"Maritime Transportation Regulations: Impacts on Safety, Security, Jobs and the Environment, Part 1"

Committee on Transportation and Infrastructure
Subcommittee on Coast Guard and Maritime Transportation
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On behalf of the Consortium of Citizens with Disabilities (CCD) Transportation Task Force, I thank you for holding this hearing today, and appreciate the opportunity to testify on this important safety and civil rights issue.

CCD is a coalition of national disability organizations working together to advocate for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. Since 1973, the CCD has advocated on behalf of people of all ages with physical, sensory, cognitive, and mental disabilities. CCD has worked to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into the mainstream of society. The Transportation Task Force focuses on ensuring that national policy regarding transportation, including both disability-specific programs and broader transportation programs and policies, move society toward the ultimate goal of access to adequate transportation to accommodate the needs of employment, housing and recreation for all people with disabilities. The CCD Transportation Task Force includes a diverse range of organizations across the disability spectrum, including the National Disability Rights Network, Easter Seals, the United Spinal Association, Paralyzed Veterans of America, the National Council on

Independent Living, the Disability Rights and Education Fund, and the American Association of People with Disabilities.

Many individuals, including veterans, who have disabilities enjoy sport fishing and other outdoor activities involving boats. This sort of therapeutic recreational activity provides people with disabilities, like anyone else, a way to enjoy nature and recreation. Americans with disabilities should be provided the same opportunity to participate in these activities as Americans without disabilities, and without fear of greater risk of dying due to inadequate survival craft.

The federal government has long recognized accessibility for people with disabilities as a civil right for people with disabilities. The Rehabilitation Act of 1973, 29 U.S.C. § 701(a)(6), recognized the goal of "providing individuals with disabilities with the tools necessary to … achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency." The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7), found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." These laws establish accessibility as a civil right for all people with disabilities. My testimony this morning will focus on why the accessibility principles enshrined in federal law require that survival craft ensure that no part of an individual is immersed in water, and why the cost-benefit analysis conducted by the Coast Guard in its August 26, 2013, report to Congress fails to take that into account. I will also discuss other flaws in the Coast Guard's cost-benefit analysis and how this report did not provide adequate regard for the value of lives of veterans and others with disabilities. The requirement that

survival craft provide out-of-water protection ensures that veterans with disabilities who risked their lives for our country should not have to unduly risk their lives to go sport fishing or ride a ferry.

I. Federal principles of accessibility for people with disabilities as a civil right, as well as the need to protect other passengers, require that owners of surface vessels provide survival craft that ensures no part of an individual is immersed in water.

In order for surface vessels to be accessible to people with disabilities on an equal basis as they are for people without disabilities, those vessels must be provided on an equal basis, with the same level of security and protection from risk that people without disabilities have. In order to be effective for people with disabilities, survival craft must provide out-of-water protection. Many people with disabilities lack the ability to hold on to survival craft in such a way as to keep themselves out of water when the craft leaves any part of them immersed. This may be a matter of life and death, in that many people with disabilities are unable to use life floats or buoyant apparatus that do not keep them fully out of water for their protection. Many people with disabilities, elderly people and infants are simply unable to hang onto these devices.

The requirement that survival craft keep people fully out of the water has been well understood for at least 70 years. In 1944, the Navy Department's Emergency Rescue Equipment Section, indicated in its biweekly report dated February 12 that Balsa "Doughnut" life floats, also known as "Carley floats," had a serious drawback "in that the survivors are partially immersed."[1] In 1973, the M/V *Comet* sank off Point

[1] Furer, J.A., U.S.N., Coordinator of Research & Development, U.S. Navy and Liaison Committee on Emergency Rescue Equipment, "Emergency Rescue Equipment," February 12, 1944, at 3.

Judith in Rhode Island. An examination by the National Transportation Safety Board examined the issue of "lack of protection in cold water" and concurred with the Coast Guard's Marine Board recommendation that "primary lifesaving devices should keep people out of the water when water temperature is expected to be 60 degrees F or less."[2] In a 1989 study entitled "Passenger Vessels Operating from U.S. Ports," the NTSB recommended that the Coast Guard:

> Require that all passenger vessels except ferries on river routes operating on short runs of 30 minutes or less have primary lifesaving equipment that prevents immersion in the water for all passengers and crew.[3]

Shortly after the 1989 report, the *Bronx Queen* sank near the entrance to New York harbor, resulting in two deaths. An investigation by the Coast Guard revealed that, although the boat had a more than sufficient number of "life-floats" on board, because they did not provide out-of-the-water protection, it was not adequate in cold water operations. As a result, the NTSB again reiterated its 1989 recommendation.[4]

Moreover, the Americans with Disabilities Act (ADA) requires provision of out-of-the-water surface vessels to accommodate people with disabilities. The ADA prohibits discrimination against individuals on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(b)(1)(A)(i). Discrimination includes the failure to make "reasonable accommodations" to a service provided, unless the place of public accommodation can show that such modification "would

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[2] National Transportation Safety Board, "M/V Comet, Point Judith, Rhode Island, May 19, 1973, available at <http://www.uscg.mil/hq/cg5/cg545/docs/boards/comet.pdf>, at 28.

[3] Nov. 28, 1989, Safety Recommendation from James L. Kolstad, Acting Chairman, National Transportation Safety Board, available at <http://www.ntsb.gov/doclib/recletters/1989/m89_111_145.pdf>, at 4.

[4] National Transportation Safety Board, *Safety Recommendation* dated December 11, 1990, available at

fundamentally alter" the nature of the service provided. 42 U.S.C. § 12812(b)(2)(A)(iii). Determination of whether an accommodation is a reasonable one and would create an undue burden is a "fact-specific, case-by-case inquiry." *Staron v. McDonald's Corp.*, 51 F.3d 353 (2d Cir. Conn.). Modifications that create a moderate cost to a place of public accommodation are generally considered reasonable. *See, e.g.,*, *Feldman v. Pro Football, Inc.*, 579 F.Supp.2d 697, 710 (requiring modifications to ensure that deaf patrons of football game receive auxiliary services to enjoy access to aural information at stadium).

Out-of-the-water survival craft are an example of the principle of "universal design," where techniques that provide accessibility for people with disabilities also provide a benefit to the population as a whole. In this case, a technique that allows people with disabilities to survive out of water in the event of a catastrophe also ensures that people without disabilities are protected from hypothermia. These benefits must be considered when determining the appropriate rules to be set for safety on vessels, particularly those transporting passengers.

II. The Coast Guard Report to Congress on Survival Craft Safety includes a flawed cost-benefit analysis of the rule requiring that survival craft provide out-of-water protection.

Unfortunately, the cost-benefit analysis of the requirement of out-of-water protection included in the August 26, 2013 Coast Guard Report to Congress[5] ("Report") does not consider many of these factors indicated above, and includes a flawed

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<http://www.ntsb.gov/doclib/recletters/1990/M90_110_111.pdf>, at 4.

[5] U.S. Coast Guard, "Survival Craft Safety: Report to Congress," August 26, 2013.

analysis of the costs and benefits of this requirement. Overall, this analysis discounts the value of the lives of the people who die as a result of failure to provide adequate survival craft. The analysis also includes many gaps in determining the number of lives that would be saved by this requirement.

The Report acknowledges that there are a number of uncertainties in determining the number of lives that might be saved by out-of-water survival craft;[6] however, it appears to resolve these uncertainties in favor of indicating fewer lives saved in every case. For example, the report only looks at casualty cases where the vessel sank and/or was lost, failing to acknowledge cases where the vessel was not lost, such as in when a person went overboard.[7]

Also, the analysis does not consider those cases when the capsizing was "so sudden that the crew and passengers did not have time to don personal flotation devices (PFDs), sound alarms, board available survival craft, or make a 'Mayday' call."[8] Of the approximately 60 vessel casualties and over 160 deaths that occurred between 2002 and 2011,[9] the Coast Guard indicated that only 21 fatalities could have been prevented by an out-of-water survival craft.[10] The report does not make clear how the Coast Guard determined that only 1/3 of the lives could have been saved through out-of-water safety vessels. This is particularly astounding given the acknowledgement in the report that, based on a comparison of the fatality rate when out-of-water survival craft are available with fatalities when they are not, out-of-water survival craft decrease

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6 *Id.* at 11.

7 *Id.* at 5.

8 *Id.* at 8.

9 The exact number of incidents and number of fatalities that occurred between 2002 and 2011 is not clear from the report, although it is note that 224 vessel casualties occurred between 1994 and 2011.

the fatality rate for passengers in incidents by 73.74%.[11]

Additionally, the cost-benefit analysis undervalues the lives of people who die because of survival craft that do not protect them out of the water. The Coast Guard relies on a review of studies by the Department of Homeland Security that placed the value of a statistical life (VSL) at $6.3 million in 2007 dollars.[12] Other recent federal government studies, however, place the VSL at a higher amount. For example, a recent analysis of regulation of crystalline silica by the Occupational Safety and Health Administration (OSHA) determined that the value of each fatality avoided would be $8.7 million.[13] A recent cost-benefit analysis by the Environmental Protection Agency of regulation of particulate matter placed the value of statistical life at $8 million in 1990 dollars and $9.6 million in 2020 dollars.[14] There is at best a great deal of uncertainty regarding the appropriate measure of the value of a statistical life.

These numbers are a matter of life and death for people with disabilities. History is rife with examples of cost-benefit analyses coming out in favor of fewer precautionary measures until the point where people begin to die. In the case of the Ford Pinto, Ford conducted a cost-benefit analysis in order to obtain an exemption from the National Highway Traffic Safety Administration (NHTSA) indicating that the additional cost of addressing the problem of rear collisions would be more than the payoffs that Ford

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[10] *Id.* at 14.

[11] *Id.*

[12] *Id.*

[13] Occupational Safety and Health Administration, *Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis*, 2013, available at <https://www.osha.gov/silica/Silica_PEA.pdf>, at VII-12 and -13.

[14] Environmental Protection Agency, *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter*, February 28, 2013, available at <http://www.epa.gov/ttn/ecas/regdata/ RIAs/finalria.pdf>, at 5-50.

would have to make as a result of the deaths caused.[15] Similarly, in determining what standards to require of the industry operating vessels transporting passengers, the stakes are high.

Indeed, the very act of valuing a human life in this way and comparing with the money saved by not using appropriate safety vessels may be difficult to justify. The value of human life cannot be monetized to the person whose life is lost, nor to that person's family. Who would want to be the one to contact the family of a veteran with a disability and inform them that the person died because Congress determined that the profit to the industry operating vessels transporting passengers was more important? The cost to use out-of-water survival craft is minimal compared to the benefit of saving someone's life.

III. Conclusion

I appreciate the opportunity to testify this morning before the Subcommittee. The Consortium for Citizens with Disabilities supports retaining the statute that requires the Coast Guard to approve only survival craft that keep people out-of-the water. Passenger vessels required to carry survival craft should only carry survival craft that provide out-of-the-water protection for ALL passengers. .

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[15] Mark Dowie, "Pinto Madness," MOTHER JONES, Sept./Oct. 1977, available at <http://www.motherjones.com/politics/1977/09/pinto-madness>.