

**Passenger Vessel  
Association**

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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

**RE: USCG-2007-0030 Passenger Weight and Inspected Vessel Stability  
Requirements; Proposed Rule**

Dear Sir/Madam:

The Passenger Vessel Association (PVA) is pleased to offer comments on the Notice of Proposed Rulemaking (NPRM) on "Passenger Weight and Inspected Vessel Stability Requirements."

PVA is the trade association for the U.S.-flag, U.S. Coast Guard-inspected passenger vessel fleet. PVA has approximately 415 vessel member companies which operate passenger vessels and small passenger vessels, plus approximately 175 associate member companies providing products and services to the passenger vessel industry. All U.S. Coast Guard (USCG) inspected vessels will be affected by this Notice of Proposed Rulemaking (NPRM).

**Key Points**

- PVA supports the proposed updated 185-pound average passenger weight assumption. This aspect of the proposed rule should be finalized quickly.
- The Coast Guard should highlight its finding (expressed in the USCG Study) that "no casualties have occurred due to the increase in passenger weight" over the years. All provisions of the NPRM need to be closely examined with this conclusion about the absence of casualties constantly in mind.
- PVA objects to the proposal that average passenger weight assumptions be automatically adjusted, without normal procedural protections, whenever the Centers for Disease Control issues new data about personal weight.
- PVA opposes the proposed requirement that stability for all existing passenger vessels be revalidated within a year. Instead, this process should be phased in over five-and-a-half years.

- PVA urges that the Coast Guard defer action on the proposed 10-year revalidation requirement. Instead, it should issue a Notice of Supplemental Rulemaking on this matter so that the question can be specifically addressed and justified under the cost/benefits provisions of the Regulatory Flexibility Act.
- PVA declares that an implementation cost of 1% - 2% of revenue for small businesses is unacceptable, particularly given the fact that no casualties can be attributed to passenger weight assumptions.

### **The Process Thus Far**

PVA acknowledges that the Coast Guard's assumptions about average passenger weight are out-of-date and should be adjusted to take into account changes that have occurred over the past decades. PVA has supported a review of the adequacy of passenger weights used in stability calculations ever since the issue was first raised by the National Transportation Safety Board (NTSB) in the investigation of the loss of the *Lady D* a pontoon vessel in Baltimore harbor on March 6, 2004 (even though the causes of that casualty can not be attributed to passenger weight). On April 13, 2005, during a meeting of the PVA/Coast Guard Partnership Action Team (PAT), PVA's representatives proposed a joint government/industry analytic review of the passenger weight issue as a means of quickly developing and finalizing a new standard. Subsequently, in a letter dated September 6, 2005 to Coast Guard Admiral Thomas Gilmour, PVA reaffirmed that same offer. PVA believed that such a process would produce a substantive analysis far more quickly, and more accurately, than resort to the traditional rulemaking process. Unfortunately, the Coast Guard chose not to accept the PVA proposal.

PVA is pleased that the issue of increasing passenger weights has at long last reached a point in the process where USCG thoughts and proposals are presented for public comment and discussion. Unfortunately, the process to bring the issue to this point has suffered from a failure to incorporate industry knowledge, experience, and participation. The "Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis" (Regulatory Analysis) reported in this NPRM reflects this information vacuum. Because the Regulatory Analysis was not informed by industry knowledge and because of misinformation contained within it, the document has led to the Coast Guard to propose unrealistic methods to implement an updated passenger weight value for stability calculations.

### **Request for Supplemental Notice of Proposed Rulemaking**

The NPRM is far broader in scope than the expected focus on the adjustment of passenger weight. For example, the periodic stability revalidation, with calculations, is beyond the expected scope. So is the "improvement" in the

calculation process assuming computer calculation methods. This proposed general updating of the stability regulations is an addition that complicates the satisfactory resolution of the passenger weight issue and threatens to add even more delay than has already occurred. This is because the accompanying regulatory analysis does not accurately address costs associated with these proposed new mandates. To rectify the deficiencies associated with the expansive nature of the proposed rulemaking, PVA urges the Coast Guard to divide it into two parts. First, the Coast Guard should promptly conclude a final rule addressing the 185-pound passenger weight assumption. Then it should issue a Supplementary Notice of Proposed Rulemaking (SNPRM) with an updated Regulatory Analysis dealing with the other matters. The SNPRM is necessary to bridge the distance between the NPRM and any Final Rule (FR).

### **Support for 185 Pounds But Concern for Automatic Future Adjustments**

In general, PVA supports the NPRM's logic and proposed use of the 185-pound value for average passenger weight. However, the implementation scheme for incorporating the new weight in stability calculations for existing vessels is unrealistic and needs to be adjusted. Also, PVA opposes the proposed process to account for future passenger weight changes.

The USCG proposes adjusting the average passenger weight each time the National Center of Health Statistics (NCHS), Centers for Disease Control (CDC) releases new National Health and Nutrition Examination Survey (NHANES) data. This proposal is not consistent with the USCG's commitment to risk-based decision making. PVA can envision future increases in passenger weight (as reported by the NHANES) that are not statistically significant and that in no way jeopardize vessel safety by stability changes. It is not rational to automatically incorporate insignificant weight changes that do not compromise safety. Further, by incorporating such an automatic adjustment, the proposed rule without cause bypasses industry's participation in a notice and comment rulemaking under the Administrative Procedures Act (APA). The Coast Guard has made no case for abandoning the APA process and has not demonstrated that vessel and passenger safety will in any way be jeopardized by adherence to traditional APA processes.

Under the proposed rule, 46 CFR 170.090 (d) states that the USCG will publish the availability of a NCHS release of new data in the *Federal Register*. This notice will start the clock for a 60-day time limit during which the vessel owner must incorporate the change in average passenger weight assumptions in the operation of a passenger vessel or small passenger vessel. Introducing such new data in this manner that might change the passenger capacity of a vessel is problematic and deserves a more deliberative process. Business plans, booked charters, ticket prices, rate setting, advertisements, interaction with other governmental agencies (i.e. public utilities commissions), other contractual commitments can all be affected by a change that reduces passenger capacity.

PVA proposes that the USCG remove the “automatic” feature of future weight adjustment from the proposed regulation. Instead, the USCG should rely on a process that first brings expertise to bear in determining if a change is significant or necessary to ensure the safety of vessels and passengers and, second, that any proposed change receives due consideration and appropriate notice. If the change is small (<3%-5%), the USCG should not require additional updates, as a small change presents little risk to the overall fleet. Any change that is proposed to become effective in less than a year must be supported by a publicly reviewed case for urgent action based on a valid risk analysis. PVA notes that the Coast Guard recently issued a final rule for adjusting limits of liability under the Oil Pollution Act. In that rule, the Coast Guard chose not to automatically adjust liability limits whenever there is an increase in the consumer price index but instead said that the adjustment will be made every three years but only if the consumer price increase has increased above a designated threshold.

**Schedule for Stability Validation by Existing Vessels:  
No Justification for Proposed 10-year Revalidation Requirement**

In the proposed rule, 46 CFR 71.25-50, 115.505, and 176.505 and the preamble illustration of the “Stability Confirmation (at each annual inspection)” process on page 73 FR 49248 would have the effect of driving every existing passenger vessel through a complete revalidation process within a year of the USCG publishing of a final rule. The ability for any individual owner to effectively comply with this rule depends on the time of year it is published (on or off season), the time interval between publishing and next annual inspection (1 to 365 days), the owner’s options to address any indicated change, funding options, and the need to adapt to the public and private sector capacity limits. There is a serious doubt that the USCG review and approval process could support such an effort. At the moment, private sector naval architect resources are fully engaged and in some cases they are insufficient to meet current demands. These existing resources would be overwhelmed unless the time for vessel revalidation is stretched out over a period of years.

PVA proposes that the initial validation process for existing vessels be spread over five years beginning after an initial six-month delay for a familiarization and education process for the passenger vessel industry. The USCG must propose a schedule where no more than 20% of the total number of the passenger vessels is expected to undergo an initial revalidation each year. The opportunity to voluntarily accomplish the revalidation earlier at the owner’s option should be acknowledged. The ability for the OCMI upon review to delay the revalidation in individual cases should be preserved.

The proposed 10-year revalidation of the vessel’s lightship characteristics appears redundant. The initial revalidation of the vessel’s stability data upon adoption of the final rule for 185 pounds coupled with the owner’s annual

demonstration that “the stability information required under subpart D of part 170 of this title has been re-examined and confirmed to be appropriate for the loading and service intended” ensures currency of the vessel’s stability data. Before adopting the 10-year revalidation the USCG must justify this requirement and its attendant cost under the APA using an updated analysis with valid data discussed later.

The more deliberate implementation process described above protects the vessel owner from a preemptory process that may create a limitation of options to accommodate weight increases and avoid the imposition of economic hardships. From the initial USCG report on the subject “Study of effects on Commercial Passenger vessels due to increasing passenger weight standards in the Code of Federal Regulations” (hereafter refer to as USCG Study) dated May 19, 2005 through the issuance of this NPRM’s Regulatory Evaluation, no one has shown that an “outdated” average passenger weight led to any passenger vessel casualty.

The USCG Study said in part: “Based on the analysis, it is concluded that no casualties have occurred due to the increase in average passenger weight since the incorporation of the lower weight standards discussed in the Objectives section. This is attributed to the margin of safety that is incorporated into stability standards.” In the absence of casualties and the inability to quantify the risk presented by the increased weight, the Regulatory Evaluation stated: “For some vessels, the current outdated weight average per person can significantly erode the margin of safety that once existed in the application of longstanding and historically proven vessel stability criteria. Correcting this outdated per-person weight would maintain that margin of safety.” In essence the proposed implementation schedule penalizes a safely operating industry by proposing an overly aggressive remedial process for correction of what remains an unquantified risk. The degree of risk is unquantifiable because of the absence of casualties or any other evidence that the margin of safety has been reduced to an unacceptable level of risk.

Based on the USCG Study, the Coast Guard implemented a thorough review, including immediate remedial action, of the inspected pontoon passenger vessel fleet. The rest of the fleet affected by this NPRM can be addressed in a more deliberate manner over 66 months after the publishing of a final rule. The option remains that if an order of risk or presumed risk is identifiable in some vessel category, those vessels could be addressed in the first 20%.

### **Deficiencies of Regulatory Evaluation**

The Regulatory Evaluation is deficient from beginning to end. In the beginning the report refers to a passenger vessel fleet of 6,073 vessels carrying a total of 655,000 passengers per year. If true, that means the average passenger vessel carries 107.8 passengers in a year. Obviously alarm bells should have sounded

by page ii of the report. Clearly, even the smallest commercial business could not be viable at 100 passengers per year. A single casino vessel in Dubuque, Iowa carries one million passengers per year. The Washington State Ferries system carries approximately 24 million passengers per year. Further, another operator with 24 Subchapter T and K excursion/dinner cruise vessels in a number of ports carries one million passengers per year. The Coast Guard apparently ignored the federal government's own statistics for ferries in the Bureau of Transportation Statistics' National Ferry Database. Since the annual costs to industry appear to be calculated based on an erroneous number of passengers carried, the actual costs would be higher in proportion to the actual number of passengers carried. It is alarming that a proposed rule would be proffered using such erroneous information.

Furthermore, the regulatory analysis assumes that all vessels that have a current stability letter for a given passenger weight would meet the new requirements at the same total passenger weight. Since the NPRM is changing the stability regulations in several ways that would tend to limit the passenger capacity, this assumption is invalid unless the intent of the NPRM is to only apply the new stability criteria to new vessels. If that is the case then the NPRM should state that the new criteria are only applicable to new vessels.

The same page concludes that "At an annual cost of about \$3.5 million, restoring the margin of safety through updating the average passenger weight used to determine vessel stability is a cost-effective means of protecting trillions of dollars worth of lives and property each year." While we are the first to acknowledge that life and limb are precious and cannot be restored once lost, there is no credible case to show that lives have been put at risk due to the current understating of average passenger weight. In addition, the costs of the proposed rule are significantly higher than estimated, and it remains to demonstrate a benefit.

The costs associated with stability testing are, in the words of a practicing experienced naval architect, only 10% to 30% of actual costs. The Regulatory Evaluation of \$200 for a simplified stability test, \$2,500 for a deadweight survey, and \$5,000 for an inclining are gross understatements. Some of the costs omitted include labor/equipment rental to move weights, creation of basic data where plans and records do not exist (i.e. lines plans), professional services of architects and shipyard services, travel and per diem, retests, etc.

The implementation plan is not realistic. The NPRM suggests that all required stability tests would be completed by each vessel's next inspection, or within one year. With approximately 6,000 vessels in the U.S. fleet, this schedule would require approximately five inclining experiments or deadweight surveys per working day and 15-20 simplified stability tests per working day. There is not adequate technical capacity in the passenger vessel industry or in the USCG to support this implementation schedule.

Overall, the Regulatory Evaluation overall is shallow, missing easily obtained information, and not reflective of the industry challenges, as follows:

- The illustrated ticket prices are universally lower than experience would support.
- The passenger vessel industry does not rely on ticket price alone for survival. Additional sales of souvenirs, food, and beverages often provide the profit margin. A reduction in passengers carried will cause a corresponding reduction in these other revenues.
- The annual passenger carriage data is woefully understated.
- The data does not reflect the impact (cost and other potentially more severe impacts) of reduced allowed passenger capacities resulting from increased passenger weight.
- The analysis does not reflect the costs of the periodic revalidation of the lightship data.
- The costs associated with simplified stability tests, deadweight surveys, and inclining a vessel are extremely understated.
- The finite number of persons in the private and public sectors having the requisite technical expertise to execute the tests and verifications of the proposed rule is not addressed.
- A small business impact of 1% to 2% of revenue is a substantial threat to most small passenger vessel operators. It may constitute or exceed the entire profit for the year.
- While not required in the Regulatory Evaluation, it should be noted that the domestic passenger vessel industry has been adversely impacted by increased costs of maintenance, labor, and fuel while experiencing business declines associated with the economic downturn.

In addition to a flawed and incomplete Regulatory Evaluation above, several other questions/issues that remain to be addressed in a SNPRM, as follows:

- The applicability of new stability calculations at 170.170 and 171.050 to existing vessels.
- The utility of draft marks on vessels where weight changes lead to changes in draft that are measured in fractions of inches.
- The accuracy of draft readings in estimating water lines other than at the upper or lower edge of the numerals.
- Lack of original simplified stability test (SST) information or stability test information.
- How does an operator do a 10-year revalidation on a SST without redoing the test?
- How does an operator do a 10-year revalidation on a vessel that originally was tested using a SST, but is no longer permitted to use a SST?


In summary, PVA:

- Supports the proposed updated 185-pound average passenger weight.
- Requests that the Coast Guard issue a supplementary notice of proposed rulemaking that addresses the public comments to the docket and corrects the shortcomings of the current NPRM.
- Declares that an implementation cost of 1% - 2% of revenue for small business is unacceptable.
- Finds the 60-day revision of average passenger weight triggered by a third party to be unacceptable.
- Proposes that implementation of future weight increases be subject to a risk assessment test and provide a reasonable phase-in time determined under the Administrative Procedures Act notice and comment process.
- Finds that the initial implementation of a final rule for the entire domestic passenger vessel industry within a year is not feasible and therefore unacceptable.
- Proposes that the initial validation of the stability of the existing vessel fleet be phased in over a 66 month period.
- Questions the need for a 10-year revalidation if the annual demonstrations have not shown a problem.
- Does not support the adoption of the 10-year revalidation period unless specifically addressed and justified under the cost/benefit provisions of the Regulatory Flexibility Act.

PVA looks forward to a deliberate and well founded analysis of the contents of the NPRM. Just as we proposed three-and-a-half years ago, we stand ready to assist the Coast Guard in a rational, risk-based, cost-reflective, valid-data-based review of passenger vessel stability. Separating the NPRM into a final rule adopting the 185-pound weight and a supplementary notice of proposed rulemaking for the stability calculation and verification is necessary to facilitate this interactive process. The appropriate exercise of the rulemaking statutes and regulations ensures the interests of all, particularly our passengers.

Your consideration is appreciated.

Sincerely,



Michael Borgstrom  
President