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Testimony of

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National Transportation Safety Board

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Good morning Chairman Cummings, Ranking Member LaTourette, and Members of the Coast Guard and Maritime Transportation Subcommittee. I am pleased to appear before you today representing the National Transportation Safety Board, and in particular, the Safety Board's reauthorization request to amend its authority to investigate major marine accidents.

As you know, the Safety Board is an independent Federal agency charged by Congress with investigating every civil aviation accident in the United States and significant accidents in other modes of transportation – railroad, highway, marine, pipeline, and hazardous materials – and issuing safety recommendations aimed at preventing future accidents.

I would like to first focus on our request to modify the authority of the Safety Board to investigate marine accidents, one part of our larger reauthorization request. Let me clarify what we are proposing, what we are not proposing, and why.

We are seeking the right to elect lead or primary status in marine investigations. This recommendation is not intended to serve as an expansion of authority by the Board. It is intended to provide the necessary authority if at any time in the immediate aftermath of a marine casualty there is paralysis between the Board and the Coast Guard created by a disagreement over interpretation of the regulations they have jointly issued. We believe this is a modest change and a needed clarification of congressional intent in the Safety Board's jurisdiction for marine investigations. While we have a small marine safety investigative staff, our investigators collectively have decades of experience across multiple marine and specialized fields and have proven capable over the years at determining cause in some very complicated scenarios. We believe we have demonstrated competence in our work and should have the authority to elect to take the lead in accidents we deem to be of national significance.

The Safety Board provides an important safety oversight function for domestic and international transportation in aviation, rail, highway, pipeline, hazardous materials and marine transportation. Through independent investigations, safety recommendations, and safety advocacy, the Safety Board has influenced the regulatory agenda of transportation safety agencies, including the Coast Guard. The Safety Board has previously examined issues within the safety jurisdiction of the Coast Guard – such as ship certification, mariner certification, operational rules, navigation aids and standards, regulatory standards, industry practices. The ability to assume the lead in these investigations is critical to ensuring an independent and dispassionate hard look at these issues to provide the safety oversight Congress intended.

The Safety Board is not seeking a dramatic increase in the number of accidents we investigate—neither directly nor by delegation of fact gathering to the Coast Guard. Quite frankly, we do not have the personnel to complete substantially more investigations than we do currently, or even to perform probable cause analyses in substantially more investigations should the Coast Guard perform on-scene fact-gathering for us consistent with another legislative change we have proposed. We are not proposing to expand in any significant way the type or number of marine accidents we investigate. We would continue to select accidents based on the existing criteria used now when we work with the Coast Guard under the existing memorandum of understanding (MOU), or any future revisions we incorporate.

The proposed change would harmonize the Safety Board's investigative authority and make it consistent with the authority we now have for aviation and rail and other transportation modes where Congress has recognized that accidents occasionally involve matters of national importance. It makes the marine jurisdiction language more closely parallel to that in modes where we routinely interact with other Federal transportation agencies also having a regulatory, inspection and enforcement role. We believe this authority will further public confidence in the integrity, competence, transparency, and independence of our marine investigations.

Currently, the Office of Marine Safety operates under the provisions of 49 USC Section 1131(1)(E) which requires the Safety Board to investigate (or have investigated) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States, involving a public and nonpublic vessel of the United States under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating. A "major marine casualty" is defined in the current MOU and in regulations (49 CFR 850.5(e)) as a casualty involving a vessel, other than a public vessel, that results in the loss of six lives or more, the loss of a mechanically propelled vessel of 100 or more gross tons, property damage initially estimated at $500,000 or more, or serious threat to life, property or the environment by hazardous materials. Most major marine accidents are those where the property damage is more than $500,000, although occasionally a vessel of over 100 gross tons is lost. Because of the high cost of repairing damaged ships, relatively inconsequential accidents could be classified as major because of damage and repair costs. For example, the sinking of the *Alaska Ranger* on March 23,

2008, is classified as a major marine casualty because it was both the loss of a mechanically propelled vessel over 100 gross tons and resulted in more than $500,000 in property damage. The loss of five crewmembers alone would not have constituted a major marine casualty. The Coast Guard is leading this investigation, with Safety Board participation.

Since 2005, there has been only one vessel casualty that claimed six or more lives – the capsizing and sinking of the *Ethan Allen* on Lake George, New York, on October 2, with the loss of 20 elderly passengers. Because the *Ethan Allen* did not operate on waters defined as "navigable," the Coast Guard did not inspect the vessel or conduct an investigation. The Safety Board launched and conducted an independent investigation receiving on-scene support and technical assistance from the Coast Guard and local law enforcement agencies. The *Ethan Allen* report was adopted by the Board on July 25, 2006, and led to changes in New York state law concerning state registered commercial passenger vessels and a significant effort to review vessel operations in sole state waters.

The proposed change we are seeking would modify only slightly the current relationship between the Coast Guard and the Safety Board. That relationship is defined by an MOU first entered into by the Safety Board and the Coast Guard in 1981. The Congress, in Public Law 106-424 in 2000, required the two agencies to revise that MOU, which now stipulates that the Coast Guard and the Safety Board agree that the Board may elect to lead an investigation of major marine casualties that "risked or threatened high loss of life to innocent third parties." That revised MOU was signed on September 12, 2002. The Staten Island ferry *M/V Andrew J. Barberi* allision in 2003 is an example where the Safety Board took the lead based on the new MOU. The "bright line" test, an attachment to the MOU to help determine the lead agency, was used effectively by the Coast Guard in handing over the investigation of the grounding of the containership *M/V New Delhi Express* in New York Harbor's Kill Van Kull Channel in 2006.

Despite the present good relationship and existing laws, regulations, and MOU, there is no assurance that a disagreement concerning primacy in a high profile marine accident investigation can be resolved in the short timeframe necessary. Once a federal investigation is underway, it must be clear who is leading the investigation. The ability to elect lead status is an important issue for the Safety Board because in cases where the Coast Guard and the Safety Board are both involved in a high profile accident investigation, cooperation is absolutely necessary and it must be clear to the public which agency is responsible for the investigation and who speaks for the Federal government.

While the MOU has provided a solid framework for Safety Board and Coast Guard cooperation, it does not resolve either's authority to direct the course of an investigation should the Safety Board and Coast Guard not agree on how to conduct the investigation. Furthermore, in some instances, there is complexity, and to some degree uncertainty by all involved in working through the MOU framework while information following an accident is unknown, incomplete, or initially inaccurate. The Safety Board believes it would benefit the public if the Board were allowed to take the lead in certain marine accident investigations, manage the evidence being collected, and be the

spokesperson for the investigation – thus resolving those isolated episodes of uncertainty or disagreement.

The rules and purposes of a Coast Guard and a Safety Board investigation are different in some significant respects. NTSB determines cause and makes safety recommendations to prevent recurrence; the Coast Guard determines cause and makes internal corrections to Coast Guard procedures and processes and potentially seeks enforcement action against mariners or operators when appropriate. There are other differences in the investigations. The Safety Board uses the party system in its investigations, leveraging its resources by involving technical experts from operators, manufacturers, professional organizations who were involved in the accident and can provide specialized knowledge to assist in developing the factual record. Factual information is routinely released during the investigation to keep the public informed of the progress of an investigation. After the factual record is developed and the facts are analyzed, the Safety Board discusses the report and deliberates on the probable cause and the recommendations to prevent the accident from recurring in a public meeting. Coast Guard investigations do not include parties involved in the accident, do not reach a causal determination in a public meeting, and focus almost exclusively on enforcement of Coast Guard regulations.

While the Office of Marine Safety is the smallest modal office at the Safety Board with just 16 employees, it is a very effective office. The Coast Guard investigates thousands of accidents a year; the Safety Board usually limits its involvement to about 20 percent of the major marine accidents, or a total of about six per year. Since our last reauthorization hearing in 2006, there have been 45 major marine casualty notifications from the Coast Guard to the Safety Board. Two of the notifications involved public (U.S. Navy) and non-public vessels in which Office of Marine Safety launched an investigator to one accident and cooperated in a foreign investigation in the other. The Office of Marine Safety launched investigation teams to 11 other major marine casualties and one non-major marine casualty during this same time period. Of these 14 investigations, after consulting with the Coast Guard, the Safety Board asserted the lead role in the investigations of just 5 major marine casualties. The Coast Guard led the other investigations of all accidents that the Safety Board did not investigate.

Even when the Safety Board is the lead agency, we rely on the support of the Coast Guard in securing accident sites, providing transportation and logistics, and gathering evidence. The Coast Guard is often first to the accident scene, might be involved in rescue and response operations, and has the boats, aircraft, facilities, and local expertise to assist Safety Board investigators. In the majority of Safety Board marine accident investigations, the Coast Guard and the Safety Board still work side-by-side in conducting parallel but not redundant investigations, regardless of which agency has lead status. Close cooperation with the Coast Guard is thus essential for virtually all marine accident investigations. However, there may be some accidents where the Coast Guard disagrees with the Safety Board's position that the Board's investigation should take precedence over the Coast Guard's investigation, and a change to the law would enable this dispute to be resolved unambiguously and quickly.

An example of some friction in the decision making process would be the investigation into the accident involving the container ship *M/V Cosco Busan* in San Francisco Bay on November 7, 2007. The 901-foot container ship, registered in Hong Kong, allided with one of the supporting towers of the San Francisco-Oakland Bay Bridge. Preliminary estimates of the oil release were low. The Safety Board was notified by phone from Coast Guard headquarters within 2 hours of the accident. The Director of the Office of Marine Safety decided not to launch because of the small (140 gallons) oil spill and minor damage reported by the Coast Guard at the time and because the marine investigators were elsewhere on another major accident investigation. However, later in the day, the Coast Guard increased its estimate of the quantity of bunker oil released to over 58,000 gallons. By November 10th, the severity of the oil spill and the Coast Guard's handling of the response were drawing increased criticism. The Board Chairman and the Director of the Office of Marine Safety, after discussing the situation with the Coast Guard, decided to launch a go-team of six investigators and a Board Member on the afternoon of November 10th. The Safety Board investigation focused on the safety aspects of the accident and the initial oil spill response, including the probable cause of the ship's allision with the bridge, damages sustained by the ship and bridge, notification of the accident, and action taken immediately after the accident to limit and contain the spill.

The Safety Board assumed leadership of the accident investigation from the Coast Guard while they were still conducting spill response and law enforcement activities. By the end of the first day of the Safety Board's investigation, there were some misunderstandings as to the respective roles of the Coast Guard and the Safety Board. Handover of information from the Coast Guard to the Safety Board was not as smooth as it could have been. More problematic were the unilateral actions of the Coast Guard in attempting to release information relevant to the safety investigation without consulting the Safety Board. Additionally, during Coast Guard press conferences, their public statements went beyond the issues related to spill cleanup and included premature conclusions about the cause of the accident.

Since the formation of the National Transportation Safety Board 40 years ago, there has been a growing public expectation that significant transportation accidents should be investigated by an expert agency seen to be independent of outside influences. This is increasingly true throughout the world. Several years ago, the United Kingdom created the independent Marine Accident Investigation Branch, vesting it with the investigation responsibility previously held by the Maritime and Coastguard agency. More recently, the European Union decided that transportation safety investigations should be conducted by agencies independent of the regulatory agencies. Japan recently passed legislation to separate marine safety investigations from regulatory enforcement investigations, and is in the process of creating an agency to investigate aviation, rail and marine accidents. The International Maritime Organization adopted a new marine casualty investigation code, parts of which will become mandatory by treaty, that specifies that a "marine safety investigation shall be able to report on the results of a marine safety investigation without direction or interference from any person or organizations that may be affected by its outcome." In proposing this modest change to

the U.S. Safety Board's authority, we are seeking a modification that is consistent with action now being taken by our international counterparts.

This completes my testimony and I would be happy to respond to any questions you may have.