



DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 1

[Docket No. USCG-2008-1259]

RIN 1625-AB32

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

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to issue a rule containing its assessment framework for, and restating its position regarding, the federalism implications of regulations issued under the authority of various statutes within Titles 33 and 46 of the United States Code. This notice requests comments on the proposal and, pursuant to Executive Order 13132, invites State and local governments to consult during its development.

DATES: Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], or

reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments, identified by Coast Guard docket number USCG-2008-1259, using any one of the following methods:

- (1) Federal eRulemaking Portal:

<http://www.regulations.gov>.

- (2) Fax: 202-493-2251.

- (3) Mail: Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

- (4) Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the "Public Participation and Request for Comments" portion of the SUPPLEMENTARY INFORMATION section below.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Lieutenant Commander Lineka Quijano, Office of Maritime and International Law, Coast Guard, telephone 202-372-3865. If you have questions on viewing or submitting material to the docket, call Ms.

Barbara Hairston, Program Manager, Docket Operations,
telephone 202-366-9826.

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I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2008-1259), indicate the specific section of this document to which each comment applies, and provide the reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail, or hand delivery, but please use

only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, select the Advanced Docket Search option on the right side of the screen, insert "USCG-2008-1259" in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time, click on "Search for Dockets," insert the docket number for this rulemaking (USCG-2008-1259) in the Docket ID box, press Enter, and

then click on the item in the Docket ID column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the Federal Register (73 FR 3316).

D. Public Meeting

We do not now plan to hold a public meeting. However, you may submit a request for a public meeting to the Docket Management Facility at the address under ADDRESSES, explaining why one would be beneficial. If we determine that a public meeting would aid this

rulemaking, we will hold one at a time and place announced by a later notice in the Federal Register.

II. Abbreviations

APPS	Act to Prevent Pollution from Ships
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
E.O.	Executive Order
FR	<u>Federal Register</u>
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978
NEPA	National Environmental Policy Act
PTSA	Port and Tanker Safety Act of 1978
PWSA	Ports and Waterways Safety Act of 1972
SMS	Safety Management System
U.S.C.	United States Code

III. Background and Purpose

A. Background

Courts have consistently upheld and reinforced the preemptive effect of Federal regulations for maritime vessels. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1859); *Moran v. New Orleans*, 112 U.S. 69 (1884); *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *U.S. v. Locke*, 529 U.S. 89 (2000). As the U.S. Supreme Court recently explained, the "authority of Congress to regulate interstate navigation, without embarrassment from

intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution. *E.g.*, The Federalist Nos. 44, 12, 64. In 1789, the First Congress enacted a law by which vessels with a federal certificate were entitled to 'the benefits granted by any law of the United States.' Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55." *Locke*, 529 U.S. at 99.

The Coast Guard is one of the primary Federal agencies responsible for the promulgation, implementation, and enforcement of Federal maritime regulations, including the implementation of international shipping treaties to which the United States is a party. The Coast Guard has asserted in the past and believes today that consistent standards of universal application and enforcement, coupled with Federal initiatives to meet unique regional concerns, best meet local and national safety and environmental goals with the least disruption to maritime commerce. To that end, the Coast Guard in the past has relied on development of case law and compliance with Congressional intent to ensure that, where appropriate, the preemptive impact of Federal vessel regulations is preserved.

In light of recent Federal cases and the Presidential Memorandum on Preemption issued on May 20, 2009, the Coast

Guard believes that a clear agency statement of the preemptive impact of our regulations, particularly those regulations issued prior to the promulgation of Executive Order 13132, Federalism, can be of great benefit to State and local governments, the public, and regulated entities. Therefore, the Coast Guard intends to revise its assessment framework and issue a general restatement of preemption, coupled with specific statements regarding regulations issued under the authority of statutes with preemptive effect, including, among others, the Ports and Waterways Safety Act (PWSA) of 1972, as amended (33 U.S.C. 1223 *et. seq.*). The Coast Guard proposes to add subpart 1.06 to Title 33 of the Code of Federal Regulations to allow easy access to this assessment framework and organizational restatement by interested persons and parties.

B. General Preemption Principles

Preemption of State law has its basis in the Supremacy Clause of the U.S. Constitution, Article VI, clause 2. The U.S. Supreme Court has determined that three general theories of preemption apply in the context of the regulation of vessels. First, express preemption applies when Congress, by an express statement, specifically precludes State regulation in a given area. The prohibition against State pilotage regulations for

coastwise vessels found at 46 U.S.C. 8501 is an example of express preemption, as is the prohibition against State regulation of Great Lakes pilotage found at 46 U.S.C. 9306.

Second, field preemption applies when the Federal regulatory regime pervades a specific area of regulation to the extent that courts conclude that Congress has left no room for State regulation. Even in the absence of an express statement by the Coast Guard or the promulgation of regulations, State rules are preempted where Congress has intended to occupy the field. Thus, a State may not regulate in areas found to be field preemptive. For example, 46 U.S.C. 3703 lists several fields of regulation, including the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels, for which State action is preempted, regardless of whether the Coast Guard has issued particular regulations in that field.

Third, conflict preemption, which in the maritime regulation context is somewhat different from traditional conflict analysis jurisprudence, applies in cases where the Coast Guard has regulated, or affirmatively decided not to regulate, on a particular subject and a State attempts to regulate on the same subject. Factors to consider in determining whether the regulations are within the same

subject include whether the State regulation conflicts with Federal law, whether compliance with both the State law and Federal law is impossible, and whether State law stands as an obstacle to the accomplishment of the full purpose of the Federal law. The Coast Guard believes that nearly all regulations currently issued under the authority of 33 U.S.C. 1231 have preemptive effect under a conflict preemption analysis.

Pursuant to Executive Order 13132, the Coast Guard must, to the extent practicable, publish federalism summary impact statements regarding any regulation that has federalism implications and that preempts State law. In the past, the Coast Guard issued federalism statements indicating that certain preemptive regulations had no federalism implications. Although these regulations were based on authorities that clearly expressed Congress' preemptive intent, the Coast Guard did not describe as clearly as it could have the full nature of the preemption. This practice was consistent with the Coast Guard's view that the regulations did not have any new federalism implications; rather they simply reflected a long standing federalism position in regard to maritime regulation. This proposed regulation seeks to make the Coast Guard's view of the preemptive impact of certain regulations more obvious.

The Coast Guard's view is that the intent of Congress to preempt is so clear in express preemption and numerous PWSA situations that the Coast Guard has no discretion in the matter; the agency was merely fulfilling the direction of Congress consistent with the Supremacy Clause of the U.S. Constitution and therefore did not believe that more particular federalism statements were required. However, in light of recent Federal cases signaling that more explicit preemption statements are instructive and helpful, and in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009, the Coast Guard proposes to clarify and restate the preemptive impact of its regulations. We welcome comments from the public on this proposal.

IV. Discussion of Proposed Rule

A. Preemption Analysis for the PWSA

As amended by the Port and Tanker Safety Act of 1978 (PTSA), the PWSA contains two Titles. Title I authorizes the Coast Guard to promulgate regulations to implement measures for controlling vessel traffic or for protecting navigation and the marine environment. 33 U.S.C. 1223(a)(1). Title II requires the Coast Guard to promulgate regulations addressing the design, construction, alteration, repair, maintenance, operation, equipping,

personnel qualification and manning of vessels. 46 U.S.C. 3703(a). With the enactment of 46 U.S.C. Chapter 37 into positive law (Pub.L. 98-89, 97 Stat. 521 (1983)), the distinction between the two titles has legally disappeared. However, reference to Title I and II makes a convenient analytical tool still used by both the courts and the Coast Guard to conduct preemption analyses of regulations issued under these authorities. The Coast Guard will continue to refer to both Titles I and II in this rulemaking and future federalism statements implicating the PWSA.

B. Preemption Restatement for PWSA Title I

In the *Ray* and *Locke* cases cited in section III.A. of this preamble, the U.S. Supreme Court held that the relevant inquiry under Title I of the PWSA, with respect to a State's power to impose navigational operating rules, is whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all. *Ray*, 431 U.S. 171-172; *Locke*, 529 U.S. 108-110. In such cases, the Coast Guard's regulation, or decision that no regulation should be promulgated, must be given preemptive effect over State laws addressing the same or similar subject matter, even when those State laws are not otherwise inconsistent with Federal law. Where the Coast Guard has neither promulgated

its own regulation nor made a determination that no regulation should be promulgated, a State may regulate, so long as the regulation is based on the peculiarities of local waters that call for special precautionary measures.

With these conflict preemption principles in mind, the Coast Guard reiterates its position that any regulations issued under the authority of PWSA Title I are intended to have preemptive impact over State law covering the same subject matter in the same geographic area (as delimited in the Federal regulation), unless the Coast Guard states otherwise in the preamble to the final rule in question.

One exception to the general preemption restatement articulated above is for the enforcement of Coast Guard safety and security zones promulgated under the authority of PWSA Title I by State or local officers. In 46 U.S.C. 70118, Congress specifically authorized State law enforcement officers to enforce Coast Guard safety and security zones. This statute is implemented by the Coast Guard through memoranda of agreement with State and local law enforcement agencies. As such, the Coast Guard's view is that enforcement by State or local officers operating in accordance with a memorandum of agreement between the Coast Guard and the officer's parent agency of safety and security zones promulgated pursuant to PWSA Title I is not

preempted.

Another exception to the general preemption restatement articulated above is for State maritime facility regulations that are more stringent than the Coast Guard maritime facility regulations in 33 CFR part 105. State maritime facility regulations will not be preempted so long as these State laws or regulations are more stringent than what is required by 33 CFR part 105 and no actual conflict or frustration of an overriding need for national uniformity exists.

For currently existing rules issued under the authority of PWSA Title I, a listing of Coast Guard determinations regarding preemptive impact is contained in section E, below, and in proposed section 2.1 of the appendix to subpart 1.06. For rules issued after publication of this restatement and assessment framework, the general intentions, presumptions, and policies described above apply, and this rulemaking will be referred to in the Federalism section of the preamble to each final rule published in the Federal Register, along with the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard intends to preempt State law (if applicable) will also be included in the codified regulation in accordance with the Presidential

Memorandum on Preemption issued on May 20, 2009.

C. Preemption Restatement for PWSA Title II

The *Locke* case reaffirmed the ruling announced in *Ray*. It held that regulations issued pursuant to PWSA Title II concern subjects that are reserved exclusively to the Federal government, as implemented by the Coast Guard. Thus State regulation in the field described in 46 U.S.C. 3703(a) is preempted at all times. This field contains categories regarding the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels. In accordance with these rulings, and to meet the intent of Congress, the Coast Guard's view is that State regulation relating to the aforementioned aspects of tank vessels is field preempted, regardless of whether the Coast Guard has made any regulatory determinations on the subject in question. A listing of regulations already issued under the authority of PWSA Title II, including the applicable Title II category, is provided in section E, below, and in proposed section 2.2 of the appendix to subpart 1.06. For regulations issued under this authority in the future, the preemption restatement and assessment framework described in this paragraph will apply, and this policy will be referred to in the Federalism section of the preamble to

each final rule issued under this authority, along with the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard intends to preempt State law will also be included in the codified regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009.

D. Preemption Restatement for PWSA Title I/Title II "Overlap" Regulations

Both the *Locke* and *Ray* Courts recognized that some regulations may not fit cleanly into either Title I or Title II of the PWSA. *Locke*, 529 U.S. at 111-12. For example, a State prohibition on the transit of large tankers through State waters might be subject to a Title I analysis if the prohibition were based on local peculiarities, or a Title II analysis if it were based on a State judgment that large tankers are generally unsafe. In *Locke*, several factors were developed to aid in determining the title in which a particular State regulation should be categorized. *Id.* The Coast Guard also recognizes this potential ambiguity as to its own regulations and will conduct what the *Locke* Court described as an "overlap analysis" in the promulgation and application of its regulations. While the *Locke* Court used the overlap analysis as a means of categorizing a

particular State regulation as either falling under a Title I (generally controlled by conflict preemption principles) or a Title II category (controlled by field preemption principles), the Coast Guard believes the overlap analysis factors described by the *Locke* Court are equally useful in categorizing a particular Federal regulation. In conducting an overlap analysis the following factors, derived from *Locke*, are considered: (1) the type of regulations the Coast Guard has actually promulgated under the applicable Title II specific category, as this may aid in determining the scope of the Title II field, and indicates that State regulation of this specific category is field preempted; (2) whether an identical State regulation would be based on conditions unique to a particular port or waterway (e.g., a Title I regulation is one based on water depth or other local peculiarities); (3) whether an identical State regulation would be of limited extraterritorial effect, not requiring the tank vessel to modify its primary conduct outside the specific body of water purported to justify the local rule; and (4) whether an identical State regulation would pose a minimal risk of innocent noncompliance, would not affect vessel operations outside the jurisdiction, would not require adjustment of systemic aspects of the vessel, and would not impose a

substantial burden on the vessel's operation within the local jurisdiction itself. Factors 2 through 4 are indicators that, in the absence of a Federal determination on the subject, an identical State regulation might not be field preempted by Title II, and therefore appropriate for conflict preemption analysis under Title I.

After considering all these factors, the Coast Guard will determine whether the regulation is categorized under Title I or Title II. The Coast Guard determinations as to its existing regulations which may be subject to an "overlap analysis," are listed in section E, below, and in proposed section 2.3 of the appendix to subpart 1.06. Where the Coast Guard has determined that the regulation falls under PWSA Title II, the applicable category is also listed. For regulations issued in the future, this section will apply, and the determinations will be stated in the preamble to the final rule, along with the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard intends to preempt State law will also be included in the codified regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009.

E. Listing of Current Regulations with Preemptive Impact Pursuant to the PWSA

After applying the principles described above, the Coast Guard has determined that by operation of the PWSA, current and future State law is preempted with respect to the following Coast Guard regulations issued under the authorities of Titles I and II of the PWSA:

Title I - 33 CFR parts 64, 101, 103, 104, 105 (for State maritime facility laws that are either less stringent or actually conflict with or frustrate an overriding need for national uniformity), 120, 128, 161, 166, 167, 169 and 401.

Title II - with respect to tank vessels only - 33 CFR parts 157, 163, and 168. 46 CFR parts 2, 8, 13, 15, 30, 31, 32, 34, 35, 36, 38, 39, 50, 52, 53, 54, 56, 57, 58, 59, 61, 62, 63, 64, 98, 105, 110, 111, 112, 113, 150, 151, 153, 154, 159, 160, 161, 162, 163, 164, 170, 172, 174, 175, 178, 179, and 199.

Some Coast Guard regulations are grounded in, and issued under the authority of, both titles of the PWSA. Using the overlap analysis described above, the Coast Guard has made the following determinations:

In 33 CFR part 155, the following sections are grounded in Title II authority, and cover fields that are foreclosed from regulation by a State: 155.100 through 155.1030, 155.1055 through 155.1060, 155.1110 through

155.1120, and 155.1135 through 155.1150.

In 33 CFR part 156, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 156.118, 156.215, 156.220, 156.230, 156.300 and 156.310. In 33 CFR part 156, the following sections are grounded in Title II authority, and cover fields that are foreclosed from regulation by a State: 156.100 through 156.115, 156.120 through 156.210, 156.225, and 156.320 through 156.330.

In 33 CFR part 160, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 160.1 through 160.7, 160.105 through 160.107, and 160.115 through 160.215. In 33 CFR part 160, the following regulations as applied to tank vessel operations are grounded in Title II, and cover fields that are foreclosed from regulation by a State: 160.101, 160.103, 160.109, 160.111 and 160.113.

In 33 CFR part 162, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 33 CFR 162.1 through 162.40, 162.65 through 162.65(b)(3), 162.65(b)(4)(ii) through 162.65(b)(6), 162.75 through 162.75(b)(5)(iv), 162.75(b)(6) through 162.80(a)(1), 162.80(a)(3) through 162.90(b)(2)(iii), 162.90(b)(2)(vi)

through 162.90(b)(3)(iv), 162.90(b)(4)(ii) through 162.117(h)(2), 162.120 through 162.125(a), 162.125(b)(3) through (5).

In 33 CFR part 162, the following sections are promulgated pursuant to Title II, and cover fields that are foreclosed from regulation by a State: 162.65(b)(4)(i) operation and equipping, 162.75(b)(5)(v) operation and equipping, 162.75(b)(5)(vi) operation, 162.80(a)(2) operation and equipping, 162.90(b)(2)(iv) manning, 162.90(b)(2)(v) operation, 162.90(b)(4)(i) operation and equipping, 162.117(h)(3) and (4) operation, 162.255(e)(1) and (2) operation and equipping, and 162.255(e)(3) operation.

In 33 CFR part 164, the following sections are promulgated under Title I and therefore preempt any similar, identical or contrary State regulation: 33 CFR 164.01, 164.02, 164.03, 164.11(c), 164.11(e), 164.11(f)-(i), 164.11(k)-(n), 164.11(p), 164.11(q), 164.19(b), 164.19(c), 164.51, 164.53, 164.55, 164.61, 164.70, 164.78(a)(3)-(8) and 164.82(c). The following sections are grounded in Title II authority, and cover fields that are foreclosed from regulation by a State: 33 CFR 164.11(b), 164.11(d), 164.11(j), 164.11(o), 164.11(r) through 164.19(a), 164.25 through 164.46, 164.72 through

164.78(a)(2), and 164.78(b) through 164.82(b).

In 33 CFR part 165, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 165.1 through 165.150(b)(4), 165.150(b)(6) through 165.501(d)(2), 165.501(d)(4) through 165.501(d)(5), 165.501(d)(7) through 165.510(d), 165.510(f)(1) through 165.510(f)(3), 165.510(f)(9) through 165.540(f)(6), 165.540(f)(9) through 165.803(e)(2), 165.803(g) through 165.810(e), 165.810(f)(2), 165.811(a) through 165.811(c), 165.811(e) through 165.923(b)(2)(ii)(D), 165.923(b)(2)(ii)(F) through 165.1152(d)(1), 165.1152(d)(3) through 165.1181(d)(1), 165.1181(d)(3) through 165.1704(c)(1), 165.1704(c)(3) through 165.1704(c)(5), and 165.1706 through 165.2030.

The following sections in 33 CFR part 165 are grounded in Title II, and cover fields that are foreclosed from regulation by a State: 165.150(b)(5) manning, 165.501(d)(3)(i)-(ii) and (6) equipping, 165.510(e) operation, 165.510(f)(4) operation, 165.510(f)(5) manning, 165.510(f)(6) operation, 165.510(f)(7) and (8) equipping, 165.540(f)(7) and (8) equipping, 165.803(e)(3) and (4) equipping, 165.803(f)(1)-(3) equipping, 165.810(f)(1) manning, 165.810(f)(3) equipping, 165.811(d) equipping, 165.923(b)(2)(ii)(E) equipping, 165.1152(d)(2) operation,

165.1181(d)(2) operation, and 165.1704(c)(2) and (6) equipping.

F. Preemption Restatement and Assessment Framework
for Regulations Issued Under the Authority of 46 U.S.C.
Chapter 32

Chapter 32 of Title 46, U.S. Code, describes the regime of regulation for certain vessels that must comply with the International Safety Management Code that is found in Chapter IX of the Annex to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS). This regime requires that certain vessels create and implement a Safety Management System (SMS) and carry onboard and maintain a proper certificate issued by the Coast Guard reflecting a current SMS. 46 U.S.C. 3203 requires the Coast Guard to issue regulations which mandate the implementation of an SMS to which the Chapter applies which identifies: (1) a safety and environmental protection policy; (2) instructions and procedures to ensure the safe operation of those vessels and protection of the environment in compliance with international and United States law; (3) defined level of authority and lines of communications between, and among, personnel on shore and on the vessel; (4) procedures for reporting accidents and nonconformities with 46 U.S.C. Chapter 32; (5) procedures

for preparing for and responding to emergency situations; and (6) procedures for internal audits and management reviews of the system. This describes a pervasive scheme of safety management for those vessels to which 46 U.S.C. Chapter 32 applies. Such a pervasive scheme, coupled with the strong mandate that the Coast Guard "shall prescribe regulations," considered in light of the significant Congressional interest to create a uniform maritime regulatory regime, suggests that Congress intended to fill the field related to SMS on all vessels to which 46 U.S.C. Chapter 32 applies, and to any other vessels Congress has made subject to Coast Guard SMS regulation. See *Locke*, 529 U.S. 113-116.

Therefore, the Coast Guard's view is that the field of vessel safety management is foreclosed from State regulation by 46 U.S.C. Chapter 32, regardless of whether the Coast Guard has issued regulations on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation. A listing of current Coast Guard regulations issued pursuant to this authority is provided in section G, below, and in proposed section 3 of the appendix to subpart 1.06. For future regulations issued under this authority, the Coast Guard will cite to this rulemaking in the preamble to the final rule, and will

conduct the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard regulations are in a field foreclosed from State regulation will also be included in the codified regulation in accordance with the Presidential Memorandum on preemption issued on May 20, 2009.

G. Regulations Issued Pursuant to 46 U.S.C. Chapter 32

All of the regulations in 33 CFR part 96 have been prescribed under the authority of 46 U.S.C. Chapter 32, and cover fields that are foreclosed from regulation by a State.

H. Preemption Restatement and Assessment Framework for Regulations Issued Under the Authority of 46 U.S.C. Chapter 33

Chapter 33 of Title 46, U.S. Code, describes the regime of regulation for vessels "subject to inspection" by the U.S. Coast Guard. Vessels "subject to inspection" is a term of art developed by Congress. It refers to various types of vessels listed in 46 U.S.C. 3301 subject to a comprehensive, pervasive regime of Federal regulation. By contrast, "uninspected vessels," such as most commercial fishing vessels and recreational vessels, are subject to Coast Guard regulation, but under a much less comprehensive

and prescriptive scheme of Federal regulation. The U.S. Supreme Court has long recognized the field preemptive impact of the Federal regulatory regime for inspected vessels. See, e.g., *Kelly v. Washington ex rel Foss*, 302 U.S. 1 (1937) and *Locke*, 529 U.S. 113-116. Therefore the Coast Guard's view is that the regulatory regime created by 46 U.S.C. 3306 in the areas of design, construction, alteration, repair, operation, superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electric installations, accommodations for passengers and crew, sailing school instructors, sailing school students, lifesaving equipment and its use, firefighting equipment, its use and precautionary measures to guard against fire, inspections and tests related to these areas and the use of vessel stores and other supplies of a dangerous nature covers fields that are foreclosed from regulation by a State. These fields are foreclosed from State regulation regardless of whether the Coast Guard has issued a particular regulation on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation. A listing of current Coast Guard regulations issued pursuant to this authority is provided in section I, below, and in proposed section 4

of the appendix to subpart 1.06. For future regulations issued under this authority, the Coast Guard will cite to this preemption statement in the preamble to the final rule, and will conduct the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard regulations are in a field foreclosed from State regulation will also be included in the codified regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009.

I. Regulations Issued Pursuant to 46 U.S.C. Chapter 33

The following regulations issued pursuant to 46 U.S.C. Chapter 33 cover fields that are foreclosed from regulation by a State: 46 CFR parts 70, 71, 76, 78, 90-93, 95-98, 105, 107-108, 110-122, 125-134, 147, 147A, 148, 150-151, 153-154, 159-164, 166-169, 170-174, 175-185, 188-190, 193-196, and 199.

J. Preemption Restatement and Assessment Framework for Regulations Issued Under the Authority of 46 U.S.C. 3717 and 6101

Section 5 of the PTSA provides that "the Secretary shall establish a marine safety information system" for tank vessels. 46 U.S.C. 3717 requires that, among other data, the marine safety information system shall include

the name of each person with an ownership interest in the vessel, details of compliance with financial responsibility requirements of applicable laws or regulations, registration information (including all changes in the name of the vessel), and a record of all inspections and examinations conducted under 46 U.S.C. 3714.

46 U.S.C. 6101 states that "The Secretary shall prescribe regulations on the marine casualties to be reported and the manner of reporting." The statute requires, among other things, the reporting of the death of an individual, serious injury to an individual, material loss of property, material damage affecting the seaworthiness or efficiency of the vessel, and significant harm to the environment.

The Supreme Court has held that "Congress intended that the Coast Guard regulations be the sole source of a vessel's reporting obligations..." and that Coast Guard regulations promulgated pursuant to the authority of 46 U.S.C. 3717 and 6101 were not intended by Congress "to be cumulative to those enacted by each political subdivision whose jurisdiction a vessel enters." *Locke*, 529 U.S. 115-116. Therefore, the Coast Guard's view is that regulations issued under the authority of 46 U.S.C. 3717 as part of a marine safety information system and under 46 U.S.C. 6101

for marine casualty reporting requirements cover fields foreclosed from regulation by a State. These fields are foreclosed from State regulation regardless of whether the Coast Guard has issued regulations on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation. A listing of current Coast Guard regulations issued pursuant to this authority is provided in section K, below, and in proposed section 5 of the appendix to subpart 1.06. For future regulations issued under this authority, the Coast Guard will cite to this preemption statement in the preamble to the final rule, and will conduct the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard regulations are in a field foreclosed from State regulation will also be included in the codified regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009.

K. Regulations Issued Pursuant to 46 U.S.C. 3717 and 6101

The following regulations issued pursuant to 46 U.S.C. 3717 and 6101 cover fields that are foreclosed from regulation by a State: 33 CFR 151.15, 151.26(b)(3), 153.203, 155.1035(b), 164.61, part 173 subpart C; 46 CFR 4.05-1 through 4.05-10, 35.15-1, 197.484 through 197.488,

and 401.260.

L. Preemption Restatement and Assessment Framework
for Regulations Issued Under the Act to Prevent Pollution
from Ships, 33 U.S.C. 1901-1912

The Act to Prevent Pollution from Ships (APPS) is the domestic law implementing the "International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto," otherwise referred to as MARPOL 73/78 or MARPOL. To the extent an international agreement creates a standard that is embodied in Coast Guard regulations or is formally recognized by the Coast Guard as applicable pursuant to domestic law (in this case, APPS), that standard will also preempt a contrary State law. Under international law, an international treaty or agreement is binding on all political subdivisions of the ratifying nation, and a party would not be excused from compliance because of the actions of a political subdivision. Because international agreements reflect the intentions of nation-states, the Supreme Court has emphasized that any concurrent power held by States in fields that are the subject of international agreements is "restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). Accordingly, whether viewed through the lens of preemption by treaty or

interference with the Federal government's exclusive authority to conduct the foreign affairs of the United States, the Supreme Court has repeatedly struck down State laws that conflict with duly promulgated Federal law touching on matters of international concern. See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). This foreign affairs based preemption analysis is also buttressed by the traditional Congressional recognition of a uniform and consistent pattern of Federal regulation of shipping. The Coast Guard recognizes there are certain and limited express statements of non-preemption related to APPS such as in Section 2003 of Public Law 100-220, among others, which will be considered in any related preemption analysis. A listing of current Coast Guard regulations issued pursuant to this authority is provided in section M, below, and in proposed section 6 of the appendix to subpart 1.06. For future regulations issued under this authority, the Coast Guard will cite to this preemption restatement in the preamble to the final rule, and will conduct the federalism analysis required pursuant to Executive Order 13132. A statement that the Coast Guard intends to preempt State law (if applicable) will also be included in the codified

regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009.

M. Regulations Issued Pursuant to 33 U.S.C. 1901-1912

The following regulations issued pursuant to 33 U.S.C. 1901-1912 preempt conflicting, similar, or identical State or local laws or regulations with the exception of State or local laws or regulations specifically permitted by Section 2003 of Public Law 100-220 or other similar express statutory authority: 33 CFR part 151, Subpart A; 33 CFR 155.100 through 155.130, 155.350 through 155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), 155.1065(g), and all the regulations in 33 CFR part 157.

N. Preemption Restatement and Assessment Framework for Regulations Issued Under Authorities Not Described Above

Other regulations issued by the Coast Guard after the effective date of the final rule may have preemptive impact. In such cases, the Coast Guard's view is that such regulations, in order to more fully address the requirements of Executive Order 13132, will also in their preamble contain a preemption analysis that states the legal rationale for concluding whether the regulation has preemptive impact. A statement that the Coast Guard

intends to preempt State law (if applicable) will also be included in the codified regulation in accordance with the Presidential Memorandum on Preemption issued on May 20, 2009. For regulations that are currently issued and not specifically addressed in this proposed Assessment Framework and Organization Restatement of Preemption, the preemptive analysis and principles recited herein will be used to determine any preemptive effect, unless there are specific preemption exceptions applicable to the particular statute or regulations in question. The absence of an express preemptive statement in a regulation or rule preamble is not determinative of the preemptive impact of the regulation, considering that the true preemptive intent of the regulation is reflected in the underlying Congressional authority and intent.

O. Preemption Restatement and Assessment Framework for Certain Coast Guard Determinations that No Regulations Should Issue

In some cases, the Coast Guard makes a determination that no regulations are needed on certain subjects or in a certain geographic area. These determinations can have preemptive impact over a contrary State determination. For example, this was true in cases of negative determinations made under Title I of the PWSA or pursuant to the

preemption provisions of the Federal Motorboat Safety Act of 1971, 46 U.S.C. 4301 *et seq.* See, e.g., *Locke*, 529 U.S. at 109 and *Ray*, 435 U.S. at 171-172, Cf. *Spreitsma v. Mercury Marine*, 537 U.S. 51, 66 (2002). These negative determinations can be made in several ways, including, but not limited to: formal decisions in response to the recommendations of advisory committees, correspondence in response to Congressional inquiries regarding an area of regulation, or in response to requests or actions by State and local governments, the marine industry, or the public where the USCG's decision is intended to have preemptive effect. Negative determinations may or may not be published in the Federal Register, so long as they are published in a medium likely to reach the affected audience as the decision of the Coast Guard on the question of preemption. Regardless of the method used to record and publish a Coast Guard preemptive determination not to regulate, negative determinations made after the effective date of the final rule in this matter should contain a statement of the preemptive impact of such negative determinations, although the mere absence of such a statement of preemptive impact does not necessarily indicate that the determination is not preemptive.

V. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below, we summarize our analyses based on 13 of these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 ("Regulatory Planning and Review") and 13563 ("Improving Regulation and Regulatory Review") direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget has not reviewed it under that Order. This proposed rule would only clarify, not change, the preemptive status of Coast Guard regulations. We expect this proposed rule would not result in additional impacts on the U.S. economy.

This proposed rule is intended to clarify the

preemptive effect of Federal regulatory regimes, and articulate the assessment framework used by the Coast Guard for evaluating the preemptive impact of future Coast Guard regulations based on their underlying statutory schemes. The assessment framework is based on the federalism analysis pursuant to Executive Order 13132. The Coast Guard currently performs federalism analyses under Executive Order 13132, if applicable. The Coast Guard would not require additional resources to implement this proposed rule.

By clarifying the preemption framework, the Coast Guard hopes to avoid or reduce confusion related to States and local governments' attempts to regulate in preempted areas. This action does not alter the preemptive effect of any Federal statute or regulation, and does not affect the relationship between the national government and the State and local governments.

We expect no additional cost impacts to State and local governments or industry from this proposed rule because it only restates and clarifies the status of Federal and State laws as it exists. This proposed rule does not alter in any way the rights of States. However, we expect this proposed rule to be beneficial to the maritime industry because it avoids potential conflicts between

State and Federal regulations.

B. Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to consider whether regulatory actions would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

As previously discussed, we estimate this proposed rule would not impose additional costs and would have no additional impact on small entities because it does not alter the preemptive impact of any particular regulation or impose any direct costs on small entities, but rather clarifies the preemptive status of certain regulations, as presented in section IV - Discussion of Proposed Rule.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the Docket

Management Facility at the addresses under ADDRESSES. In your comment, explain why you think it qualifies and how and to what degree this proposed rule would economically affect it.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Lieutenant Commander Lineka Quijano, Office of Maritime and International Law, Coast Guard, telephone 202-372-3865. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

D. Collection of Information

This proposed rule would not require a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

E. Federalism

A rule has implications for federalism under Executive

Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order. This regulation, in and of itself, does not change or alter the Coast Guard's view on the law of preemption, or the preemptive impact of our existing regulatory regime. Likewise, it does not serve to prospectively give preemptive impact to any future regulatory effort. As we make clear below, many of the statutes we administer, and many of our regulations, have preemptive impact. In keeping with the intent of Congress, and the spirit of Executive Order 13132 and the Presidential Memorandum on Preemption issued on May 20, 2009, the purpose of this rulemaking is to identify those statutes and regulations the Coast Guard considers to be preemptive. We also clarify and restate the principles and procedures by which the Coast Guard identifies and promulgates regulatory determinations with preemptive impact. This proposed rule discusses existing law on preemption; it identifies the laws and regulations that have preemptive effect. It clarifies (but does not alter) the Coast Guard's view on the preemptive effect of its regulations. Nonetheless, the Coast Guard recognizes the

key role State and local governments may have in making regulatory determinations. Accordingly, the Coast Guard encourages State and local governments to participate in the development of this rulemaking, and will, if we receive comments from States, consult with the States pursuant to Executive Order 13132. We will also make available to the Director of the Office of Management and Budget any written communications submitted by State and local officials. Any future rulemaking covering an area the Coast Guard considers to have preemptive impact pursuant to this proposed policy will also be promulgated in accordance with E.O. 13132 or its successors.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector, of \$100,000,000 [adjusted for inflation] or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This proposed rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian

tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, the Coast Guard welcomes input from Federally recognized Indian tribes.

K. Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

L. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable

law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under the "Public Participation and Request for Comments" section of this preamble. This rule involves regulations that are editorial or procedural and regulations concerning internal agency functions. This

rule falls under paragraphs 34(a) and (b) of the Instruction. We seek any comments or information that may lead to discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 1

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, and Penalties.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 1 as follows:

PART 1—GENERAL PROVISIONS

1. Add subpart 1.06 to read as follows:

Subpart 1.06—Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard

Sec.

1.06-1 General Restatement Regarding Preemption and Preemption Assessment Framework.

1.06-10 Restatement Regarding Preemption and Assessment Framework for the Ports and Waterways Safety Act and Regulations Issued under its Authority.

1.06-20 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. Chapter 32 and Regulations Issued Under its Authority.

1.06-30 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. Chapter 33 and Regulations Issued Under its Authority.

1.06-40 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. 3717 and 6101 and Regulations

Issued Under their Authority.

1.06-50 Restatement Regarding Preemption and Assessment Framework for The Act to Prevent Pollution from Ships, codified at 33 U.S.C. 1901 to 1912 and Regulations Issued Under its Authority.

Appendix to Subpart 1.06 of Part 1—Regulations with Preemptive Effect.

Subpart 1.06—Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard

AUTHORITY: 14 U.S.C. 2 and 91; 33 U.S.C. 1223, 1231, 1903(b); 46 U.S.C. 3203, 3306, 3703, 3717, 4302, & 6101; Dept. of Homeland Security Delegation No. 0170.1.

§ 1.06-1 General Restatement Regarding Preemption and Preemption Assessment Framework.

(a) Preemption of State law has its basis in Article VI, clause 2, the Supremacy Clause of the U.S. Constitution. The Coast Guard follows the three general theories of preemption that the U.S. Supreme Court has determined apply in the context of the regulation of vessels.

(1) Express preemption applies when Congress, by an express statement, specifically precludes State regulation in a given area.

(2) Field preemption applies when the Federal regulatory regime pervades a specific area of regulation to the extent that courts conclude that Congress has left no room for State regulation. Even in the absence of an express statement by the Coast Guard or the promulgation of regulations, State rules are preempted where Congress has intended to occupy the field. Thus, a State may not regulate in areas found to be field preempted.

(3) Conflict preemption applies in cases where courts find that the State regulation conflicts with a Federal statute or regulation, where compliance with both the State law and Federal law or regulation is impossible, or where State law stands as an obstacle to the accomplishment of the full Federal purpose.

Note to paragraph (a): General Policy. Since the founding of the Republic, the Federal government has historically exercised the preeminent and preemptive role in regulating interstate and international shipping. Courts have consistently upheld and reinforced the preemptive effect of the Federal regulatory regime for vessels. See, e.g., *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *U.S. v. Locke*, 529 U.S. 89 (2000). The Coast Guard is one of the primary Federal agencies responsible for the promulgation, implementation and enforcement of Federal shipping regulations, including the implementation of international shipping treaties to which the United States is a party. The Coast Guard's policy position is that consistent standards of universal application and enforcement, coupled with Federal initiatives to meet unique regional concerns, best meet local and national safety and environmental goals with the least disruption to maritime commerce. Thus, in many cases, the Coast Guard regulations preempt non-federal regulatory or enforcement actions, consistent with the principles described in paragraph (a) of this section. The Coast Guard does not intend, through the publication of this policy, to affect any regulation promulgated pursuant to authority under which Congress has expressed an intention not to preempt State or local law or regulation.

(b) Procedures. In cases where a Coast Guard regulatory determination has preemptive impact, the Coast

Guard will use the following procedures to identify and communicate that impact:

(1) For regulations promulgated under the authority of a statute that is discussed in this subpart, but issued prior to [EFFECTIVE DATE OF FINAL RULE], the Coast Guard has published a listing of the preemptive impacts in the appendix to subpart 1.06 of this part, although that listing is not intended to be exclusive.

(2) For regulations promulgated under the authority of a statute that is discussed in this subpart, issued after [EFFECTIVE DATE OF FINAL RULE], those final rules will contain a reference to and a statement of the applicability of the preemption policies in this subpart. The preambles of those rules will also contain a report of the results of the consultative process with State and local governments required by Executive Order 13132.

(3) For regulations promulgated under the authority of a statute that is not discussed in this subpart, issued prior to [EFFECTIVE DATE OF FINAL RULE], the Coast Guard will issue preemption analyses and determinations on a case by case basis, as necessary. Any such determination will include a report on the results of the consultative process required under Executive Order 13132, if applicable. Any party seeking a Coast Guard preemption determination for a

regulation covered by this paragraph may do so by writing to the Commandant (CG-0941), Attn: Office of Maritime and International Law, U.S. Coast Guard Stop 7213, 2703 Martin Luther King Jr Avenue SE., Washington, DC 20593-7213.

(4) For regulations promulgated under the authority of a statute not discussed in this subpart, issued after [EFFECTIVE DATE OF FINAL RULE], those final rules will contain a reference to the applicability of the general preemption policy in this subpart, as well as a statement of the preemptive impact of the specific statutes and regulations in question. The preambles of those rules will also contain an analysis of the preemptive impact and a report of the results of the consultative process with State and local governments required by Executive Order 13132, if applicable.

(5) In cases where the Coast Guard has made a determination not to regulate on a certain subject or in a certain geographic area, the procedures for identifying and communicating the preemptive impact of such negative determinations are:

(i) For negative determinations issued prior to [EFFECTIVE DATE OF FINAL RULE], the Coast Guard will issue preemption analyses and determinations on a case by case basis, as necessary. Any such determination will include a

report on the results of the consultative process required under Executive Order 13132, if applicable. Any party seeking a Coast Guard preemption determination for a negative determination covered by this paragraph may do so by writing to the Commandant (CG-0941), Attn: Office of Maritime and International Law, U.S. Coast Guard Stop 7213, 2703 Martin Luther King Jr Avenue SE., Washington, DC 20593-7213.

(ii) For negative determinations issued after [EFFECTIVE DATE OF FINAL RULE], the Coast Guard negative determination will contain a reference to the applicability of the preemption principles in this subpart, as appropriate, as well as a statement of the preemptive impact of the negative determination. The negative determination will also contain a report of the results of the consultative process with State and local governments required by Executive Order 13132, if applicable.

§ 1.06-10 Restatement Regarding Preemption and Assessment Framework for the Ports and Waterways Safety Act and Regulations Issued under its Authority.

(a) General. The Ports and Waterways Safety Act of 1972 (Pub. L. 92-340, 86 Stat. 424), as amended by the Port and Tanker Safety Act of 1978 (P.L. 95-474, 92 Stat. 1471) (collectively the "PWSA") contained two titles. Title I is

codified at 33 U.S.C. 1221-1232. Title II is codified at 46 U.S.C. Chapter 37. This subpart refers to the PWSA by title, not section.

(b) PWSA Title I.-(1) Preemptive effect. Conflict preemption principles apply to PWSA Title I. Any regulations or negative determinations issued by the U.S. Coast Guard under the authority of PWSA Title I are intended to have preemptive impact over State law covering the same subject matter in the same geographic area (as delimited in the Federal regulation), unless the Coast Guard states otherwise in the preamble to the final rule or the negative determination in question. This does not include enforcement of Coast Guard safety and security zones created under the authority of Title I of the PWSA when done by State or local officers, pursuant to 46 U.S.C. 70118 and a memorandum of agreement between the Coast Guard and the State or local enforcement agency in question. Also, this does not include State maritime facility regulations that are more stringent than the Coast Guard maritime facility regulations in 33 CFR part 105. State maritime facility regulations will not be preempted so long as these State laws or regulations are more stringent than what is required by 33 CFR part 105 and no actual conflict or frustration of an overriding need for national

uniformity exists.

(2) Procedures. For rules or negative determinations issued under the authority of PWSA Title I and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(1) and (b)(5)(i) of this subpart apply. For rules or negative determinations issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(2) and (b)(5)(ii) of this subpart apply.

(c) PWSA Title II.-(1) Preemptive effect. Field preemption principles apply to PWSA Title II. State regulations relating to the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels are preempted, regardless of whether the Coast Guard has made any regulatory determinations on the subject in question.

(2) Procedures. For rules issued under the authority of PWSA Title II and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(1) of this subpart apply. For rules issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(2) of this subpart apply. In addition, the preambles to those final rules will contain a determination as to which PWSA Title II category or categories are applicable.

(d) PWSA Title I/Title II Overlap. In cases where a regulation could be classified as either Title I or Title II, the Coast Guard conducts the "overlap analysis" described in the U.S. Supreme Court decision in *United States v. Locke*, 529 U.S. 89, 111-112 (2000). For regulations issued prior to [EFFECTIVE DATE OF FINAL RULE], the Coast Guard has published a listing of our overlap analyses in the appendix to subpart 1.06 of this part. For regulations issued after [EFFECTIVE DATE OF FINAL RULE], the result of the overlap analysis will be contained in both the preamble and the text of those final rules.

§ 1.06-20 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. Chapter 32 and Regulations Issued Under its Authority.

(a) Preemptive effect. Field preemption principles apply to 46 U.S.C. Chapter 32. Regulations issued by the Coast Guard under the authority of 46 U.S.C. Chapter 32 in the field of vessel safety management cover a field foreclosed from regulation by a State, regardless of the existence of conflict between the State and Coast Guard regulation.

(b) Procedures. For rules issued under the authority of 46 U.S.C. Chapter 32 and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(1) of

this subpart apply. For rules issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(2) of this subpart apply. In addition, the preambles to those final rules will contain a determination as to which 46 U.S.C. Chapter 32 category or categories are applicable.

§ 1.06-30 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. Chapter 33 and Regulations Issued Under its Authority.

(a) Preemptive effect. Field preemption principles apply to 46 U.S.C. Chapter 33. Regulations issued by the Coast Guard under the authority of 46 U.S.C. 3306 in the fields of design, construction, alteration, repair, operation, superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electric installations, accommodations for passengers and crew, sailing school instructors, sailing school students, lifesaving equipment and its use, firefighting equipment, its use and precautionary measure to guard against fire, inspections and tests related to these fields, and the use of vessel stores and other supplies of a dangerous nature cover fields that are foreclosed from regulation by a

State. These fields are foreclosed from State regulation regardless of the existence of conflict between the State and Coast Guard regulation.

(b) Procedures. For rules issued under the authority of 46 U.S.C. 3306 and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(1) of this subpart apply. For rules issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b)(2) of this subpart apply. In addition, the preambles to those final rules will contain a determination as to which 46 U.S.C. 3306 category or categories are applicable.

§ 1.06-40 Restatement Regarding Preemption and Assessment Framework for 46 U.S.C. 3717 and 6101 and Regulations Issued Under their Authority.

(a) Preemptive effect. Field preemption principles apply to 46 U.S.C. 3717 and 6101. Any regulation issued by the Coast Guard under the authority of 46 U.S.C. 3717 or 46 U.S.C. 6101 covers fields that are foreclosed from State regulation. These fields are foreclosed from State regulation regardless of the existence of conflict between the State and Coast Guard regulation.

(b) Procedures. For rules issued under the

authority of 46 U.S.C. 3717 or 6101 and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b) (1) and (b) (5) (i) of this subpart apply. For rules issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b) (2) and (b) (5) (ii) of this subpart apply.

§ 1.06-50 Restatement Regarding Preemption and Assessment Framework for The Act to Prevent Pollution from Ships, codified at 33 U.S.C. 1901 to 1912 and Regulations Issued Under its Authority.

(a) Preemptive effect. Conflict preemption principles apply to 33 U.S.C. 1901-1912. With the exception of State or local laws or regulations specifically permitted by section 2003 of Public Law 100-220 or other similar express statutory authority, any regulation issued by the Coast Guard under the authority of 33 U.S.C. 1901-1912 has preemptive impact over similar, identical, or contrary State law.

(b) Procedures. For rules or negative determinations issued under the authority of 33 U.S.C. 1901-1912 and promulgated prior to [EFFECTIVE DATE OF FINAL RULE], the

procedures in § 1.06-1(b) (1) and (b) (5) (i) of this subpart apply. For rules or negative determinations issued after [EFFECTIVE DATE OF FINAL RULE], the procedures in § 1.06-1(b) (2) and (b) (5) (ii) of this subpart apply.

Appendix to Subpart 1.06 – Regulations with Preemptive Effect

1. Scope. This Appendix sets out the preemptive effect of certain Coast Guard regulations as they existed on [EFFECTIVE DATE OF FINAL RULE]. It amplifies the assessment framework set out in subpart 1.06 by providing examples, taken from existing law, of the different preemption analyses described in subpart 1.06. It also provides information on the Coast Guard's analytical approach to the listed regulations. This appendix does not list all regulations that may have preemptive effect, nor does it describe in totality the preemptive effect of all Federal statutes governing every Coast Guard activity. This appendix does not account for developments occurring after [EFFECTIVE DATE OF FINAL RULE]. For regulations not listed in this appendix, refer to the preemption assessment framework in 33 CFR 1.06-1.

2. Regulations with Preemptive Impact Pursuant to the Ports and Waterways Safety Act.

2.1 Regulations in effect on [EFFECTIVE DATE OF FINAL

RULE] and having the preemptive effect described in 33 CFR 1.06-10(b) pursuant to Title I of the Ports and Waterways Safety Act. 33 CFR parts 64, 101, 103, 104, 105 (for State maritime facility security laws that are either less stringent or that actually conflict with or frustrate an overriding need for national uniformity), 120, 128, 161, 166, 167, 169 and 401.

2.2 Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] covering fields foreclosed from State regulation as described in 33 CFR 1.06-10(c) pursuant to Title II of the Ports and Waterways Safety Act. With respect to tank vessels only: 33 CFR parts 157, 163, and 168; 46 CFR parts 2, 8, 13, 15, 30, 31, 32, 34, 35, 36, 38, 39, 50, 52, 53, 54, 56, 57, 58, 59, 61, 62, 63, 64, 98, 105, 110, 111, 112, 113, 150, 151, 153, 154, 159, 160, 161, 162, 163, 164, 170, 172, 174, 175, 178, 179, and 199.

2.3 Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and appropriate for analysis under the "overlap analysis" described in 33 CFR 1.06-10(d).

Using the overlap analysis described in 33 CFR 1.06-10(d), the Coast Guard has made the following determinations:

(a) In 33 CFR part 155, the following sections are grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 155.100 through 155.1030,

155.1055 through 155.1060, 155.1110 through 155.1120, and 155.1135 through 155.1150.

(b) In 33 CFR part 156, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 156.118, 156.215, 156.220, 156.230, 156.300 and 156.310.

(c) In 33 CFR part 156, the following sections are grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 156.100 through 156.115, 156.120 through 156.210, 156.225, and 156.320 through 156.330.

(d) In 33 CFR part 160, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 160.1 through 160.7, 160.105 through 160.107, and 160.115 through 160.215.

(e) In 33 CFR part 160, the following regulations as applied to tank vessel operations are grounded in Title II, and therefore cover fields foreclosed from State regulation: 160.101, 160.103, 160.109, 160.111 and 160.113.

(f) In 33 CFR part 162, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 33 CFR 162.1 through 162.40, 162.65 through 162.65(b)(3),

162.65(b) (4) (ii) through 162.65(b) (6), 162.75 through 162.75(b) (5) (iv), 162.75(b) (6) through 162.80(a) (1), 162.80(a) (3) through 162.90(b) (2) (iii), 162.90(b) (2) (vi) through 162.90(b) (3) (iv), 162.90(b) (4) (ii) through 162.117(h) (2), 162.120 through 162.125(a), 162.125(b) (3) through (5).

(g) In 33 CFR part 162, the following regulations are promulgated pursuant to Title II, and therefore cover fields foreclosed from State regulation: 162.65(b) (4) (i) operation and equipping, 162.75(b) (5) (v) operation and equipping, 162.75(b) (5) (vi) operation, 162.80(a) (2) operation and equipping, 162.90(b) (2) (iv) manning, 162.90(b) (2) (v) operation, 162.90(b) (4) (i) operation and equipping, 162.117(h) (3) and (4) operation, 162.255(e) (1) and (2) operation and equipping, and 162.255(e) (3) operation.

(h) In 33 CFR part 164, the following regulations are promulgated under Title I and therefore preempt any similar, identical or contrary State regulation: 33 CFR 164.01, 164.02, 164.03, 164.11(c), 164.11(e), 164.11(f) - (i), 164.11(k) - (n), 164.11(p), 164.11(q), 164.19(b), 164.19(c), 164.51, 164.53, 164.55, 164.61, 164.70, 164.78(a) (3) - (8) and 164.82(c).

(i) In 33 CFR part 164, the following sections are

grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 33 CFR 164.11(b), 164.11(d), 164.11(j), 164.11(o), 164.11(r) through 164.19(a), 164.25 through 164.46, 164.72 through 164.78(a)(2), and 164.78(b) through 164.82(b).

(j) In 33 CFR 165, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 33 CFR 165.1 through 165.150(b)(4), 165.150(b)(6) through 165.501(d)(2), 165.501(d)(4) through 165.501(d)(5), 165.501(d)(7) through 165.510(d), 165.510(f)(1) through 165.510(f)(3), 165.510(f)(9) through 165.540(f)(6), 165.540(f)(9) through 165.803(e)(2), 165.803(g) through 165.810(e), 165.810(f)(2), 165.811(a) through 165.811(c), 165.811(e) through 165.923(b)(2)(ii)(D), 165.923(b)(2)(ii)(F) through 165.1152(d)(1), 165.1152(d)(3) through 165.1181(d)(1), 165.1181(d)(3) through 165.1704(c)(1), 165.1704(c)(3) through 165.1704(c)(5), and 165.1706 through 165.2030.

(k) In 33 CFR part 165, the following sections are grounded in Title II, and therefore cover fields foreclosed from State regulation: 165.150(b)(5) manning, 165.501(d)(3)(i)-(ii) and (6) equipping, 165.510(e) operation, 165.510(f)(4) operation, 165.510(f)(5) manning, 165.510(f)(6) operation, 165.510(f)(7) and (8) equipping,

165.540(f)(7) and (8) equipping, 165.803(e)(3) and (4) equipping, 165.803(f)(1)-(3) equipping, 165.810(f)(1) manning, 165.810(f)(3) equipping, 165.811(d) equipping, 165.923(b)(2)(ii)(E) equipping, 165.1152(d)(2) operation, 165.1181(d)(2) operation, and 165.1704(c)(2) and(6) equipping.

3. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-20.

All of the regulations in 33 CFR part 96 have been prescribed under the authority of 46 U.S.C. Chapter 32, and therefore cover fields foreclosed from State regulation.

4. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-30.

The following regulations issued pursuant to 46 U.S.C. Chapter 33 cover fields foreclosed from State regulation: 46 CFR parts 70, 71, 76, 78, 90-93, 95-98, 105, 107-108, 110-122, 125-134, 147, 147A, 148, 150-151, 153-154, 159-164, 166-169, 170-174, 175-185, 188-190, 193-196, and 199.

5. Regulations in effect on [EFFECTIVE DATE OF PUBLICATION OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-40.

The following regulations issued pursuant to 46 U.S.C.

3717 and 6101 cover fields foreclosed from State regulation: 33 CFR 151.15, 151.26(b)(3), 153.203, 155.1035(b), 164.61, part 173 subpart C; 46 CFR 4.05-1 through 4.05-10, 35.15-1, 197.484 through 197.488, 401.260.

6. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and having the preemptive effect described in 33 CFR 1.06-50.

The following regulations issued pursuant to 33 U.S.C. 1901 through 1912 preempt similar, identical, or contrary State or local laws or regulations with the exception of State or local laws or regulations specifically permitted by Section 2003 of Public Law 100-220 or other similar express statutory authority: 33 CFR part 151, subpart A; 33 CFR 155.100 through 155.130, 155.350 through 155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), 155.1065(g), and all the regulations in 33 CFR part 157.

Dated: December 5, 2013.

F.J. KENNEY
Rear Admiral, U. S. Coast Guard
Judge Advocate General

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