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July 3, 2013

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

RE: Docket No. USCG-2013-0010-003
Proposal to Establish Safety Zones Around Grain Shipment Vessels and Grain
Shipment Assist Vessels on the Columbia and Willamette Rivers
SCBIL File No.: 3207-030

To Whom It May Concern,

Thank you for this opportunity to submit comments regarding the proposed temporary safety zones, published in the Federal Register on June 4, 2013, Docket Number USCG-2013-0010. This letter is submitted on behalf of the International Longshore and Warehouse Union ("ILWU International") and ILWU Locals 4, 8, 19, 21 and 23 ("ILWU Locals") (collectively "ILWU"). The ILWU has reviewed the temporary interim rule establishing safety zones around all inbound and outbound grain shipment and grain shipment assist vessels involved in commerce with Columbia Grain, United Grain Corporation, Temco Irving, Temco Kalama, and the Louis Dreyfus facilities, to remain in effect until September 3, 2013. The ILWU's members perform grain handling work at the facilities – two of which have locked out their ILWU represented workforces and have been the focus of ongoing picketing. The ILWU objects to the rule on the basis that it unnecessarily and arbitrarily infringes upon its and its members' rights to engage in constitutionally and statutorily protected free speech.

Background on Proposed Rule.

ILWU initially notes that this temporary interim rule is similar to a previous interim rule, published in the Federal Register on January 30, 2013 (78 FR 6209), Docket Number USCG 2013-0010-001. However the more recently published rule is more expansive in several respects. While the previous rule regulated *only* grain shipment vessels, the new rule regulates both grain shipment vessels, and grain shipment assist vessels. The new rule also regulates vessels engaged in commerce with the Louis Dreyfus grain facility, which was not included in the previous rule.

Additionally, while another previously published temporary interim rule, Docket Number USCG-2012-1029 (77 FR 74777),¹ also regulated grain shipment assist vessels, that rule too was much narrower than the instant rule's regulation of assist vessels. For instance, the previous rule regulated only four specific tugboats while the new rule applies to all tugs, pilot boats, and launches engaged in commerce with the named facilities. Additionally, USCG-2012-1029 applied only while the named grain shipment assist vessels were "engaged in transferring persons to or from grain-shipment vessels, and/or assisting grain shipment vessel movements" whereas the new rule applies to vessels at any time when they are located on the Columbia or Willamette Rivers. Finally, USCG-2012-1029 created a safety zone that extended 50 yards ahead, abeam, and astern of the named vessels, while the instant rule applies to a larger area, 100 yards ahead, and 50 yards abeam and astern.

For those reasons, the recently proposed rule raises more significant concerns, explained in further detail below, than were raised by the previous rules which also regulated grain shipment vessels and grain shipment assist vessels.

Comments on Proposed Rule.

The temporary interim rule has been enacted following on-water picketing activities related to an ongoing labor dispute involving certain employer members of the Pacific Northwest Grain Handlers Association. Both United Grain Corporation and Columbia Grain have locked out their ILWU-represented workforces. The union responded with picketing near the facilities, including on-water picketing on the Columbia and Willamette Rivers. Water picketing serves to educate the public about the labor dispute, and also creates a visible demonstration that publicizes the dispute to incoming vessels allowing them to decide whether or not to honor the picket line. Similar protests occurred in 2002 with no disruption and without creating hazardous navigation conditions. The sweeping safety zones proposed by the Coast Guard here will prevent ILWU members from exercising their right to engage in peaceful protest in support of their ongoing labor negotiations.

The proposed rule also singles out labor unions for differential treatment for no reason. While the rules do not explicitly elucidate *why* the USCG has deemed it necessary to establish safety zones around grain shipment vessels and grain shipment assist vessels on the Columbia and Willamette Rivers, previous rules more candidly revealed that the safety zones were enacted to regulate "protest activities relating to an ongoing labor dispute."² In the absence of an independent justification for the rule, it is clear that regulating labor protests is the true object of the instant rule as well, despite the fact that this previous explanation has been stripped away. The USCG has given no explanation as to why the possibility of peaceful protest activities by parties to a labor dispute creates a risk of hazardous navigation conditions. To the contrary, past water picketing in this sector during the 2002 lockout demonstrates that such a rule is unnecessary. In the absence of a rational explanation of the need for a special rule regulating the speech of labor protestors, it appears the safety zones were enacted as the result of union animus.

¹ That rule was published without providing for an opportunity for public comment.

² See e.g. Dockets Nos. USCG-2012-1027; USCG-2012-1028; USCG-2012-1029.

Importantly, the same speech activities prohibited by the Coast Guard's proposed rule are protected under the National Labor Relations Act, 29 U.S.C. §151 *et seq.* The proposed rule thus creates a conflict, with one federal law assuring employees the right to engage in concerted activity such as water picketing, while another makes the same activity illegal. The National Labor Relations Act establishes a careful balance between the rights of management and employees that the Coast Guard's proposed rule disrupts by unfairly tipping the scales towards management. The proposed rule confers an undue advantage to multinational grain corporations during a labor dispute by undermining the rights of grain elevator workers to effectively advocate for a new contract and educate the public about their dispute.

Additionally, the rule is over broad and burdens more speech than necessary. The rule covers expansive terrain, applying to areas 500 yards ahead and 200 yards abeam and astern of grain shipment vessels underway, 100 yards ahead and 50 yards abeam and astern of grain shipment assist vessels underway, and creates a 200 yard radius of grain shipment vessels when anchored at any berth, moored, or in the process of mooring on the Columbia and Willamette Rivers. No justification has been offered as to why zones of these sizes were chosen rather than more narrowly tailored zones that would tread less upon free speech rights. The zones prevent ILWU members from engaging in meaningful lawful protest activities by impeding their ability to form effective water pickets and from communicating their message to the intended audience. The on-water picketing activities are aimed at announcing the existence of a picket line to incoming vessels and grain shipment assist vessels that may choose to honor the picket line. By prohibiting demonstrators from coming anywhere near incoming vessels, the safety zones effectively prevent the ILWU from conveying its message to its intended audience.

The expansive area covered by the zones is particularly troubling given that the zones established by the rule are "floating" and ever-changing depending on the regulated ships' movements. Given the unpredictability of where on the river an incoming vessel may chart its course (i.e. closer to the eastern or western river bank), the floating zones could easily encompass an on-water picketing site. For instance, as the Willamette River turns Kelly Point, just downriver from Columbia Grain, the river is just over 450 yards wide (see enclosed maps). Depending on the placement of an incoming grain vessel, the 200 yard buffer zone abeam and astern could easily intrude upon an on-water picket area. A protestor could find themselves inadvertently in violation of the floating safety zones. Indeed, an incoming vessel could purposefully cause on-water picketers to violate the temporary safety zones by skirting the shore closest to where the picket is staged. Similar floating buffer zones have been struck down as unconstitutional precisely because they create uncertainty, burden more speech than necessary, and could cause those exercising their First Amendment rights to unwittingly violate the zone. *See Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997).

Moreover, the rule is also wholly unnecessary given the existing powers granted to the Coast Guard to regulate waterways. *See e.g.* 33 C.F.R. § 6.04-1 *et seq.* In light of the expansive authority already granted to the Coast Guard to ensure safety, a total ban on entering certain areas is unnecessary and overbroad to achieve the rule's stated purpose of preventing hazardous navigation conditions for vessels.

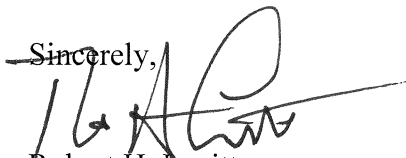
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Finally, the fact that the Captain of the Port has identified “waters in the vicinity of these safety zones where those desiring to do so can assemble and express their views without compromising navigational safety” does not cure the proposed rule of constitutional infirmities. When ILWU members engage in on-water picketing, the primary purpose is to publicize the existence of a labor dispute to other marine vessels approaching or passing by the grain facilities. The waters identified by the Coast Guard for engaging in protest activities, i.e. “Free Speech Zones,” are inadequate substitutes that do not protect ILWU members’ right to engage in meaningful lawful protest activities. Most of the zones are positioned so as to prevent demonstrators from conveying their message to incoming vessels *before* they arrive at the facility because they are located upstream from the terminal.³ Grain vessels and ship-assist tugs arrive at the terminal from the mouth of the river. This impedes the ILWU from delivering its message to its intended audience. Similarly, some of the zones are positioned so far away from the grain facilities and pathway of approaching vessels that protesters would not be audible and the signs and flags ILWU members and supporters would carry would not even be visible, again stifling the ILWU’s message.

Also, the Captain of the Port’s suggestion that protestors assemble on shore is not acceptable as doing so would not allow ILWU members to effectively convey their message to the intended audience – vessels on the water. ILWU members have a right to engage in protected speech activity in a manner and location which allows them to effectively convey their message to their target audience. The alternatives suggested in the Coast Guard’s proposed rule do not protect this right.

For the reasons discussed above, ILWU objects to the proposed safety zones and asks that the Coast Guard reconsider the wisdom and necessity of a rule that tramples the ILWU’s and its members’ constitutional rights and does not advance any legitimate interest.

Sincerely,

Robert H. Lavitt
Danielle Franco-Malone
Attorneys for ILWU

Attachments

cc: ILWU Coast Committee
ILWU Grain Negotiating Committee

³ The Kelly Point zone is the only exception as that is located downstream from the Columbia Grain facility.

Attachments

