

U.S. Department  
of Transportation  
**United States  
Coast Guard**



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United States Coast Guard

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DEPARTMENT OF TRANSPORTATION

U.S. COAST GUARD

STATEMENT OF CAPTAIN JAMES M. MACDONALD

ON THE DOMESTIC COMMERCE IMPROVEMENT ACT

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON MERCHANT MARINE

COMMITTEE ON MERCHANT MARINE AND FISHERIES

7 FEBRUARY 1990

## BIOGRAPHICAL SKETCH

### CAPTAIN JAMES M. MACDONALD

Captain James M. MacDonald has been Division Chief of the Coast Guard Merchant Vessel Inspection and Documentation Division at Coast Guard Headquarters since 12 August 1988.

Following his graduation from the Coast Guard Academy in 1968, Captain MacDonald's early assignments included duty aboard the Polar Ice Breaker EDISTO and as Coast Guard Liaison Officer and Instructor at the Naval Damage Control Training Center at Philadelphia.

Captain MacDonald has served as Executive Officer of MIO Kobe, Japan from 1981 to 1982; as Chief, Inspection Department and Executive Officer of MSO Honolulu, Hawaii from 1982 to 1985; as Chief Commercial Vessel Safety Branch Fourteenth Coast Guard District from 1985 to 1986 and as Commanding Officer of Coast Guard Section Marianas from 1986 to 1988.

Other assignments include Assistant Marine Environmental Protection Branch Chief in the Twelfth District and Marine Inspection at Marine Inspection Office, Los Angeles-Long Beach.

In addition to his Bachelor of Science Degree in Engineering from the Coast Guard Academy, Captain MacDonald holds a Master of Science Degree in Management from Rensselaer Polytechnic Institute, Troy, New York.

Captain MacDonald's decorations include the Meritorious Service Medal, two Coast Guard Commendation Medals, two Coast Guard Achievement Medals, the Navy Achievement Medal and two Coast Guard Meritorious Unit Commendations.

Captain MacDonald is married to the former Jean L. Kehoe of Shrewsbury, Massachusetts, a Connecticut College graduate. They have two sons, Jason and Greg.

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GOOD MORNING, MR. CHAIRMAN.

I AM CAPTAIN JAMES MACDONALD, CHIEF OF THE MERCHANT VESSEL INSPECTION AND DOCUMENTATION DIVISION. ACCOMPANYING ME IS MR. THOMAS L. WILLIS, CHIEF OF MY VESSEL DOCUMENTATION BRANCH.

I AM PLEASED TO BE ABLE TO COMMENT ON THE PROPOSED DOMESTIC COMMERCE IMPROVEMENT ACT, INVOLVING REBUILDING, LIMITED COASTWISE ENDORSEMENTS, CITIZENSHIP AND DREDGING. THE PROPOSED LEGISLATION WOULD SOLVE SOME PROBLEMS IN THE COASTWISE TRADE LAWS, BUT SOME OF ITS PROVISIONS NEED FURTHER CONSIDERATION. OVER THE LAST YEAR THE COAST GUARD HAS HAD SEVERAL OPPORTUNITIES TO COMMENT ON EARLIER DRAFTS OF PROPOSED LEGISLATION REGARDING REBUILDING AND LIMITED COASTWISE ENDORSEMENTS. THE COAST GUARD HAS VOICED OBJECTION TO SOME OF THE PROPOSED CHANGES BECAUSE, FROM THE POINT OF VIEW OF ENFORCEMENT AND ADMINISTRATION, THEY APPEARED LIKELY TO CREATE AS MANY PROBLEMS AS THEY SOLVED. THIS DRAFT IS AN IMPROVEMENT OVER THE EARLIER DRAFTS, BUT IT STILL CONTAINS PROVISIONS THAT COULD BE DIFFICULT FOR THE COAST GUARD TO ADMINISTER, OR THAT COULD LEAD TO UNINTENDED RESULTS. I AM SURE THAT THE CHANCE, AFFORDED BY

THIS HEARING, FOR ALL INTERESTED PARTIES TO GIVE THE ISSUES FURTHER CONSIDERATION WILL BE BENEFICIAL.

BEFORE ADDRESSING THE PROPOSED LEGISLATION ON REBUILDING, I WOULD LIKE TO DISCUSS SOME OF THE CONSIDERATIONS UNDERLYING THE COAST GUARD'S APPROACH TO THE REBUILDING ISSUE. THE ORIGINAL PURPOSE OF THE REBUILT PROVISION WAS TO CLOSE A LOOPHOLE IN THE U.S.-BUILT REQUIREMENT. IT SIGNIFICANTLY RESTRICTED, FOR THE FIRST TIME, THE FOREIGN WORK THAT COULD BE DONE ON A U.S.-BUILT VESSEL, SUBSEQUENT TO ITS ORIGINAL CONSTRUCTION IN THE UNITED STATES. BEFORE THE REBUILT PROVISION WAS ENACTED IN 1956, FOREIGN WORK ON A U.S.-BUILT VESSEL WOULD NOT CAUSE A LOSS OF PRIVILEGES UNLESS SO MUCH WORK WAS DONE THAT THE VESSEL WAS DEEMED TO BE A NEW FOREIGN-BUILT VESSEL. IF ANY CONSIDERABLE PART OF THE VESSEL REMAINED INTACT, IN A CONDITION THAT COMMITTED IT TO USE IN BUILDING A VESSEL, THE VESSEL WOULD CONTINUE TO QUALIFY FOR THE SPECIAL TRADING PRIVILEGES OF A U.S.-BUILT VESSEL.

ALTHOUGH THE U.S.-BUILT REQUIREMENT ALLOWS SOME FOREIGN MADE ITEMS TO BE INCLUDED IN A U.S.-BUILT VESSEL, THE LOOPHOLE THAT EXISTED BEFORE THE REBUILT REQUIREMENT WAS ENACTED PERMITTED VIRTUALLY UNLIMITED FOREIGN REPAIRS, REPLACEMENTS OR ADDITIONS. THE REBUILT REQUIREMENT WAS MEANT TO LIMIT LATER FOREIGN WORK TO ITEMS THAT--THOUGH FOREIGN MADE--COULD HAVE BEEN INCLUDED IN A U.S.-BUILT VESSEL WHEN IT WAS ORIGINALLY CONSTRUCTED. IT ESTABLISHED A REASONABLE EQUIVALENCE BETWEEN THE FOREIGN MADE ITEMS THAT CAN BE USED IN BUILDING A NEW U.S. VESSEL AND THE ITEMS THAT CAN LATER BE REPAIRED, REPLACED OR ADDED IN A FOREIGN YARD, WITHOUT A LOSS OF PRIVILEGES.

SEVERAL OF THE NEW "MAJOR WORK" STANDARDS PROPOSED EARLIER SEEMED TO GO WELL BEYOND THE REBUILT PROVISION'S ORIGINAL PURPOSE OF CLOSING A LOOPHOLE IN THE U.S.-BUILT REQUIREMENT. IN TERMS OF LIMITS ON FOREIGN-MADE COMPONENTS, THEY PROPOSED A STANDARD MORE RESTRICTIVE THAN THE U.S.-BUILT STANDARD THAT THE REBUILT PROVISION WAS INTENDED TO SUPPORT. THE REASONABLE EQUIVALENCE IN THE RESULTS ACHIEVED BY THE REBUILT AND THE U.S.-BUILT PROVISIONS WILL BE LOST, IF SIGNIFICANT CHANGES IN THE REBUILT STANDARD ARE MADE WITHOUT SIMILAR ADJUSTMENTS TO THE U.S.-BUILT REQUIREMENT.

THE SECTION ON REBUILDING IN THE PROPOSED DOMESTIC COMMERCE IMPROVEMENT ACT WOULD ELIMINATE THE REBUILDING STANDARD THAT HAS BEEN THE LAW FOR MORE THAN THIRTY YEARS, AND SUBSTITUTE A NEW STANDARD IN TERMS OF "MAJOR WORK". THE "MAJOR WORK" STANDARDS PROPOSED EARLIER WERE INTENDED TO REDUCE THE WORK DONE ON U.S.-BUILT VESSELS IN FOREIGN SHIPYARDS. THE LATEST PROPOSAL WOULD IN SOME RESPECTS BE MORE RESTRICTIVE, BUT IN OTHER RESPECTS WOULD PERMIT MORE WORK TO BE DONE IN FOREIGN YARDS. WHETHER THE RESTRICTIONS ON FOREIGN WORK NEED TO BE CHANGED IS A MATTER FOR THE JUDGMENT OF CONGRESS. THE COAST GUARD'S CONCERN IS WITH ITS ABILITY TO ADMINISTER AND ENFORCE WHATEVER STANDARD CONGRESS ADOPTS.

THE EMPHASIS IN THE PROPOSED "MAJOR WORK" STANDARD ON WORK THAT "CHANGES THE BASIC CHARACTERISTICS OF THE VESSEL" WOULD PERMIT OVERSEAS WORK THAT IS PROHIBITED BY THE REBUILT STANDARD. ARGUABLY, THE PROPOSED STANDARD WOULD NOT INCLUDE REPAIRS, RENEWALS OR LIFE EXTENSION PROJECTS, HOWEVER GREAT, WHICH RESTORE THE VESSEL TO ITS ORIGINAL CONDITION. THAT IS A

SIGNIFICANT CHANGE. ADDITIONALLY, SINCE ALL REPAIRS SEEM TO BE EXCLUDED FROM THE PROPOSED "MAJOR WORK" STANDARD, THE EXPLICIT EXCEPTION FOR EMERGENCY REPAIRS WOULD BE SURPLUSAGE. ON THE OTHER HAND, THE ALTERNATIVE TESTS FOR "MAJOR WORK", WHICH PROHIBIT ALL ALTERATIONS AFFECTING CARGO CARRYING CAPACITY OR CATEGORY OF SERVICE, ARE MUCH MORE RESTRICTIVE THAN CURRENT LAW, BUT THEY DO PROVIDE A BRIGHT LINE TEST.

THE PROPOSED "MAJOR WORK" STANDARD DUPLICATES A PART OF THE U.S.-BUILT REQUIREMENT BY INCLUDING A NEW-VESSEL TEST. UNDER A LINE OF PRECEDENTS, BASED ON THE U.S.-BUILT REQUIREMENT AND PRE-DATING THE REBUILT REQUIREMENT, A VESSEL'S U.S.-BUILT STATUS IS LOST IF IT IS DEEMED A NEW FOREIGN-BUILT VESSEL. REGULATIONS SETTING OUT THE NEW-VESSEL STANDARD ARE FOUND AT 46 C.F.R. §67.27-1. HISTORICALLY, UNDER THE DOCUMENTATION LAWS, THERE HAS BEEN GREAT CARE TO DISTINGUISH BETWEEN NEW BUILT VESSELS AND REBUILT VESSELS. VESSELS HAVE BEEN DEEMED EITHER NEW OR REBUILT; NEVER NEW AND REBUILT. INCLUSION OF THE NEW-VESSEL TEST IN THE "MAJOR WORK" STANDARD WOULD ADD NOTHING TO THE DOCUMENTATION LAWS, SINCE IT IS REDUNDANT WITH ANOTHER EXISTING PROVISION. HOWEVER, BY COMBINING THE REBUILT AND NEW BUILT CONCEPTS IN ONE PROVISION, THE PROPOSED STANDARD WOULD BLUR THE CAREFULLY MAINTAINED DISTINCTION BETWEEN THEM, AND COULD CAST DOUBT ON THE ESTABLISHED DEFINITION OF NEW VESSEL.

SOME OF THE DISSATISFACTION WITH THE CURRENT REBUILT STANDARD MAY BE BASED ON THE FACT THAT, HISTORICALLY, CERTAIN CATEGORIES OF FOREIGN WORK HAVE BEEN DISCOUNTED WHEN MAKING REBUILT DETERMINATIONS. FOR INSTANCE, INSTALLATION OF PROPULSION MACHINERY AND NAVIGATION EQUIPMENT HAS NEVER BEEN

CONSIDERED RELEVANT TO A REBUILT DETERMINATION. YEARS OF ADMINISTRATIVE PRACTICE HAVE BETTER DEFINED THE REBUILT STANDARD BUT, FOR SPECIFIC WORK ITEMS, EVEN WITH THIS HISTORIC GLOSS, THE CURRENT LAW FAILS TO PROVIDE A BRIGHT LINE TEST, AND THE COAST GUARD MUST MAKE DIFFICULT JUDGMENTS. IN THIS RESPECT, WITH THE EXCEPTION OF THE PROPOSED PROHIBITION AGAINST ALTERATIONS AFFECTING CARGO CAPACITY OR CATEGORY OF SERVICE, THE NEW STANDARDS THAT HAVE BEEN PROPOSED TO DATE ARE NO IMPROVEMENT. THEY REQUIRE THE COAST GUARD TO DECIDE WHICH OF SEVERAL SOMEWHAT IMPRECISE AND OVERLAPPING LABELS BEST CHARACTERIZES OVERSEAS WORK, AND LOSS OF PRIVILEGES MAY WELL DEPEND ON HOW THE COAST GUARD CHOOSES TO CHARACTERIZE WORK THAT ARGUABLY COULD FIT UNDER MORE THAN ONE LABEL.

UNDER THE PRESENT REBUILT STANDARD, THE COAST GUARD NOT ONLY HAS YEARS OF ADMINISTRATIVE PRACTICE FOR GUIDANCE, BUT CAN ALSO DRAW ON ITS EXPERIENCE WITH THE U.S.-BUILT REQUIREMENT. IT IS THE COAST GUARD'S PRACTICE TO APPLY BOTH REQUIREMENTS IN A CONSISTENT MANNER, SINCE BOTH ARE PARTS OF A COMMON STATUTORY SCHEME TO RESERVE CERTAIN TRADING PRIVILEGES TO U.S.-BUILT VESSELS.

CONSIDERING ALL OF THE MATTERS JUST DISCUSSED, I RECOMMEND THAT CONGRESS ATTEMPT TO REFINE THE PRESENT REBUILT STANDARD, BY PROVIDING ADDITIONAL GUIDANCE, RATHER THAN ABANDON IT IN FAVOR OF A NEW, BUT STILL PROBLEMATICAL, STANDARD. NONE OF THE NEW STANDARDS THAT HAVE BEEN PROPOSED HAVE SATISFIED THE DESIRE FOR A CLEAR AND EASILY APPLIED STANDARD. IF A CHANGE IN THE LAW IS NEEDED, CONGRESS SHOULD TRY REFINING THE CURRENT LAW TO SEE IF SATISFACTORY RESULTS CAN BE ACHIEVED, BEFORE SCRAPPING

THIRTY YEARS OF ADMINISTRATIVE PRACTICE AND TRYING AN ENTIRELY NEW APPROACH. CONGRESS COULD EXPAND THE DEFINITION OF HULL AND SUPERSTRUCTURE, DEFINE REBUILDING TO INCLUDE ITEMS BEYOND THE HULL AND SUPERSTRUCTURE OR ALTER THE REQUIREMENT THAT THE WORK INVOLVE A "CONSIDERABLE" PART OF THE HULL OR SUPERSTRUCTURE. ANY SUCH CHANGES, HOWEVER, COULD BE INCONSISTENT WITH LONG-STANDING PRECEDENTS REGARDING THE U.S.-BUILT REQUIREMENT.

CERTAINLY, THERE IS NOTHING TO BE GAINED FROM CHANGES IN TERMINOLOGY THAT MAKE NO SUBSTANTIVE CHANGE. THAT WOULD INVITE NEW LITIGATION OVER PREVIOUSLY SETTLED ISSUES, AND GRATUITOUSLY CREATE DOUBTS ABOUT THE APPLICABILITY OF PRECEDENTS BASED ON PREVIOUS LANGUAGE--WITHOUT AFFECTING THE ABILITY OF VESSEL OWNERS TO HAVE WORK DONE IN FOREIGN YARDS.

IN THE AMENDED LANGUAGE FOR 46 U.S.C. §12108(A)(3), "WORD" SHOULD BE "WORK".

SOME CHANGES SHOULD BE MADE TO THE NEW PROPOSAL REGARDING LIMITED COASTWISE LICENSES. PROPOSED SECTION 12106A(B)(2) SHOULD BE ELIMINATED. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ONLY RECENTLY AFFIRMED THE COAST GUARD'S POSITION THAT THE BOWATERS STATUTE DOES NOT REQUIRE THE COAST GUARD TO CONDUCT AN INVESTIGATION PRIOR TO ISSUING A CERTIFICATE OF COMPLIANCE. SECTION 12106A(B)(2) APPEARS TO REQUIRE A PRE-ISSUANCE INVESTIGATION FOR THE LIMITED COASTWISE TRADE LICENSE AND, EVEN IF IT IS NOT INTENDED TO REQUIRE SUCH A PRE-ISSUANCE INVESTIGATION, IT WILL ENCOURAGE FURTHER LITIGATION OF THE ISSUE. THE COAST GUARD OPPOSES ADDING A REQUIREMENT FOR A PRE-ISSUANCE INVESTIGATION TO THE DOCUMENTATION LAWS AND, THEREFORE, OPPOSES SECTION 12106A(B)(2).

CERTIFICATES OF DOCUMENTATION AND RELATED ENDORSEMENTS ARE ISSUED ON THE BASIS OF SELF-CERTIFICATION BY VESSEL OWNERS. THE COAST GUARD IS NOT REQUIRED TO INVESTIGATE INTO THE TRUTHFULNESS OF AN APPLICATION FOR DOCUMENTATION BEFORE ISSUING A CERTIFICATE. HOWEVER, THE COAST GUARD MAY INVESTIGATE INTO ANY APPLICATION FOR DOCUMENTATION BEFORE OR AFTER A DOCUMENT IS ISSUED, AND THERE ARE SEVERE PENALTIES FOR KNOWING MISREPRESENTATION OR CONCEALING OF MATERIAL FACTS REGARDING DOCUMENTATION. THE DOCUMENTATION LAWS HAVE BEEN DESIGNED IN THIS WAY BECAUSE OF CONGRESSIONAL RECOGNITION THAT THE RESOURCES DO NOT EXIST FOR THE COAST GUARD TO DO A PRE-ISSUANCE INVESTIGATION IN EVERY CASE. THE COAST GUARD SHOULD HAVE THE SAME DISCRETION TO DECIDE IF A PRE-ISSUANCE INVESTIGATION IS NECESSARY, IN THE CASE OF LIMITED COASTWISE TRADE ENDORSEMENTS. IN ADDITION TO BEING A BURDEN ON THE COAST GUARD, THE REQUIREMENT FOR A PRE-ISSUANCE INVESTIGATION WOULD CREATE SIGNIFICANT DELAYS IN ISSUING LIMITED COASTWISE ENDORSEMENTS AND WOULD PLACE AN UNWARRANTED ADMINISTRATIVE BURDEN ON MANY APPLICANTS. SECTION 12106A(B)(2) SHOULD BE ELIMINATED FROM THE PROPOSED LEGISLATION, AND CONGRESS SHOULD MAKE CLEAR, PERHAPS WITH LANGUAGE IN SECTION 2(E) OF THE DRAFT, THAT, AS IS THE CASE GENERALLY UNDER THE DOCUMENTATION LAWS, NO PRE-ISSUANCE INVESTIGATION IS REQUIRED FOR THE LIMITED COASTWISE LICENSE.

THE PHRASE "VESSEL DOCUMENTED", THE SECOND TIME IT APPEARS IN NEW SECTION 12106A(C), SHOULD BE "DOCUMENTED VESSEL". HOWEVER, REQUIRING THAT A VESSEL BE DOCUMENTED TO OPERATE PURSUANT TO SECTION 12106A IS A SIGNIFICANT CHANGE. MANY BARGES USED ON INLAND WATERS ARE NOT REQUIRED TO BE DOCUMENTED.

ALTHOUGH THEIR OWNERS MUST QUALIFY AS CITIZENS TO USE THEM FOR TRANSPORTING MERCHANDISE. UNDER CURRENT LAW, A BOWATERS CORPORATION MAY OPERATE AN UNDOCUMENTED BARGE IN LIMITED COASTWISE TRADE. AS WRITTEN, THE DRAFT PROPOSAL WOULD REQUIRE MANY BARGES THAT HAVE NOT PREVIOUSLY BEEN DOCUMENTED TO OBTAIN DOCUMENTATION. THE PROPOSED AMENDMENT TO SECTION 9 OF THE SHIPPING ACT, 1916, PRESENTS THE SAME PROBLEM. FINALLY, THE TERM "ENDORSEMENT" SHOULD BE SUBSTITUTED FOR "LICENSE" IN KEEPING WITH RECENT AMENDMENTS TO 46 U.S.C. CHAPTER 121.

WITH RESPECT TO THE PROPOSED DREDGING PROVISIONS, SECTION 4(D) PROVIDES AN EXTREMELY NARROW EXCEPTION TO THE NEW REQUIREMENT THAT A DREDGE MEET THE REQUIREMENTS FOR A COASTWISE ENDORSEMENT. ESPECIALLY RESTRICTIVE IS SECTION 4(D)(2), WHICH LIMITS THIS EXCEPTION TO A VESSEL THAT WAS ISSUED A DOCUMENT UNDER 46 U.S.C. 12105 ON OCTOBER 1, 1987. VERY FEW DOCUMENTS ARE LIKELY TO HAVE BEEN ISSUED ON THAT PARTICULAR DAY. UNLESS THIS EXCEPTION IS INTENDED TO APPLY TO ONLY ONE, OR AT MOST A FEW, VESSELS, IT MAY NEED TO BE BROADENED SOMEWHAT. THE DREDGING PROVISION WILL NEED TO HAVE A COMPLETE SECTION NUMBER ASSIGNED. IT SEEMS LOGICALLY TO BELONG NEAR SECTION 12106 AND PERHAPS SHOULD BE DESIGNATED 12106B, SINCE THE LIMITED COASTWISE LICENSE PROVISION WOULD BE 12106A.

THE PROPOSED LEGISLATION CAN BE IMPROVED AND CLARIFIED IN SOME AREAS. THE COAST GUARD WOULD BE HAPPY TO WORK WITH YOUR STAFF AND WILL PROVIDE DRAFTING ASSISTANCE, WHERE APPROPRIATE.

MR. CHAIRMAN, THIS CONCLUDES MY STATEMENT. I WILL BE GLAD TO ANSWER ANY QUESTIONS THAT YOU OR THE OTHER MEMBERS OF THE SUBCOMMITTEE MAY HAVE.