration Branch in St. Louis, and reworked after the proposed cell was found to unnecessarily narrow the width of the waterway. At that point the matter of funding construction of the cell had to be arranged with IDOT Headquarters in the state capitol at Springfield. Final plans then had to be submitted to and approved by the Coast Guard. However, the process became bogged down within the IDOT bureaucracy when the Coast Guard's Bridge Administration Branch did not push the issue with any sense of urgency. Consequently, this project that

was obviously necessary for the safety of the excessively large tows passing through Joliet Harbor never saw the light of day by the time of the LAURA ELIZABETH allision. However, shortly after the accident, the Coast Guard finally **ordered the bridge owner** (IDOT) to construct the protective cell. It was a textbook case of slamming the barn door after the cow escapes.

All the attorney's efforts, in pointing out another governmental screw-up came to naught. The Administrative Law Judge in his Decision and Order<sup>(1)</sup> pointed out that "These arguments are essentially that of contributory negligence. In a Coast Guard suspension and revocation proceeding, the only issue is the negligence of the licensee charged. Contributory negligence is not a defense. *Appeal Decision 2380 (Hall)*<sup>(2)</sup> I must, therefore, reject the contributory negligence defense of (the) respondent." This is one of those nasty surprises that the existing Administrative Law System can deliver to a reasonable defense. [<sup>(1)</sup> *Decision and Order, p.10.* <sup>(2)</sup> *Commandant Decisions on Appeal #2380.*]

## PUBLIC OUTRAGE

On May 21, 2003, several weeks after the LAURA ELIZABETH accident, the Coast Guard's Ninth Coast Guard District announced a "Temporary Final Rule" establishing a Regulated Navigation Area on the Des Plaines River requiring all southbound tows in the vicinity of the Jefferson Street Bridge over 89 feet wide and 800 feet long to use an assist tug. Some regulation was long overdue and was another textbook example of the Coast Guard ineptly slamming the barn door after the cow ran away.

The Coast Guard also "encouraged comments" on whether a Regulated Navigation Area (RNA) was the appropriate tool to provide for the safe navigation of tows transiting through the Jefferson Street Bridge.

Comments returned to the Coast Guard indicated that the rule was flawed because it did not indicate whether the 800 foot tow length included the length of the towboat or not "a remarkable oversight in the eyes of our mariners. The Coast Guard's "assist tug" concept also had its own flaws.

Two classes of comments poured in to the Coast Guard "in favor of (pro) and against (con) the Coast Guard proposal for a permanent regulated navigation area. In any event, the **temporary regulation with its flaws and adjustments simply expired on March 1, 2004 and has not been renewed** according to a call placed with the MSO Operations Office on April 28, 2004.

**[GCMA Position: Without a reasonable Regulated Navigation Area in effect and with no bridge protection cell in place, it does not appear that the interests of the citizens of Joliet have a single iota of protection more than they had on the day(s) of the accident.]**

**Pro:** According to letters in the Coast Guard's Rulemaking Docket,<sup>(1)</sup> the Chamber of Commerce commented in part: "The disabling of the Jefferson Street Bridge " has resulted in a devastating negative economic

impact on the Joliet business community. While businesses throughout the city suffer significantly as a result of this incident, businesses located in Joliet City Center are suffering overwhelming losses because of the chaotic traffic situation getting into and out of the City Center due to traffic reconfiguration resulting from the barge accident. Two new businesses who just opened prior to the barge damaging the bridge are facing probable failure simply because they will not be able to survive until the reopening of the Jefferson Street Bridge. Knowing that the bridges in this section of river through Joliet have been damaged by barge traffic in three of the past five years, we strongly urge you to move these restrictions from temporary to permanent status " " In a separate letter, IDOT concurred with making a permanently-regulated navigation area in Joliet. [<sup>(1)</sup> *CGD09-03-214.*]

The Joliet City Partnership, a division of the Joliet/Will County Center for Economic Development made these points among others:

"Joliet is the County Seat of Will County where thousands of county residents transact their business with government officials.

"On (June 9, 2003) at noon both the Ruby and Jefferson Street bridges were closed for repair. At the noon hour, southbound tows closed two other bridges at Cass Street and Jackson Street for one-half hour each meaning that none of the downtown bridges were available for use.

"Since the Ruby Street bridge is also vulnerable to heavy tows, the Regulated Navigation Area should be extended farther north. (Letters from the Joliet City Manager and from IDOT, the bridge owner, concurred.)

"No 3X5 barge configuration should be allowed in either direction through Joliet.

"The narrow area does not allow an assist tug to be secured on the side of the barges to direct them through the area. A letter from IDOT agreed with this point because of the limited (150-foot) opening between bridge piers. The Joliet City Manager also pointed out that: "An assist tug in such a 3X5 configuration is in and of itself creating a dangerous condition" " a thought that clearly escaped the Coast Guard rulemakers who are well paid to know about these things!

"The Illinois Department of Transportation also stated: "Even after the proposed pier cell is constructed at the northwest corner of the Jefferson Street Bridge, there will remain little maneuvering room for large tows.

The Joliet Police Chief pointed out that: "Each time a lift bridge is put out of commission, public safety is negatively affected by more difficult and restricted police response to emergencies. This negative effect is not just caused when a bridge is hit and put out of commission but it is also affected year-round when three-by-five barges move through the area. The reason for this year-round effect is the extended length of time it takes for a three-by-five barge (flotilla) to slowly attempt to navigate through the City of Joliet.

**Con.** A letter from the Chairman of the River Industry Executive Task Force stated: "This Regulated Navigation Area is a significant regulatory action and does place financial pressures on the industry. It is estimated that this action will increase the tows and costs by over 20%. This is an unacceptable shift of financial burden from those who have

responsibility for the bridge, IDOT, to an industry that transits congressionally authorized commercial waterways.

RIETF and other industry groups are disappointed that MSO Chicago has neglected the government/industry partnership that industry has tried to foster and issued such a heavy-handed RNA without sufficient dialogue with all stakeholders, including the towing industry.

**[GCMA Comment: The “dialog” between the Coast Guard and the towing industry does not appear to adequately consider the views of the citizens of Joliet and Will County or those of mariners that oversized tows place at risk.]**

The Illinois River Carriers Association (IRCA) stated in part: “There have only been three (3) collisions between tows transiting the Joliet Harbor and the Jefferson Street Bridge over the past ten (10) years. While the percentage of collisions is low, the industry feels that even these could have been preventable had the IDOT been pro-active in the installation of the protective cell. With the establishment of this RNA, the towing industry is taking on all of the burden for the additional time and cost while the industry continues to wait for the IDOT to react.”

The Coast Guard Prosecutors do not appear to have bought that argument because, during the Pilot’s suspension and revocation hearing in December CWO Razney posed these questions to the Past President of the Illinois River Carriers Association (IRCA) who was acting as an expert witness for the pilot:

Q. The protection cell is the reason for not wanting to go with this Regulated Navigation Area is essentially that it costs members of your association money?

A. That is correct.

Q. If IRCA would rather have the cost borne by the State putting in a protection cell<sup>(1)</sup> than there be any kind of a revenue increase cost to them?

A. That’s one (aspect). The other is a safety factor. Any time you place a tug on the head of a tow you are exposing the crewmembers to a (man) overboard situation and you’ve got a flotilla out ahead of your tow with a tug that contains crewmembers, and you have put them in harms way as far as I am concerned.<sup>(2)</sup> [ <sup>(1)</sup> Transcript p. 576. <sup>(2)</sup> Transcript p. 263 ]

**Congressional Interest.** U.S Representative Jerry Weller representing Illinois 11<sup>th</sup>. Congressional District (and the Assistant House Majority Whip), while citing points previously mentioned, added this comment to the regulatory docket that should stand out as a warning to our mariners: “I also urge you to look into the licensing of barge pilots to determine if they are (sic) appropriate. It is my understanding the pilot of the barge who hit the bridge on May 2, 2003 has been charged with negligence. One cannot help but wonder if this would happen if the license requirements were stricter and/or required additional testing or training. Many professionals are mandated to keep their skills updated with additional instruction.”

**[GCMA Comment: In May 2001, the Coast Guard upgraded towing vessel officer licensing regulations. The**

**root of this problem lies beyond the mariner's control.]**

**[GCMA Comment: The subject of oversized and overloaded tows is covered in detail in GCMA Report #R-340 on our internet website.]**

### MONTHS OF STRESS, STRAIN & HARASSMENT TAKES A TOLL

Any mariner who is charged with any offense under the Coast Guard’s Administrative Law system will invariably find himself under intense pressure from every quarter. This part of the report details these pressures:

As a mariner you must answer the Coast Guard’s formal complaint in writing within 20 days. If you fail to provide an answer or fail to request an extension of time to reply or fail to attend any scheduled hearings, you may be found in default. This constitutes an admission of all alleged facts in the complaint and waives (i.e., gives up) your right to a hearing.

The “complaint” for this accident was directed to the Pilot at the towing company’s address in the form of a registered letter that arrived several weeks after the accident. The letter was forwarded to the Pilot at home and then to the company attorney in St. Louis.

The Coast Guard Marine Safety Office in Chicago, thirty miles from the accident, prepared the “complaint.” Southern Towing Company’s main office is in Memphis, TN. Goldstein and Price, the law firm that would handle the case, is located in St. Louis, MO. The Pilot lives in Alabama. The hearing was set at Joliet, IL. The Pilot had to look forward to paying significant travel and hotel expenses just to appear at the hearing.

Although the towing company and their insurance underwriters agreed that they “should defend this administrative procedure” it took them some time to let the Pilot know that this meant they would defend him in this matter. It was while left in limbo at this point at the end of July 2003 when the Pilot contacted GCMA.

Understand that a boat company is under no obligation to defend one of its employees at a license hearing. A license is granted to a mariner and not to his employer. It is up to the license holder to protect, defend, and if necessary surrender his license before the Coast Guard.

Fortunately for the mariner in this case, the company decided it was in their interest to provide a skilled lawyer to defend the Pilot.

GCMA expressed its concern to the Pilot that his interests and the interests of the company might not be the same and that there might be some conflict of interest. However, since the Pilot stated that he could not afford to pay an attorney, our advice to him was limited to how he might best prepare himself for the hearing.

GCMA advised the Pilot that defending himself adequately against the charges is best handled by an experienced maritime attorney. Hiring a lawyer during a time without a paycheck coming in and with no license insurance to pay for the lawyer is very difficult. This is why we advise our mariners to purchase license insurance.<sup>(1)</sup> Unfortunately, too many mariners take their chances without it. [ <sup>(1)</sup> Refer to

GCMA Report #R-342, License Defense and Income Protection Insurance.]

Several weeks later after Southern Towing Company made Attorney Robert Nienhuis available to counsel the Pilot, GCMA called him to discuss the issue of any possible conflict of interest and received assurances that this would not be a problem. We proceeded to share the information we gathered with the defense.

Throughout the ordeal of the hearing, as determined by a GCMA's review of the entire 587-page transcript, attorney Robert Nienhuis did what we consider to be the right thing for the Pilot because it is not the company's obligation to defend a mariner's license! For this we commend both Southern Towing Company and Robert Nienhuis, Esq.

The company footed thousands of dollars in legal fees that, considering the reported financial impact upon the mariner of \$18,000 to \$20,000 made the difference between bankruptcy and keeping his head above water. As it was, the pilot had to sell his recreational vehicle, a major piece of shop equipment, take out a loan on another vehicle and still continue to support his two children at a heavy price for just doing your job.

The Pilot passed on this advice to his fellow licensed Masters and Pilots after the trial, "If you really love this type of work, you had better stash away a full 12-months pay for the time when the Coast Guard decides to get on your case!"

The Pilot's written answer to the Coast Guard was to deny that he was guilty of negligence as charged because he did everything leading up to the accident by the book with the full knowledge and consent of the vessel's Master who was standing by him in the pilothouse at the time of the accident. He firmly believed that the accident was a result of forces that were completely beyond his control.

In the proposed settlement agreement the Coast Guard proposed three months outright suspension of the Pilot's license. That means the Pilot would be out of a job for the next 90 days the moment he signed on the dotted line and that the suspension would go on his record that had been unblemished for over 20 years.

The definition of negligence is "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." This definition, along with the knowledge he discovered of the failure of three separate governmental agencies and a major industry association to control and safely manage the waterway reinforced the Pilot's determination to vigorously fight the charge against him.

The Pilot, as a professional, was concerned that he would no longer have a job with a company that he thought highly of. He also was concerned about what the company thought of him. The fact is that he was not recalled to service in the six months after the accident and had to obtain another job to support his family and pay his bills.

Another point, and one not brought out at the hearing, was that the Master he worked under and who testified that he was not comfortable with or posted on that section of the Illinois Waterway reportedly spread rumors that were malicious,

prejudicial to the Pilot's reputation, and were untrue. This led the Pilot to question in his own mind why he did not let the Master steer the tow through the waterway and serve as his advisor as he originally agreed to do. (Later, at trial, the Pilot would receive professional exoneration of sorts when an expert witness, the Past President of the Illinois River Carriers Association (IRCA) stated: "He (i.e., the Pilot) probably did one of the best things that we teach down at the Seaman's Church Institute is to give the Captain of the vessel (the freedom to) determine who has the more experience to go through that particular area.") [1] *Transcript, p. 553.*]

As the case moved toward trial, the Coast Guard Prosecutors announced that the trial would be held at the Will County Courthouse at 14 West Jefferson Street in Joliet several blocks away from the bridge that had been knocked out of commission. Considering the magnitude of the calamity that had befallen the downtown center of this city of 105,000, the many newspaper articles that appeared at the time of the accident, the involvement of politicians and civic leaders, all took a toll on the Pilot who was freely blamed for the disaster and every delay it had caused for the past six months. Every mariner needs to put himself in the place of this Pilot.

Add to the roiling stomach acid the perverse pleasure that many mariners get from trashing other mariners on internet chat boards. While seeking employment between June and December 2003 the Pilot found that several employers knew all about the accident by reading these chat board accounts and had the temerity to lecture him on why they would never hire him to work for their company.

We suggest that a far more accurate account of this accident is rendered in the pages of the hearing transcript. This is one of many reasons why GCMA does not operate an online chat board!

Life would be much easier for Coast Guard Prosecutors if every respondent would sign a settlement agreement. This is because it takes a great deal of work and preparation to put on a full-blown hearing before an Administrative Law Judge (ALJ). Many prosecutors are not trial lawyers and some have only the most tenuous grasp of what is expected of them. In the courtroom they no longer face the mariner they can threaten, cajole and browbeat. They cannot cut any deals and must now perform and be rated on their performance. They are facing accomplished trial lawyers on one hand and an experienced Judge on the other hand.

Other Coast Guard officers, warrant officers and ratings as well as interested members of the public may attend a hearing. The MSO Investigations Office provides interested observers for, when the Judge comes to town, this is their big day. This particular Judge flew in from Seattle, WA, specifically for this trial, and as the trial proceeded, it was obvious that he had little knowledge of either the local area or of the towing industry that exists in mid-America on the 6,000 mile Western Rivers system a significant shortcoming. [1] Even the courtroom is not located at the Marine Safety Office and was borrowed from county authorities. All these things must be arranged and the Judge treated like visiting royalty. [1] *Refer to GCMA Historical Report #396*

When you are a mariner and see a number of blue uniforms in the room, they appear there to serve as moral



support for the efforts of the prosecution. However, some will be there principally to rate the performance of the Prosecutor.

What the Pilot reported as being most disconcerting to him was when this Coast Guard "cheering section" passed notes to the Prosecutor when he appeared at a loss for words. None of this appears in the cold pages of a hearing transcript.

By the time the trial got underway, the original charge of failing to safely navigate the vessel through the bridge and seeking 3 months license suspension was increased by two additional counts, namely:

- É failing to maintain a proper lookout (seeking 3 additional months suspension), and
- É failing to maintain a safe speed (seeking 3 additional months for a total of 9 months suspension).

Whatever the Coast Guard's motivation for adding these counts, they had to be defended. This took time and effort on the part of the Pilot's attorney. The charge of failing to maintain a proper lookout was relatively easy to dispose of by showing the Pilot, the Master, the Mate and a deckhand were all watching the progress of the tow and reporting its progress directly to the Pilot by radio at all times the tow was underway in the Des Plaines River.

The question of "safe speed" took much more soul searching since it is wrapped in so much seagoing tradition and case law. However, the testimony that both engines were operating only at "clutch speed" (i.e., idle), that this degree of propulsion was necessary, and the tow was only making the speed of a "slow walk" finally disposed of that count. However, the transcript shows it took the lawyer's skill to successfully make these points with the Judge. A mariner alone would not have had much of a chance.

The Pilot characterized MSO Chicago's Investigations Branch as "the equivalent of Russia's infamous KGB." In reviewing the transcript, much of this heartburn comes from the opening statement by the Prosecutor LTJG Michael Reed who had also boarded the vessel at the time of the accident. The Pilot was particularly incensed at his opening remarks outlining the Coast Guard's case against him, specifically:

É Mr.            had limited experience transiting the area. (Testimony would show approximately 50 trips ó how much is enough?).

É It was dark. (That happens every day).

É The Joliet section of the river is difficult to navigate (That's what he was paid to do.)

É Mr.            elected not to take any additional precautions. He could have easily solicited an assist tug to help him maneuvering his tow. (At the river flow correctly reported to him by the Master standing at his side he did not need assistance. An assist boat would be of limited and of questionable value and possibly a danger as supported by expert testimony.)

É He could have broken his tow in half so it was more maneuverable and made two trips. (He already made the same trip a number of times safely and successfully.)

É He could have delayed his transit until conditions were safer. (At 2,600 CFS flow, conditions were safe. However, the MWRD increased the flow without notification.)

É He should have followed the example set by the vessel's Captain and admitted he did not have the experience to

safely transit the area. (The Captain asked him to do a job he had done many times before. He had the experience and demonstrated it clearly after the accident by recovering his tow and safely transiting three additional bridges.)

## THE DECISION AND SANCTIONS

The Judge's Decision and Order was issued on March 23, 2004 almost 11 months after the accident and fills 18 pages.

Judge Edwin M. Bladen stated inter alia that "It is well settled that a rebuttable presumption of negligence arises when a moving vessel strikes a fixed object. Without adequate rebuttal, the presumption permits an Administrative Law Judge to rely upon the presumption to find negligence in a suspension and revocation proceeding.

I find the respondent has not adequately rebutted the presumption of negligence arising from the allision of the flotilla with the Jefferson Street Bridge. I must conclude the charge of negligence is proven."

"It is ordered (that) respondent's license is suspended for a period of four (4) months, two (2) months of which is remitted with six months of probation to follow. As conditions of probation

- (1) Respondent shall take and successfully complete a bridge resource management course approved by the Coast Guard;
- (2) Any violation of the rules, regulations or COLREGS by respondent during the probationary period shall subject respondent to an outright two (2) month suspension besides any further sanction warranted on account of the violation established after a hearing on the matter.

## GCMA VIEWS

The Coast Guard delivered the public a nice, neat package tied with a ribbon and a bow. The Pilot was found guilty of "negligence" after a show trial in downtown Joliet that the public and the media was welcome to attend if they chose to do so. The pilot was found guilty of "negligence", lost his license and was ordered as part of his punishment to go back to school and take a course in "Bridge Resource Management." If the Coast Guard believes the problem is solved, we respectfully disagree.

1. The indiscriminate release of water by the Metropolitan Water Reclamation District without providing adequate advance warning and time for navigation interests in the pool below remains an outstanding problem. The citizens of Joliet must understand that the lack of coordination between the MWRD and the Corps of Engineers is directly coupled to knocking out the Jefferson Street Bridge in this accident. This is a local problem that local interests should address.

**[GCMA Position: We advise our mariners not to accept any piloting assignment in the area between the Lockport and Brandon Road Locks until such time as the indiscriminate water-release problem is resolved and the**

**Corps of Engineers publishes suitable water-flow regulations or guidelines.]**

2. Parts of this section of the waterway are over 70 years old and were not built for the size of some of the large tows that now use it. The only reason it can be utilized to move 15 barges in one tow is through the exceptional skill of the pilots that use the waterway. Once it was proven that a tow of this size could physically fit in the waterway, its use gradually became routine and accepted by the authorities who failed to establish reasonable governing regulations.

3. The wisdom of continuing to use the existing waterway facilities to move oversized tows needs to be re-evaluated. Many legitimate concerns of the citizens of the local community need to be considered as well as the needs of the companies that continue to exploit the waterway.

4. By allowing the temporary regulations restricting the size of tows through the area to lapse on March 1, 2004, the Coast Guard ignored local concerns in favor of allowing unrestricted traffic to benefit a few large towing companies. Mariners understand that the towing industry exercised considerable political clout in Washington for the past 30 years to the detriment of legitimate mariner safety interests and has established a very comfortable partnership with the Coast Guard. [Refer to GCMA Report #R-276, Rev. 7, Towing Vessels Need Regulations Comparable to Other Vessels; GCMA Report #R-340, Rev. 7, Oversize and Overloaded Tows Cause Safety Problems; GCMA Report #R-375, Crew Endurance: The "Call Watch" Cover-Up. These reports are on our internet website.]

5. The Pilot on the M/V LAURA ELIZABETH at the time of the accident was a fully trained professional river pilot with many years of experience that met all Coast Guard license requirements. The company he worked for is a highly regarded employer in the industry. The equipment he worked with was top of the line equipment in good mechanical order.

**[GCMA Position: The Coast Guard's Chicago Marine Safety Office erred in its failure to recognize that poor management practices evidenced by the indiscriminate water releases by the MWRD and the failure to adequately notify tows in the pool below were the cause of a legitimate "accident."]**

**[GCMA Position: Attempting to humiliate and denigrate experienced river pilots using prosecutors who do not have comparable credentials or knowledge and then covering the problem with a legal mantle is not conducive to solving a festering communication problem between several government agencies and waterway users.]**

**[GCMA Comment: If the Coast Guard, Corps of Engineers and the MWRD cannot properly coordinate and regulate the water releases with existing marine interests today, how can they be expected to do so in the future if Congress authorizes extensive and expensive construction projects to improve the waterway?]**

6. The towing company erred in not assigning a Master to the vessel that was as well posted on local river and operating conditions as the Pilot. Therefore, the Pilot who would have normally been off-watch at the time of the accident, was called upon to undertake the most risky portion of the southbound voyage.

7. Although he was provided with compensatory time off-watch, the fact that both the Pilot and the Master were together in the pilothouse at the same time for a considerable period conducting the southbound voyage through the Des Plaines River technically violated the 12-Hour Rule established by Congress at 46 U.S. Code §8104(h). The Coast Guard has an exceptionally poor record in regard to enforcing this statute. Consequently, mariner fatigue and exhaustion has played a role in a number of bridge collisions although not in this case. [Refer to GCMA Report #R-346, Rev. 2, Work-Hour Abuse, Whistleblower Protection, and "Deadhead" Transportation; GCMA Report #R-293, Rev. 2 Towboats and Bridges, A Dangerous Mix on our internet website.]

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