COMMENTS OF THE AMERICAN PILOTS’ ASSOCIATION
ON THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING
FOR IMPLEMENTATION OF THE AMENDMENTS TO THE
INTERNATIONAL CONVENTION ON STANDARDS OF TRAINING,
CERTIFICATION AND WATCHKEEPING FOR SEAFARERS (STCW), 1978,
AND CHANGES TO DOMESTIC ENDORSEMENTS
[COAST GUARD DOCKET NUMBER USCG-2004-17914]

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Introduction

The American Pilots’ Association (APA), on behalf of its nation-wide membership, is pleased to submit the following comments in response to the Notice that appeared in the August 1, 2011 Federal Register, 76 Fed. Reg. 147, requesting public comments on the proposed regulations to implement amendments to the STCW Convention and to make certain changes to domestic mariner endorsements.

The APA is the national association of the piloting profession. Virtually all of the nearly 1,200 state-licensed pilots working in the 24 coastal states of the United States, as well as all of the U.S. registered pilots operating in the Great Lakes system under authorization by the Coast Guard, belong to APA member pilot groups. These pilots handle well over 90 percent of large ocean-going vessels moving in international trade in the waterways of the United States. Their role and official responsibility is to protect the safety of navigation and the marine environment in the waters for which they are licensed. In this regard, the APA and the Coast Guard have the common objectives of the safe, secure, and environmentally responsible movement of maritime commerce.

While APA’s membership is comprised predominantly of groups of state-licensed pilots, APA has a strong interest in these federal regulations and the proposed changes to them. The reason for this interest rests in the fact that state-licensed pilots also hold officer endorsements as federal first class pilots. In the state pilotage system, state training, certification, qualification, and recency standards are far more stringent than any federal requirements, but the federal pilot endorsement does provide some benefit in that it serves as a national minimum standard. In the state pilotage system, obtaining a federal

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first class pilot endorsement can be either an entry level requirement for selection to a state pilot training or apprentice program or it could be one of the many steps in such a training program preparing an individual for an eventual state pilot license. In addition, state pilots must maintain a valid federal pilot endorsement in order to hold a state license or to work under that license. As a result, the professional career of each state-licensed pilot who belongs to an APA member pilot group, and the welfare of the pilot and his or her family, depends upon how the Coast Guard chooses to interpret the United States’ international obligations with regard to the STCW Convention, how the Coast Guard promulgates and interprets federal credentialing and certification regulations, and how the National Maritime Center (NMC) administers its federal credentialing and medical review programs.

The APA has a strong, ongoing formal Partnership Agreement with the Coast Guard and will continue to support the advancement of shared maritime safety, security, and environmental protection goals. In the spirit of this Partnership Agreement, and in the hopes of encouraging the Coast Guard to make meaningful and substantial changes to its merchant mariner credentialing, qualification, certification and medical review programs, the APA respectfully offers the following comments and suggestions.

Comments

1. Medical.

   a. **Examining physicians should make fitness determinations.** It appears – although it is certainly not without ambiguity – that the Coast Guard is now ready to address the fundamental flaw in its current mariner medical fitness review process. Presently, the Coast Guard has in place a medical review system in which non-practicing government medical personnel located in West Virginia at the NMC make medical fitness determinations for all mariners *without ever seeing, let alone examining, the mariner.* Such a system is unfair, inconsistent, and ultimately ineffective in determining a mariner’s fitness for duty, as well as inefficient, costly, and unduly burdensome for the mariner. The Coast Guard is a lone outlier among its sister transportation safety agencies in how it makes medical fitness determinations.

   Other federal agencies, such as the Federal Aviation Administration, Federal Motor Carrier Safety Administration, and the Federal Railroad Administration, have all concluded that private sector *examining* physicians/medical practitioners should have the primary responsibility for making medical fitness determinations for airmen, commercial drivers, and safety-sensitive railroad personnel. Each of these agencies has put in place (or is in the process of putting in place) a medical review system in which a private sector medical professional, who has the benefit of actually examining the individual, is principally responsible for making medical fitness determinations. These agencies fully meet their public safety obligations by establishing medical standards to be used to make fitness determinations, exercising robust oversight over the training of the private sector examining medical professionals, and conducting quality control activities.

   It seems (although again, it is somewhat unclear) that the Coast Guard, through its proposed definition of “designated medical examiner” or DME, envisions a merchant mariner medical review program that is more in line with the approach of other federal
transportation safety agencies. The definition of DME under proposed regulation 46 CFR § 10.107 reads, “Designated medical examiner means a licensed physician, licensed physician’s assistant, or a licensed nurse practitioner who has been trained and approved to conduct medical and physical examinations of merchant mariners on behalf of the U.S. Coast Guard and may be delegated limited authority to grant waivers and approve physical/medical suitability for service.” (emphasis added).

If this definition of DME would permit private sector medical professionals to readily gain certification by the Coast Guard, be included on a list or “register” of approved medical practitioners, conduct mariner physical examinations, and ultimately make final medical waiver and fitness determinations, this would represent a positive and welcomed step forward. From the standpoint of mariners, such a system would of course be inherently more fair, transparent, understandable and efficient. The Coast Guard would, however, also greatly benefit from such as system. A true designated medical examiner system as described above would permit a more accurate assessment of mariner fitness because examining physicians on this “register” would have received training/guidance on mariner fitness matters and would be armed with the Coast Guard’s medical fitness standards. Such a system would also be more cost-effective for the Coast Guard because it would allow the NMC’s limited medical resources and staff to be focused on maintaining relevant fitness standards and promulgating clear guidance to the DMEs.

In addition to being a better system for both the Coast Guard and the regulated mariner, a system in which medical fitness determinations are made by a preapproved list of medical professionals (who personally conduct physical examinations) would also ensure the United States is in full compliance with recent “Manila Amendments” to the STCW Convention. Regulation I/9 and Section A-I/9 of this binding international treaty specifically require countries to “establish standards of medical fitness for seafarers”, “establish provisions for recognizing medical practitioners” and to maintain a “register of recognized medical practitioners.” Further, these same portions of the STCW Convention clearly state that “medical fitness examinations of seafarers shall be conducted by” medical practitioners who are on this register. (emphasis added).

The APA urges the Coast Guard – in order create a more fair, efficient, transparent, and effective mariner medical review system, and to ensure the United States meets both the letter and spirit of its international obligations under the amended STCW Convention – to further clarify its proposed regulations regarding its mariner medical fitness program to make clear that while the Coast Guard retains final authority regarding merchant mariner medical fitness determinations, as a practical matter such routine determinations will be delegated to recognized medical practitioners who are listed on the Coast Guard’s “register.” The method and process for a medical practitioner to be included on the Coast Guard’s register should be expansive rather than restrictive in order to allow the optimal number of medical practitioners to be included on the register. A practical approach to establishing the register, at least initially, could be to permit medical practitioners who are currently listed on other federal transportation safety agency “registers”, with appropriate supplemental training, to be approved for listing on the Coast Guard’s “register” of DMEs. Such an inclusive, practical approach will help to ensure mariners in remote areas and those in areas not in or near port cities or maritime centers will have reasonable access to a DME.
b. **Pilots should be issued 2-year medical certificates.** Another area of the proposed regulations that APA requests the Coast Guard address relates to the frequency of the issuance of medical certificates. In proposed regulation 46 CFR § 10.301(b), the Coast Guard proposes to establish three separate timetables under which mariners will be issued “medical certificates/endorsements.” Specifically, first class pilots or mariners merely “serving as” a pilot under § 15.812, would be issued 1-year medical certificates; mariners serving under the authority of an STCW endorsement would be issued 2-year medical certificates; and all other U.S. mariners would be issued 5-year medical certificates. The APA recommends that the Coast Guard amend the proposed regulations to provide that pilots be issued 2-year medical certificates. Such a change would not impact public or navigation safety and would provide much needed administrative and workload relief to the Coast Guard’s medical review program staff at the NMC.

There are no credible studies, investigative findings, or evidence of any kind to suggest that moving first class pilots and so-called “serving as” pilots from 1-year medical certificates to 2-year certificates would in any way impact navigational safety. In fact, on September 21, 2011, the Merchant Mariner Medical Advisory Committee (MEDMAC), an advisory body established by Congress in the Coast Guard Authorization Act of 2010 to provide advice to the Coast Guard on mariner medical certification, standards, and guidelines, discussed this specific issue extensively. At the end of their 3 day deliberations, these maritime medical experts – selected by the Coast Guard – recommended that the Coast Guard eliminate the 1-year medical certificate and move pilots to the 2-year certification program. It is important to note, as MEDMAC did, that moving pilots to a 2-year medical certificate cycle would not impact the long-standing federal statutory requirement (see 46 U.S.C. § 7101(e)(3)) that pilots have a thorough physical examination each year while holding the license, nor would it effect the various state medical fitness requirements for state-licensed pilots.¹ To affect this recommended change, in addition to making appropriate amendments to proposed regulation 46 CFR § 10.301(b), it would also be necessary to amend proposed regulation 46 CFR § 11.709. See below.

c. **Use the term medical “waivers” appropriately.** APA also has a concern over the NMC’s continual misuse of the term “waiver” to describe a medical fitness determination made after further review of medical conditions or with limitations or operational conditions applied. By any common or generally accepted definition, a “waiver” should only be used to describe a situation in which a mariner does not meet the applicable medical fitness standards, but because of mitigating circumstances, the NMC “waives” the medical standard or standards and grants the credential or endorsement. To clarify this point, APA recommends that the Coast Guard include specific language from

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¹ It is, as an aside, a historical curiosity that the September 28, 2006 Federal Register Notice (71 Fed. Reg. 188) that initially put in place the requirement that pilots submit the results of annual physical examinations to the Coast Guard was prompted by a National Transportation Safety Board investigation of a 2003 accident involving the Staten Island Ferry ANDREW J. BARBERI. This accident did not involve a state-licensed pilot, federal first class pilot or “serving as” pilot in any way. Moreover, the actual cause of this accident, at its core, was much more about inadequate manning than about mariner medical matters.
Navigation and Vessel Inspection No. 04-08 (NVIC 04-08) dealing with NMC credential issuing actions/options and that proposed regulation 46 CFR § 10.303(b) be amended.

The suggested amendment to § 10.303(b) is shown below in “track changes”:

(b) In general, medical waivers are approved when an applicant does not meet the applicable medical standards, but, with certain conditions, limitations or restrictions imposed on the mariner, the mariner can carry out the functions and duties for which the credential is issued with for medical conditions and medications when objective medical evidence indicates that the condition is sufficiently controlled and the effects of medication pose no significant risk to maritime and public safety. The Coast Guard retains final authority for the issuance of medical waivers, but per 46 CFR § 10.107, such authority may be delegated to a “designated medical examiner”.

In order to further clarify the appropriate use of the term “waiver”, the APA also recommends that the Coast Guard include, in an appropriate paragraph of proposed regulation 46 CFR § 10.303, specific language from NVIC 04-08. In particular, APA recommends that the Coast Guard include the following text from NVIC 04-08, Enclosure (6), paragraph 7:

7. The NMC will review all information provided, and will determine one of the following:

   a. The applicant is physically and medically qualified for the credential without any limitations, waivers and/or other conditions for issuance of the credential.

   b. The applicant is physically and medically qualified for the credential with limitations and/or other conditions for issuance of the credential as specified by the NMC.

   c. The applicant does not possess the vision, hearing, or general physical condition necessary, but a credential may be issued with appropriate limitations, waivers, and/or other conditions for issuance of the credential as specified by the NMC.

   d. Additional information is necessary to determine if the applicant is physically and/or medically qualified for the credential. The NMC will request additional information from the applicant. The NMC may hold the package pending receipt of that information before the package and/or application is returned unprocessed.

   e. The applicant is not physically and/or medically qualified for the credential. The application for a credential will be denied by the OCMI.
Inserting this language from NVIC 04-08 into 46 CFR § 10.303 is consistent with a recommendation made by the MEDMAC at its inaugural meeting in September 2011, and, combined with the APA’s suggested changes to 46 CFR § 10.303(b), will result in more appropriate and effective regulatory guidance on the use and issuance of medical waivers.

**d. No distinction for Great Lakes Pilots’ physical exams.** Proposed regulation 46 CFR § 10.302(b) should be amended by striking the last sentence of this subparagraph (e.g., “Medical examinations for Great Lakes Pilots must be conducted by a licensed medical doctor in accordance with the physical exam requirements in 46 CFR § 402.210.”). In accordance with the first sentence of this same proposed regulation, physical examinations of all other mariners are permitted to be conducted by “a licensed medical doctor, licensed physician assistant, licensed nurse practitioner, or a designated medical examiner.” There is no statutory requirement or policy justification to require Great Lakes Pilots to see a “licensed medical doctor” when all other mariners have the option of seeing other types/classes of medical professionals. This arbitrary requirement places an unnecessary financial and administrative burden on Great Lakes Pilots and should be eliminated. ²

2. **Training, Qualifications, and Certification.**

**a. Clarify “invalid” and “invalidation” of credentials.** APA is concerned that the proposed regulations continue to be unclear as to the meaning of “invalid” or “invalidation” of merchant mariner credentials, documents, endorsements, and licenses. This lack of clarity is particularly troubling because it could be read to imply that the Coast Guard may exercise inappropriate authority regarding the invalidation of properly issued credentials, documents, endorsements, and licenses. In proposed regulations 46 CFR § 10.107 the Coast Guard correctly states that “Invalid credential means a Merchant Mariner Credential, merchant mariner document, merchant mariner license, STCW endorsement, or Certificate of Registry that has been suspended or revoked, or has expired.” (emphasis added). This definition places appropriate boundaries around Coast Guard authority in this area. Further, the Coast Guard makes an important point regarding credential invalidation during a discussion in the SNPRM. Page 100 of this notice states:

A mariner’s due process rights, however, preclude automatic invalidation of his or her [credential]. By law, a formal hearing is required to proceed against a mariner’s credential.

Proposed regulations 46 CFR § 11.709(b) and (d), however, are not as clear and should be amended to remove ambiguity as to Coast Guard authority with respect to credential invalidation. Amending this proposed regulation would also ensure that the regulation accurately reflects the reality of pilot submission of annual physical

examinations. These proposed regulations should be amended as shown below in “track changes”:

(b) Every person holding a license or MMC endorsement as first-class pilot must have a thorough physical examination each year, to be completed by the first day of the month following the anniversary of the individual’s most recently completed Coast Guard required physical examination. Every other year, as per the medical certificate/endorsement requirements in 46 CFR § 10.301(b), the results of the physical examination must be recorded on a CG-719K form and submitted to the Coast Guard no later than thirty (30) calendar days after completion of the physical examination.

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(d) An individual’s first class pilot endorsement becomes invalid on the first day of the month following the first anniversary of the individual’s most recent physical examination satisfactorily completed; the individual may not operate under the authority of that endorsement until a physical examination has been satisfactorily completed. If a person holding a first class pilot license or endorsement does not submit his or her CG-719K form in accordance with 46 CFR § 11.709(b), the individual may not operate under the authority of that license or endorsement until the CG-719K form has been properly submitted to the Coast Guard.

b. Documenting pilot sea service. Proposed regulation 46 CFR § 10.232 should be amended to reflect current Coast Guard policy (per agreements between the NMC and APA) and pilot association practice, as well as to recognize the practical realities regarding documenting pilot sea service. Specifically, 46 CFR § 10.232(a)(1) should be amended by adding “pilot association letter of attestation” to the list of acceptable forms to document sea service. In addition, 46 CFR § 10.232(a)(2) should be amended by inserting “as practicable,” between the words “must” and “contain.” This latter change will allow for the reality that for full-time independent professional compulsory pilots, it is not necessary or practicable to include the precise number of vessels piloted and the specific vessel information for the potentially hundreds of ships that may have been piloted during a particular reporting period.

c. Exempt persons serving on pilot boats from application of the STCW Convention. The APA recommends that the United States interpret the STCW Convention regarding pilot vessels as follows: Pilot vessels are not considered seagoing ships because they operate “in waters within, or closely adjacent to, sheltered waters or

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3 Note, these APA proposed changes also reflect the APA’s earlier recommendation in these comments that the Coast Guard require pilots to be issued 2-year medical certificates rather than 1-year certificates.

4 This recommendation is focused on independent state-licensed or U.S. registered Great Lakes compulsory pilots, who temporarily go aboard vessels to guide them into and out of port. This is in contrast to individuals who may obtain a federal first class pilot endorsement or merely “serve as” a pilot while being assigned as a permanent member of a ship’s crew.
areas where port regulations apply.” Consistent with this recommended interpretation of the U.S. obligations under the STCW Convention, persons serving aboard pilot boats should be exempt from application of the STCW. Therefore, the APA recommends that a new subparagraph (5) be inserted in 46 CFR § 15.105(f) as follows:

(5) Pilot boats.

d. “Document of Continuity”, “Delayed Issuance” and post-dated credentials. The APA is pleased that the Coast Guard has clarified the requirements and guidelines with regard to the issuance of Documents of Continuity, the process for the delayed issuance of mariner credentials, and the authority for the Coast Guard to post-date issued mariner credentials to reduce the effects of “license creep”. Over the past several years these issues have been the subject of discussion between the APA and Coast Guard and the APA has continually urged that these issues be addressed.

Conclusion

These proposed regulations are of great importance to the APA and its member pilot groups. APA supports the Coast Guard’s efforts to meet its navigational safety and international obligations and appreciates the opportunity to offer constructive comments and suggestions. The APA believes the comments and suggestions offered above will help the Coast Guard meet its obligations while also helping to ensure that U.S. mariners, specifically including independent professional compulsory maritime pilots, will be better and more fairly served.

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5 STCW Convention, Article II, paragraph (g).