



16711/46USC3301

Mr. Larry Acheson
Offshore Marine Towing, Inc.
560 N. E. 26th Court
Pompano Beach, FL 33064

JAN 20 2010

Dear Mr. Acheson:

This is in response to your e-mail dated December 21, 2008 appealing the decisions of the Commander, Seventh Coast Guard District and the Officer in Charge, Marine Inspection (OCMI) Miami. Your appeal is partially granted as discussed below. In short, I find that the current regulatory definition of "disabled vessel" allows you to continue assistance towing operations as you intend in your letter and as outlined below. This constitutes final agency action on this matter.

To recap, the requirement to license assistance towing vessels operators is found in Title 46, U.S. Code, § 8904(b); this requirement was added in 1986 as part of Pub. L. 96-640 (100 Stat. 3545). Neither this amendment nor its legislative history specified what constituted a "disabled vessel". Through rulemaking completed in 1999, the Coast Guard put forth a regulatory definition of "disabled vessel" and this definition is found within Title 46, Code of Federal Regulations, Subchapter B (46 CFR 10.107). Specifically, "Disabled vessel means a vessel that needs assistance, whether docked, moored, anchored, aground, adrift, or under way; but it does not mean a barge or any other vessel not regularly operated under its own power."

Prior to developing this regulatory definition of "disabled vessel," the Coast Guard did discuss the term "disabled" vessel in a rulemaking published in 1988 (53 FR 18561). At that time, the Coast Guard stated that a "disabled vessel is one which, while being operated, has been rendered incapable of proceeding under its own power and is in need of assistance." This statement remained as the "definition" of disabled vessel until the term was actually defined through the regulatory process in 1999. While the 1988 discussion may be indicative of the intent of the agency at that time, it is clear that the Coast Guard modified their position on the meaning of what constituted a disabled vessel in 1999. A plain reading of the regulatory definition finds that the vessel need not be in operation or underway (it can be docked, moored, or at anchor) and the vessel need not be rendered incapable of proceeding under its own power (it can be underway).

The key element is that the vessel needs assistance of some kind; the vessel need not be in extremis for this element to be present, although it could be (as when a vessel is aground). In addition, this regulatory definition was subject to public review and comment and it occurred later in time than the original "intent" discussion in 1988. For these reasons, I find that this regulatory definition of disabled vessel more compelling and the appropriate one to use in this appeal. Although the Coast Guard has defined the term "disabled vessel" it has not specified or limited the "needs assistance" aspect of the disabled vessel definition. As a result, I am

empowered to interpret this aspect pursuant to other existing regulations and industry practice. Based on this authority and information, I interpret that a vessel that needs assistance includes, but is not limited to, a vessel that needs support or aid from another vessel (or vessels) to achieve completion of a maneuver or a portion of a transit safely (such as mooring at a marina or needing assistance to execute a turn). This assistance should be brief in nature, lasting minutes as opposed to hours, and conducted within a single port area. I include tows involving vessels unable to proceed under their own power from one moored location to another, within a single marina or from one marina to another marina within the same port area, as meeting the definition of a disabled vessel.

This also would include those instances where the vessel is being towed as a result of a repossession action. My interpretation of “needs assistance” includes anytime the operator determines, in conjunction with the Coast Guard, that vessel safety is at risk and the risks would be reduced by using an assistance towing vessel (or vessels). This includes situations like mechanical difficulty, weather conditions, port/waterway congestion, or vessel maneuvering constraints but does not include salvage activities, which require special knowledge, skills and training not part of the assistance towing license competency. In reaching these interpretations, I have considered the safety of the vessel you described as needing assistance, the personnel embarked on that vessel, and the risk to other mariners, the public, and the marine environment. Tows of disabled vessels beyond a single port area may be possible, but will require approval from the local COTP and must meet all other applicable requirements.

As part of this appeal response, I feel that it is important to discuss a related rulemaking that involved the Master, Towing Vessel license that was published on June 17, 2003 (68 FR 35801). While this specific rulemaking focused on licensing for towing vessels, its preamble did contain some discussion regarding aspects of this appeal including a clarification that a “disabled vessel” could be a commercial vessel as well as a recreational vessel. This would include such commercial vessels as uninspected passenger vessels, small passenger vessels, and commercial fishing vessels.

While the 2003 preamble offers additional discussion on what constitutes a “disabled vessel” it does not actually change the definition that was set forth in 1999. While this discussion states that “disabled” means a vessel cannot be used for its intended purpose, it does not revise or amend the existing regulatory definition to include this language. In such a case, where the text of the regulation appears to be in conflict with some statement of intent, I am compelled to rely on the text of the actual regulation. While this intent discussion was put forth (in 2003) after the regulatory definition of “disabled vessel” became effective (in 1999), the Coast Guard made a conscious decision not to actually change the definition. As a result, I am compelled to use the existing regulatory text.

In addition, while I did consider this intent discussion in my deliberations regarding this appeal, since 2003, the assistance towing industry has expanded and evolved to include providing assistance to vessels that are not just “malfunctioning” but that need assistance for other reasons including maneuvering in restricted channels or fairways. In many cases, these locations include areas that are not accessible to “traditional” harbor assist towing vessels. In such cases, I am choosing to provide for the safety of the vessel, those onboard, the port area, and the marine

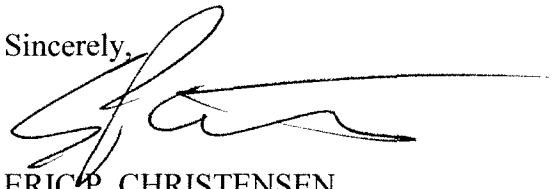
environment by ensuring where the vessel operator feels they need “assistance” to safely navigate an area, that assistance is available and is not precluded by harbor assist towing vessel characteristics or availability.

As part of your appeal, you have specifically requested an exemption from the Master of Towing licensing requirement so that assistance towing vessel operators are able to continue the work you describe in your e-mails as assistance towing. In response to this specific request, the Coast Guard must deny this exemption request. The Coast Guard is unable to provide such an exemption because one is not authorized by law. However, as described above, most, if not all of your reasons for requesting such an exemption have been addressed such that they can be performed by individuals with an assistance towing endorsement on their license rather than requiring a Master of Towing Vessel license.

Finally, as part of the forthcoming Notice of Proposed Rulemaking dealing with towing vessel inspections, you may submit comments on the terms “assistance towing” and “disabled vessel” if you so choose. I must emphasize that this rulemaking may affect Coast Guard policy and the impact of this appeal. Please continue to work through the Towing Safety Advisory Committee to make recommendations to the Coast Guard to improve our policies regarding assistance towing vessels.

Please refer any questions on our response to this appeal to Mr. Scott Kuhaneck at the telephone number provided above.

Sincerely,



ERIC P. CHRISTENSEN
Captain, U.S. Coast Guard
Chief, Office of Vessel Activities
By direction

Copy: LANTAREA (3P-1)
Commander, Seventh Coast Guard District (dp)
Commander, Sector Miami