United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. TIDEWATER PACIFIC, INC., Respondent.	OSHRC Docket No. 93-2529

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

On May 12, 1993 the Occupational Safety and Health Administration ("OSHA") inspected the vessel M.V. Dr. Jack, ("Dr. Jack") operated by Tidewater Pacific, Inc. ("Tidewater"), and subsequently issued two citations alleging four serious and one other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act" or "OSH Act"), proposing a combined penalty of $7,200. The cited conditions pertain to confined space permit entry (29 C.F.R. § 1910.146(c)(4)), machine guarding (29 C.F.R. § 1910.215(a)(4) and (b)(9)), blood borne pathogen exposure control plans (29 C.F.R. § 1910.1030(c)(1)(i)), and recordkeeping (29 C.F.R. § 1904.2(a)). Tidewater contested the citations alleging that OSHA jurisdiction is preempted under section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), by the United States Coast Guard's regulation of shipping.

On a stipulated record, Administrative Law Judge James H. Barkley concluded that Tidewater had not satisfied its burden of demonstrating the existence of applicable Coast

Guard regulations concerning the cited working conditions, and accordingly found that OSHA jurisdiction was not preempted. Judge Barkley then entered a final order reflecting the parties' second stipulation, which provided for an amended penalty of $3,600, but reserved their right to appeal the contested jurisdictional issue. In addition to the issue of section 4(b)(1) preemption raised by the parties, we ordered supplemental briefing and held oral argument on the issue of OSH Act applicability under section 4(a), 29 U.S.C. § 653(a).[1] For the following reasons, we affirm the judge's decision with respect to all of the cited conditions except the recordkeeping violation. As to it, we conclude that OSHA is not preempted from enforcing the illness recordkeeping requirement, but that applicable Coast Guard regulations requiring reporting of marine accidents and casualties preempts OSHA jurisdiction over injury recordkeeping. Accordingly, we reduce the penalty to $3,375.

I. BACKGROUND

The Dr. Jack is a U.S. flag ocean-going tug boat that operates in foreign and U.S. territorial waters and was, at the time of the alleged violations, engaged in vessel escort and oil spill emergency response activities for the oil tankers entering and exiting the Valdez Oil Terminal in Valdez, Alaska. It is undisputed that the vessel was located in the U.S. territorial waters known as the "three-mile ring"[2] at the time of the inspection. The Dr. Jack's nine-person crew consists entirely of Coast Guard licensed and certified officers and seamen, but the vessel is classified as an "uninspected vessel" and thus is not subject to the shipping inspection requirements of 46 U.S.C. §§ 3301-3318 and extensive Coast Guard regulations

[1]Direction for review by the Commission establishes jurisdiction to review the entire case, and is not limited to those issues raised by the parties. *See* Commission Rule 2200.92(a), 29 C.F.R. § 2200.92(a).

[2]*See United States v. Maine*, 469 U.S. 504, 513 (1985); Submerged Lands Act, 43 U.S.C. § 1312.

promulgated thereunder.[3] Accordingly, the Dr. Jack is not subject to the 1983 Memorandum of Understanding ("MOU") between the Coast Guard and OSHA, which provides that OSHA will not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels.[4]

The Coast Guard, however, has issued some regulations applicable to the Dr. Jack pursuant to its authority to regulate uninspected vessels. *See* 46 U.S.C. § 4102; 46 C.F.R. Part 25. The Dr. Jack is also subject to the marine casualty and accident reporting requirements of 46 U.S.C. §§ 6301-6307 and 46 C.F.R. Part 4, and is periodically examined by the Coast Guard's Valdez Marine Safety Office for compliance with applicable uninspected vessel regulations.

II. DISCUSSION

A. Section 4(a) Applicability

It is undisputed that although the Dr. Jack operates within and outside U.S. territorial waters, it was, at the time of the alleged violations, located inside the U.S. territorial waters appurtenant to Valdez, Alaska. We must decide, therefore, whether a vessel located within these waters is "a workplace in a State" within the meaning of section 4(a) and, consequently, whether the OSH Act is applicable to the working conditions aboard such a vessel.[5]

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[3]A vessel's inspection classification is unrelated to whether it operates on the high seas (the area seaward of U.S. territorial waters) or solely in territorial waters.

[4]The agreement excludes the section 11(c), 29 U.S.C. § 660(c), prohibition on discrimination against employees for exercising their rights under the Act, and leaves unresolved any recordkeeping issues. OSHA issued an internal "instruction" dated November 8, 1996, that affirms the continued applicability of the MOU to inspected vessels and establishes that OSHA's policy is to require recordkeeping for inspected and uninspected vessels. OSHA Instruction CPL 2-1.20, OSHA/U.S. Coast Guard Authority Over Vessels.

[5]Although we presume that OSHA inspected the Dr. Jack while the vessel was docked at port in Valdez Harbor, which may constitute coastal "inland waters," *see United States v.*

(continued...)

Section 4(a) provides:

> This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction.

The Act is otherwise silent as to coverage of vessels at sea.[6] The legislative history is not particularly elucidating, except for a reference to House withdrawal of a proposal that vessels underway on Outer Continental Shelf Lands[7] be excluded from coverage. H.R. Rep. No. 91-1765, 91st Cong., 2d Sess. 32 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970,* at 1185 (1971). While in no way dispositive of the issue, the withdrawal of this proposal indicates that Congress was at least aware of the potential for vessel coverage, and did not expressly exclude it.

In the absence of clearly stated legislative intent regarding vessel coverage, we consider whether the open sea[8] within the territorial bounds of the United States is deemed, in any respect, to be within the territorial bounds of the appurtenant state. The Admiralty

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[5](...continued)
California, 381 U.S. 139 (1965), we do not rely on that presumption as the record does not establish the vessel's precise location.

[6]OSHA does regulate health and safety on vessels for longshore and harbor workers engaged in ship repairing, shipbuilding, and shipbreaking. *See* § 4(b)(2) of the Act, 29 U.S.C. § 653(b)(2); 29 C.F.R. Part 1915.

[7]The Outer Continental Shelf ("OCS") consists of the seabed beyond the area delineated in the Submerged Lands Act, 43 U.S.C. § 1301. Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a).

[8]We use the term "open sea" to refer to the area seaward of coastal inland waters. 43 U.S.C. § 1301(c). *See also United States v. California,* 381 U.S. at 147.

Clause of the Constitution accords to the United States jurisdiction over maritime activities located on navigable waters in interstate or foreign commerce, "whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state." Gilmore and Black, *The Law of Admiralty*, 31-32 (2d ed. 1975). *See also Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1420-22 (9th Cir. 1990). Reasoning that criminal acts would go unpunished in the absence of state law applicability to events occurring on such waters, the Supreme Court concluded in *Manchester v. Massachusetts*, 139 U.S. 240 (1891), that "[t]he extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as has been granted to the United States, this control remains with the [S]tate."[9] *Id.* It has since become well-settled that a state may exercise its police powers over vessels and conduct occurring on the open sea to the extent such action does not conflict with federal law. *See, e.g., Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 328-29 (1973) (Florida regulation of oil spills in territorial waters not *per se* preempted by federal regulation); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 442 (1960) (stating that states may exercise their police power to act in "many areas of interstate commerce and maritime activities[] concurrent with the [F]ederal [G]overnment," Court

[9]The effect of this holding here is undiminished by the Court's later caveat that any indication in *Manchester* suggesting that "a [s]tate may draw its boundaries as it pleases within limits recognized by the law of nations regardless of the position taken by the United States," would be dictum. *United States v. California,* 381 U.S. at 168-169. We do not cite *Manchester* for the proposition that a state may expand its "traditional international boundary" in the face of opposition by the United States. 381 U.S. at 168-69. Rather, we rely on it only to establish that states have historically exercised jurisdiction over appurtenant waters, at least to the federally mandated territorial boundary of the United States, in matters that do not conflict with federal regulation.

found permissible Detroit's Smoke Abatement Code, compliance with which required structural alterations to appellant's vessels).[10]

The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, which establishes the three-mile seaward boundary of coastal states, 43 U.S.C. § 1312, further suggests that a state's boundary extends to the three-mile limit. The purposes of that Act were to "confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries." *United States v. Louisiana,* 363 U.S. 1, 8 (1960). Although the statute applies by its terms to the lands beneath the waters, it provides for the extension of a state's seaward boundary to the three-mile limit, indicating an assumption that a state's territory does not end at its coastline. 43 U.S.C.§§ 1301(b), 1311(a), and 1312. Moreover, although the Submerged Lands Act provides that the United States retains constitutional powers of regulation and control over commerce, navigation, national defense, and international affairs, these limitations apply to the submerged lands as well as to the waters. 43 U.S.C. § 1314(a). Finally, the Supreme Court has decided a number of cases arising under the Submerged Lands Act in which it referred to the waters located within the three-mile limit as within a state's boundary. *See Amoco Prod. Co. v. Gambell, Alaska,* 480 U.S. 531, 547 (1987) (stating that Alaska's boundaries "can be delineated with exactitude" and include territorial waters, Court noted that under Submerged Lands Act, "the seaward boundary of a coastal [s]tate extends to a line three miles from its coastline"); *United States v. Maine*, 469 U.S.

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[10]We recognize that a state's geographic boundary is not necessarily defined by the limit of its power to apply its laws, as there are circumstances when those laws may apply beyond the state's territory. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 77-78 (1941) (sovereign states have power to govern their own citizens' conduct occurring on high seas); *Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409 (California overtime pay laws applicable to seamen and maritime workers on territorial waters and high seas off California coast).

504, 512-13 (1985) ("waters up to three miles seaward of the coastline are also within a [s]tate's boundary as part of the 3-mile ring referred to as the marginal sea"); *United States v. California,* 436 U.S. 32, 36-37 (1978) (finding that Submerged Lands Act transferred dominion to California over contested lands and waters situated within the three-mile marginal sea off the southern California mainland).

We find that the above-referenced authority supports the conclusion that a coastal state's boundary has long been commonly understood to extend to the limit of the territorial sea and, therefore, that this was the likely intent of Congress in drafting section 4(a) of the OSH Act. Moreover, because the marginal sea extending to the three-mile limit constitutes United States territory, this interpretation effectuates the clearly expressed intent of Congress that the statutory purpose of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. § 651(b)), and to provide for OSHA coverage as broad as "the authority vested in the Federal government by the [C]ommerce [C]lause of the Constitution" (Conf. Rep. S. 2193, 91st Cong., 2d Sess. (1970), Leg. Hist., *supra*, at 1216). Accordingly, we find that the phrase "in a State" under section 4(a) of the OSH Act includes the territorial waters adjacent to a state extending out to the boundary established under the Submerged Lands Act.[11] Consequently, we conclude

[11]We do not consider whether OSH Act coverage would extend to vessels underway over OCS lands or beyond, but note that OSHA indicates in its November 8, 1996 instruction (*see* note 4, *supra*) that its jurisdiction ends at the territorial boundary. Consequently, the Supreme Court's decision in *OCAW v. Mobil Oil Corp.,* 426 U.S. 407 (1976), is inapposite. In *Mobil*, the Court applied a job situs test under the National Labor Relations Act to determine whether Texas' right-to-work law prevented application of the collective bargaining agreement's union security clause, where eighty to ninety percent of the seamen's work was performed on a vessel underway on the high seas, "outside the territorial bounds of the State of Texas." 426 U.S. at 410-412, 420-421. The vessels there at issue were tankers transporting oil from a port in Beaumont, Texas to Providence or New York, a 4 ½ to 5-day trip. The Court's observation, that the high seas between these locations are not within the territorial bounds of the State of Texas, does not indicate whether the open sea within three miles of a state's coastline is within the territorial bounds of the state.

that OSHA has authority to enforce the OSH Act with respect to vessels that are located in U.S. territorial waters. Because the Dr. Jack was located within the three-mile territorial limit of the State of Alaska at the time of the OSHA inspection, the inspection and the citation were within the confines of OSHA's statutory jurisdiction.

B. Section 4(b)(1) Preemption

1. Applicable Standard

It is well settled under Commission precedent that in order to preempt OSHA jurisdiction over a cited working condition, another federal agency must possess the statutory authority to regulate the cited condition and must also have taken some action to exercise that authority by promulgating standards or regulations having the force and effect of law. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703, 1991-93 CCH OSHD ¶ 29,758, p. 40,449 (No. 89-1192, 1992) (consolidated); *Northwest Airlines, Inc.,* 8 BNA OSHC 1982, 1989-91, 1980 CCH OSHD ¶ 24,751, pp. 30,487-89 (No. 13649, 1980). Where the employer claiming the exemption satisfies its burden of proving that the other agency has so exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl*, 15 BNA OSHC at 1703-1704, 1991-93 CCH OSHD at p. 40,449. In effect, OSHA's jurisdiction over the workplace as a whole is preserved, while the redundant regulation of particular working conditions proscribed by section (4)(b)(1) is avoided. *See Southern Pac. Transp. Co. v. Usery,* 539 F. 2d 386, 391-92 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977)*; Northwest Airlines, Inc*., 8 BNA OSHC at 1989-90, 1989-90 CCH OSHD at p. 30,488.

Originally, the Commission had indicated that it deemed jurisdiction over the working conditions of seamen to remain with the Coast Guard after passage of the Act.[12] In 1981, however, it rejected that view in *Puget Sound Tug & Barge*, concluding that the Coast Guard's authority to regulate the occupational safety and health of seamen should be

[12]*See T. Smith & Son, Inc.*, 2 BNA OSHC 1177, 1973-74 CCH OSHD ¶ 17,106 (No. 2240, 1974).

governed by the same preemption standard as any other federal agency with authority to regulate employee safety and health, and that no industry-wide exemption from OSHA regulations existed for the cited inspected vessels. 9 BNA OSHC 1764, 1775-1776, 1981 CCH OSHD ¶ 25,373, pp. 31,594-95 (No. 76-4905, 1981) (consolidated). Applying this standard in *Alaska Trawl Fisheries, Inc.*, the Commission found that in the absence of relevant Coast Guard regulations, OSHA jurisdiction over fish processing work performed on uninspected factory ships was not preempted. 15 BNA OSHC at 1704, 1991-93 CCH OSHD at p. 40,450. The Commission distinguished *Dillingham Tug & Barge Corp,*[13] a prior decision in which Coast Guard regulations were found to preempt OSHA jurisdiction over mooring line operations, finding that *Dillingham* involved a sailor engaged in the operation of a ship, "the traditional area of Coast Guard expertise." *Alaska Trawl,* 15 BNA OSHC at 1704-1705, n.10, 1991-93 CCH OSHD at p. 40,450 n. 10. The *Alaska Trawl* decision dismissed as dictum any implication that *Dillingham* created an industry-wide exemption, as the Coast Guard's regulations applied generally to the cited condition and would have preempted OSHA jurisdiction even absent such an exemption. *Id.*

Here, the cited working conditions affect the safety and health of seamen engaged in tugboat operations that are apparently routine, though not plainly navigational. While such conditions may be amenable to Coast Guard regulation, they do not fall within the "traditional area of Coast Guard expertise" that was dispositive of OSHA preemption in *Dillingham*. Absent an industry-wide exemption, therefore, OSHA jurisdiction would be preempted only if the Coast Guard has specifically regulated the cited conditions.

2. Coast Guard Uninspected Vessel Regulations

We are aided in our consideration of whether applicable Coast Guard regulations preempt OSHA jurisdiction in this case by the Coast Guard's *amicus* brief, to which Commission precedent supports according considerable weight.

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[13]10 BNA OSHC 1859, 1982 CCH OSHD ¶ 26,166 (No. 77-4143, 1982).

> When federal agencies assert that they do or do not have statutory authority to regulate particular working conditions, the Commission gives considerable weight to the agency's representations. [Citation omitted.] While such statements by a federal agency are not controlling, the [C]ommission will limit its inquiry to determining whether the statute reasonably supports the agency's assertions.

Alaska Trawl Fisheries, Inc., 15 BNA OSHC at 1703, 1991-93 CCH OSHD ¶ at pp. 40,448-49.

Simply stated, the Coast Guard unequivocally disclaims comprehensive regulation of uninspected vessels generally, regulation of the cited conditions, and statutory authority to promulgate such regulations. Overall, the Coast Guard describes its safety standards applicable to uninspected vessels as "minimal." It asserts that its authority to regulate these vessels is, in relevant part, limited *solely* to those areas delineated in 46 U.S.C. Chapter 41, which provides for regulation concerning (a) number, type and size of fire extinguishers; (b) type and number of life preservers; (c) flame arrestors, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and (e) number and types of alerting and locating equipment for vessels on the high seas. The Coast Guard describes the purpose of such regulations as "protect[ing], in the event of an emergency, individuals on board and . . . ensur[ing] the safe operation of the vessel," and contrasts this limited authority with the comprehensive regulation of inspected vessels authorized under 46 U.S.C. § 3306(a) (regulation of inspected vessels).

Moreover, the Coast Guard notes that broader regulation is not evidenced by the provisions concerning the seaworthiness of vessels, load line stability, or seamen licensing, nor by the Valdez Marine Safety Office uninspected vessel examination procedures. Though applicable to uninspected vessels, the Coast Guard does not enforce the seaworthiness requirement of 46 U.S.C. § 10902(a)(1).[14] While the Coast Guard does enforce the load line

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[14]The warranty of seaworthiness is judicially enforceable only through the appropriate federal district court or, where no such court is held at the vessel's location, a judge or justice of the peace. 46 U.S.C. § 10902(a)(1).

stability regulations (46 C.F.R. Table 24.05-1) applicable to the Dr. Jack, it contends that their purpose in ensuring the safety of the vessel and crew does not pertain to the type of working conditions cited by OSHA. Similarly, with respect to seamen licensing, the Coast Guard acknowledges that the minimum competency standards required of seamen are generally designed to promote the safe operation of vessels, but asserts that they are not otherwise directly related to the safety and health of the crew's working conditions. Finally, the Coast Guard describes the Valdez Marine Safety Office examination procedures as implementing the Coast Guard's role as the "primary maritime law enforcement agency" responsible for all United States laws and regulations applicable to vessels operating on United States navigable waters. Any local examination conducted by the Valdez office would be motivated by this function, but circumscribed by the Coast Guard's limited authority to regulate uninspected vessels described above.

a. Confined Space Permit Entry, Machine Guarding and Blood Borne Pathogens

With respect to the confined space permit entry, machine guarding and blood borne pathogen items cited here, it is apparent that none of the Coast Guard's uninspected vessel regulations duplicate those of OSHA. The OSHA confined space permit entry standard applies to all "confined spaces" and to hazardous atmospheres caused by a broad range of conditions. *See generally* 29 C.F.R. §1910.146(b). According to the Coast Guard, its ventilation regulation pertains only to explosive or flammable gasses contained in engine spaces or fuel tanks and, accordingly, does not cover most of the conditions regulated by OSHA. The Coast Guard also states that its limited authority to regulate uninspected vessels does not include authority to regulate the safe use of machinery on those vessels, except for the boiler and machinery examination provisions applicable only to vessels which, unlike the Dr. Jack, are steam propelled. *See* 46 C.F.R. Table 24.05-1(a), n.8; 46 C.F.R. § 24-20-1. Moreover, despite any applicability the warranty of seaworthiness may have to the alleged machine guarding hazards, it is judicially enforced and, therefore, does not preempt OSHA's

regulations as it is not a standard over which "[an]other Federal agenc[y] . . . exercise[s] statutory authority." Finally, the Coast Guard does not regulate blood borne pathogens.

We find that the relevant statutes and pertinent legislative history[15] "reasonably support" the Coast Guard's interpretation of its regulatory authority over uninspected vessels and its implementing regulations. *Alaska Trawl*, 15 BNA OSHC at 1703, 1991-93 CCH OSHD ¶ at pp. 40,448-49. Accordingly, we conclude that the Coast Guard's regulation of uninspected vessels is insufficient to warrant an "industry-wide" exemption from OSHA regulation, and that the Coast Guard has conclusively established that none of its regulations concerning uninspected vessels reasonably pertain to the confined space permit entry, machine guarding, or blood borne pathogen exposure control plan items contained in the OSHA citation. These citation items, therefore, are not preempted under section 4(b)(1).

b. Recordkeeping

The OSHA recordkeeping item presents a somewhat different inquiry. The cited recordkeeping regulation[16] implements the statutory mandate of section 24(a), 29 U.S.C.

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[15]*See Donovan v. Red Star Marine Services, Inc*, 739 F. 2d 774, 777 (2d Cir. 1984), *cert. denied,* 470 U.S. 103 (1985) (finding a significant distinction between Coast Guard regulation of inspected and uninspected vessels, court references several unsuccessful Coast Guard attempts to obtain from Congress additional regulatory authority over uninspected vessels).

[16]29 C.F.R. § 1904.2(a) provides:

> Each employer shall, . . . (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The

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§ 673(a), which directs the Secretary to "maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics," and of section 8(c)(2), 29 U.S.C. § 657(c)(2), which directs the Secretary to issue regulations requiring employers to maintain accurate records of "work-related deaths, injuries and illnesses." 29 C.F.R. § 1904.1. The Secretary's efforts in this area, however, are circumscribed by the section 8(d), 29 U.S.C. § 657(d), mandate to minimize the recordkeeping burden on employers and avoid unnecessary duplication of efforts, as well as the section 24(a) exclusion from statistical obligations of "employments excluded by section 4 of th[e] Act."

We are guided by the statutory purpose of the OSHA recordkeeping requirement in determining whether it is preempted by the Coast Guard's reporting requirements. *See Tri-State Steel Constr. Co., Inc.,* 17 BNA OSHC 1769, 1771, 1996 CCH OSHD ¶ 31,145, p. 43,511 (No. 93-0512, 1996) (consolidated) (citing Supreme Court in *Chandris v. Latsis,* 115 S.Ct. 2172, 2190 (1995), Commission followed well-settled rule of statutory construction that "statutes are to be construed consistent with their substantial purpose").[17] The recordkeeping and statistical reports mandated by Congress were motivated by a recognition that "[f]ull and accurate information is a fundamental precondition for meaningful

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[16](...continued)

log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

[17]Commission precedent includes only a few cases presenting the question of section 4(b)(1) preemption of recordkeeping, and reflects a lack of consistency and authority on this issue. *See S. Pac. Transp. Co.*, 2 BNA OSHC 1313, 1974-75 CCH OSHD ¶ 19,054 (No. 1348, 1974), *aff'd on other grounds*, 539 F.2d 386 (5th Cir. 1975), *cert. denied*, 434 U.S. 874 (1977) (OSHA recordkeeping preempted by Department of Transportation ("DOT") accident reporting for railroad employers); *Puget Sound Tug & Barge*, 9 BNA OSHC at 1777-1778, 1981 CCH OSHD at p. 31,597 (no preemption of OSHA recordkeeping for seamen employed on a drill ship); *Consol. Rail Corp.*, 10 BNA OSHC 1706, 1708, 1982 CCH OSHD ¶ 26,082, pp. 32,827-28 (No. 80-3495, 1982) (overruling *S. Pac. Transp. Co.* and finding OSHA recordkeeping for railroad industry not preempted by DOT regulations).

administration of an occupational safety and health program."[18] The adoption of "adequate" statistical programs was described as "an essential first action under th[e] bill." *Id.* Explicitly included in this mandate were both injury *and* illness recordkeeping and reporting. *Id*. at 156-157. In contrast, the Coast Guard's reporting requirement pertains only to maritime casualties and accidents, excluding entirely any illness reporting.[19] Thus, the scope of information reported to the Coast Guard by uninspected vessel operators does not satisfy the statutory purpose of an entire category of information required under the OSHA statistical program. *See S. Pac. Transp.*, 2 BNA OSHC at 1318-1319, 1974 CCH OSHD at pp. 22,788-89 (dissenting opinion of Commissioner Cleary). Accordingly, we affirm the recordkeeping citation concerning occupational illnesses.

We also conclude, however, that injury recordkeeping is sufficiently accomplished by the Coast Guard's casualty and accident reporting requirements to warrant preemption of that portion of the OSHA recordkeeping obligation. Although the Coast Guard does not require vessel operators to maintain the type of log required by OSHA, the injury reports to the Coast Guard must be in writing and are presumably available to OSHA upon request. This conclusion follows long-established Commission precedent holding that "[s]ection 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner,"[20] and effectuates the section 8(d) prohibition on unnecessary duplication of recordkeeping. Accordingly, we vacate the recordkeeping citation as to injuries and reduce the penalty by $225, one-half the stipulated amount for the recordkeeping violation, and assess a total penalty in this case of $3,375.

C. Fifth Circuit Precedent

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[18]S. Rep. 91-1282, 91st Cong., 2d Sess. 16 (1970), Leg. Hist., *supra*, at 156.

[19]46 C.F.R. §§ 4.03 & 4.05-1.

[20]*Mushroom Transp. Co., Inc.*, 1 BNA OSHC 1390, 1392, 1971-73 CCH OSHD ¶ 16,880, p. 21,591 (No. 1588, 1973). *See also Alaska Trawl*, 15 BNA OSHC at 1704 n.9, 1991-93 CCH OSHD at p. 40,450 n.9.

"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *See, e.g., D. M. Sabia Co*., 17 BNA OSHC 1413, 1414, 1996 CCH OSHD ¶ 30,930, p. 43,057 (No. 93-3274, 1995), *vacated & remanded on other grounds*, 17 BNA OSHC 1680, 1996 CCH OSHD ¶ 31,117 (3rd Cir. 1996). Here, Tidewater's principal office is located in New Orleans and the violations occurred in Alaska. Accordingly, this case could be appealed by Tidewater to the District of Columbia Circuit, or by either party to the Fifth or Ninth Circuits.[21]

The Fifth Circuit has broadly stated that OSHA regulations do not apply to the working conditions of seamen on vessels in navigation. In *Clary v. Ocean Drilling and Exploration Co*., 609 F.2d 1120 (5th Cir. 1980), the court held that evidence of non-compliance with OSHA regulations could not be introduced to support a negligence action filed by a seaman under Jones Act[22] and maritime law because the OSH Act "does not apply to the working conditions of seamen on vessels operating on the high seas." *Id*. at 1121. Concluding that application of OSHA regulations was precluded by section 4(b)(1), the court relied on its view that the Coast Guard's vessel regulations were extensive and cited then applicable Commission precedent indicating that the working conditions of seamen were subject only to Coast Guard regulation. *Id*. The court found additional support for its decision in its conclusion that the proffered OSHA regulations pertained to construction work and shipbuilding, and could not apply to the special purpose drilling vessel there at issue. *Id*. In *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983), the court concluded that the Secretary lacked jurisdiction to bring an action under section 11(c) for the retaliatory discharge of a Coast Guard-licensed engineering officer employed in the defendant's deep sea fleet. First, the court cited *Clary* and the Commission's decision in *Dillingham* in support

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[21]*See* OSH Act § 11(a) and (b), 29 U.S.C. § 660 (a) and (b).

[22]46 U.S.C. § 688 (provides for damage action by seamen injured in the course of their employment).

of its conclusion that section 4(b)(1) creates an industry-wide exemption from OSHA regulation for the working conditions of seamen serving on vessels operating on navigable waters. *Id*. at 826. The court also found preemption warranted under section 4(b)(1) based on its view that the extensive regulations governing the rights and duties of seamen include "protections paralleling, in some degree, th[ose] accorded complaining landside workers by the provisions of Section 11(c) of OSHA." *Id.* at 828. Finally, the court considered the geographic limitation of OSHA coverage contained in section 4(a) and concluded that "[a] vessel on the high seas is not . . . a 'workplace [in a State].'"

Here, the OSHA citations indisputably concern the working conditions of seamen on vessels in navigation and arguably come within the Fifth Circuit's proscription against OSHA regulation of such workplaces. Nevertheless, with due respect to the court, we find that *Clary* and *Donovan v. Texaco* are sufficiently distinguishable from the case here presented to have left undecided the precise question of OSH Act applicability to uninspected vessels.[23]

In neither of the cases considered by the court did it differentiate between the extensive degree to which the Coast Guard regulates inspected vessels and the minimal degree to which it regulates those that are uninspected. The vessel classifications in those cases were not identified, although the court's consideration in *Donovan v. Texaco* of the MOU between the Coast Guard and OSHA suggests that the vessel there was inspected. 720 F.2d at 827 n.3. Moreover, the court relied in both cases on Commission precedent, subsequently overruled, suggesting that OSHA lacks jurisdiction over the working conditions of seamen. Most significantly in *Clary*, the court found that the cited OSHA construction and shipbuilding regulations did not, by their own terms, pertain to the special purpose drilling vessel on which the injured seaman worked. 609 F.2d at 1122. This fact alone

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[23]*See Southern S.S. v. NLRB*, 316 U.S. 31, 42 (1942) (question of applicability of mutiny statute to seamen aboard a docked vessel unresolved by previous cases finding that such statute applies to seamen on vessels located in a harbor, because in none of the prior cases was the vessel tied to a dock).

would have been sufficient to decide the case. *See Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1531 n.5 (11th Cir. 1986), *cert. denied,* 479 U.S. 883; *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d at 779. Similarly, the court's finding in *Donovan v. Texaco,* that the Coast Guard's regulations included protections "parallel" to those contained in section 11(c), would have been sufficient to dismiss the Secretary's case. *See Inspection of Norfolk*, 783 F.2d at 1531; *Donovan v. Red Star Marine*, 739 F.2d at 778-779.

We also note that other courts of appeal have distinguished *Clary* and *Donovan v. Texaco* from cases involving the application of OSHA regulations to uninspected vessels. In a case involving crane safety on an uninspected dredge operating in navigable waters off the coast of Florida, the Eleventh Circuit upheld the validity of an OSHA inspection warrant, concluding that "the Coast Guard's regulation of safety aboard uninspected vessels is so circumscribed that it does not preempt OSHA's jurisdiction over crane safety aboard uninspected vessels . . . ." *Inspection of Norfolk*, 783 F.2d at 1531-1532.[24] Similarly, on appeal of an unreviewed Administrative Law Judge's decision in which the judge found that OSHA lacked jurisdiction to cite an uninspected tugboat operator for non-compliance with an OSHA noise standard, the Second Circuit concluded that since the Coast Guard does not regulate noise hazards on uninspected vessels, OSHA may exercise its authority to do so. *Donovan v. Red Star Marine*, 739 F.2d at 780. The court particularly noted that "[i]n light of the extensive tradition of congressional concern for mariners, Congress could not have intended that employees aboard uninspected vessels be deprived of the protections accorded the vast majority of American workers by the OSH Act, and those protections offered employees aboard inspected and certificated vessels." *Id.*

Finally, in *Donovan v. Texaco,* the Fifth Circuit expressed its concern that OSH Act coverage of seamen's working conditions would create the anomaly of "steaming in and out

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[24]The Eleventh Circuit's decision is particularly noteworthy as it was bound to follow *Clary* under the Fifth Circuit Court of Appeals Reorganization Act of 1980. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

of OSHA coverage" because of the limits of OSHA's geographic reach under section 4(a). 720 F.2d at 829. To the extent the court was concerned about the possibility of vessels steaming between OSHA and Coast Guard coverage, and the lack of uniformity and predictability that would ensue, section 4(b)(1) precludes such a result. As with any stationary workplace concurrently regulated by OSHA and another federal agency, OSHA regulations apply only to those working conditions not regulated by the other agency. *See, e.g., Consol. Rail Corp.,* 16 BNA OSHC 1033, 1993 CCH OSHD ¶ 30,012 (No. 91-3133, 1993) (consolidated). Thus, when a vessel departs U.S. territorial waters, it does not become subject to Coast Guard regulation of conditions that were covered by OSHA within the three-mile limit, because OSHA regulations apply only to working conditions not regulated by the Coast Guard.

Nonetheless, it is true that a vessel might steam in and out of OSHA coverage as it enters and departs U.S. territorial waters. Some vessel owners would be required to comply with OSHA regulations while underway within territorial waters but may disregard them upon entering the high seas beyond the three-mile limit. We emphasize, however, both the limit of this anomaly and the logic of tolerating it. Inspected vessels subject to the MOU between OSHA and the Coast Guard are essentially regulated only by the Coast Guard and, consequently, would not steam in and out of OSHA coverage.[25] As to the uninspected fleet, OSHA provides the *only* significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

Moreover, despite the obvious appeal of a universal system of vessel regulation, some lack of uniformity has been tolerated even within U.S. territorial waters. Courts have consistently upheld the exercise of a locality's police power to regulate vessels located only

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[25]As mentioned in note 4, *supra*, the MOU excludes the prohibition on discrimination and leaves unresolved any recordkeeping issues. OSHA's November 8, 1996 instruction indicates that OSHA will enforce recordkeeping obligations on inspected vessels.

temporarily within its territorial waters where those regulations do not conflict with federal law. *See e.g., Askew v. American Waterways Operators, Inc.,* 411 U.S. 325 (upholding Florida's police power over sea-to-shore pollution, and finding Florida Oil Spill Prevention and Pollution Control Act which requires, inter alia, that vessels maintain containment gear and other equipment for the prevention of oil spills in the State's territorial waters, not *per se* preempted by federal regulation); *Huron Portland Cement Co. v. Detroit,* 362 U.S. at 442 (vessels used to transport cement from Michigan port to ports located in various other states required to comply with Detroit's Smoke Abatement Code which required structural alterations to vessels); *Kelly v. Washington*, 302 U.S. 1 (1937) (upholding those provisions of State vessel inspection code not in conflict with federal requirements); *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483 (9th Cir. 1984), *cert. denied* 471 U.S. 1140 (1985) (upholding Alaska statute governing discharge of oil tanker ballast in territorial waters).[26] In light of this authority, we find that OSHA jurisdiction over vessels located only temporarily within U.S. territorial waters is consistent with a locality's ability to exercise its police power over vessels plying the waters appurtenant to its shore.

We do not suggest, however, that OSH Act applicability to these vessels is necessarily the most desirable approach to achieving workplace safety. We realize that OSHA does not regularly inspect seagoing vessels for compliance with the Act, nor has it indicated any interest in dedicating its limited resources to promulgating regulations specifically applicable to such workplaces. We are also particularly mindful of the complexities and anomalies that may inure to illness recordkeeping on a mobile workplace that may enter and exit the

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[26]The Supreme Court's admonitions concerning uniformity and predictability in *OCAW v. Mobil,* and *Chandris v. Latsis,* are inapposite, as they were derived from the purposes and policies of the statutes being enforced, and involved conflicts of laws issues. Here, there is no conflict of laws because the OSH Act does not apply to any condition regulated by the Coast Guard, and because the OSH Act is a federal law which applies uniformly to vessels located within all U.S. territorial waters. Moreover, OSH Act applicability to these vessels furthers the statutory purpose of providing safe and healthful workplaces to *all* men and women within the Nation.

geographic reach of OSHA's jurisdiction in the course of a single illness, and recognize the inefficiency inherent in dividing the recordkeeping obligation between OSHA and the Coast Guard. It may be that Coast Guard regulation of all health and safety aboard vessels would best serve the public interest. In our view, however, that is not what the present state of the law and regulation provides. Since we find that Congress has accorded to OSHA regulatory authority over vessels underway in U.S. territorial waters, OSHA may exercise that authority unless and until it is rescinded by Congress or is preempted by applicable Coast Guard regulations.

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Stuart E. Weisberg
Chairman

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Velma Montoya
Commissioner

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Daniel Guttman
Commissioner

Dated: _____