

March 27, 2014

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

Submitted via [www.regulations.gov](http://www.regulations.gov)

RE: **Docket No. USCG-2008-1259**

On behalf of the National Association of State Boating Law Administrators (NASBLA), which represents the recreational boating law officials in the 50 states and six U.S. territories, I am writing to offer initial comment on *Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard; Proposed Rule*.

The proposed rule addresses a wide range of Coast Guard regulations and, depending on interpretation and application of the framework, potentially could impact numerous state laws and regulations. However, our primary interest in commenting today is regarding the proposed rule's language and presentation of the preemptive effect of federal regulations associated with casualty and accident reporting (33 CFR Part 173 subpart C) and issued pursuant to 46 U.S.C. 6101.

Specifically, we are seeking clarification on **sections J and K of IV. Discussion of Proposed Rule** (pp. 79246-79247), and on the language of the proposed **§ 1.06-40** and the related **paragraph 5 in the proposed Appendix to subpart 1.06** (cited in § 1.06-1(b)(1)). To explain our reason for seeking this clarification, I will reference previous regulatory action by the U.S. Coast Guard.

On March 28, 2012, the Coast Guard issued a Final Rule on **Changes to Standard Numbering System, Vessel Identification System, and Boating Accident Report Database** [RIN 1625-AB45], affecting 33 CFR Parts 173, 174, 181, and 187. Among other revisions, it amended **§ 173.1** to incorporate language describing the basis for and extent of preemption of state regulatory action as it applies to subparts A, B, and D (conflict preemption) and subpart C (field preemption). The revision reads:

**§ 173.1 Purpose; preemptive effect.** This part prescribes requirements for numbering vessels and for reporting casualties and accidents to implement sections 6101, 6102, 12301, and 12302 of Title 46, United States Code. The regulations in subparts A, B, and D of this part have preemptive effect over conflicting State or local regulation. The regulations in subpart C of this part have preemptive effect over State or local regulation within the same

field, **except to the extent that Congress requires the Coast Guard to allow State casualty reporting systems pursuant to 46 U.S.C. chapter 131.**

Underlining and boldfacing added for emphasis

The revision is in accord with the Final Rule's discussion of the Federalism implications described in **VI. Regulatory Analyses**. The relevant language in *E. Federalism* is in the third paragraph (p. 18697) of the Final Rule:

"...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. 6101 were not intended by Congress "to be cumulative to those enacted by each political subdivision whose jurisdiction a vessel enters." See the decision of the Supreme Court in the consolidated cases of *United States v. Locke* and *Intertanko v. Locke*, 529 U.S. 89, 115–116. Therefore, the Coast Guard's view is that regulations issued under the authority of 46 U.S.C. 6101 for marine casualty reporting requirements have preemptive effect over State regulation in these fields, **except to the extent that Congress requires the Coast Guard to allow State casualty reporting systems pursuant to 46 U.S.C. chapter 131....**"

Underlining and boldfacing added for emphasis

In both the Regulatory Analyses' description of the Federalism implications and in the actual revision to § 173.1, the 2012 Final Rule qualifies and clarifies the extent of the Coast Guard's preemption of state regulatory action by acknowledging that Congress has required the Coast Guard to allow state casualty reporting systems pursuant to U.S. Code.

However, we have not been able to identify any similar references or qualifications within the proposed assessment framework defined in this current NPRM. In fact, the third paragraph in **section J of IV. Discussion of Proposed Rule** (pp. 79247), which could be considered most comparable to that of the Final Rule's Federalism discussion, completely omits the reference to the Congressional intent and requirement and suggests a more narrow and unqualified interpretation of this field preemption. It reads, in part:

"...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....”

Underlining added for emphasis

The language in the proposed **§ 1.06–40** (p. 79251) and related **paragraph 5 in the proposed Appendix to subpart 1.06** (p. 79252) align with that Discussion:

**§ 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 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.

Underlining added for emphasis

**Appendix to subpart 1.06 referred to in § 1.06–1(b)(1)) (p. 79252)**

*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.

Underlining added for emphasis

The discrepancies in language between this current proposal and the 2012 Final Rule’s provisions on the extent of preemptive effect are significant, and especially so if the proposal’s intent is to *describe the Coast Guard’s interpretation of the preemptive effects of existing regulations even if a complete description of the Federalism implications was articulated in the development of those regulations.*

Does the language in the assessment framework represent a change in the “Coast Guard’s view,” a drafting error of omission, or something else?



If it is anything other than a drafting error or oversight, then we request clarification of the preemptive effect associated with 33 CFR Part 173 subpart C. As presented in this NPRM, it would suggest a departure from current practice and common understanding of intent, and *could* potentially and negatively affect the states' ability to regulate aspects of recreational boating safety within their jurisdictions and in fulfillment of their casualty reporting systems.

For example, each year, the Coast Guard, *in its own **Recreational Boating Statistics** report*, publicly describes the criteria for accident reporting as articulated in 33 CFR Part 173 subpart C. On page 9 of the 2012 Statistics report, it describes that:

"...The minimum reporting requirements are set by Federal regulation, but states are allowed to have more stringent requirements. For example, some states have a lower threshold for reporting damage to vessels and other property..."

Underlining added for emphasis

If the preemptive effect captured in the proposed **§ 1.06–40** and related **paragraph 5 in the proposed Appendix** were to be strictly read, interpreted, and applied, however, it could be taken to mean that the states would be "foreclosed" from setting more stringent requirements or perhaps, in the extreme, from regulating at all in this area and others named.

We appreciate your consideration of this request for clarification.

Thank you,

John M. Johnson, CAE  
CEO