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31 March 2015

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Public Comment on - [Federal Register Volume 80, Number 33 (Thursday, February 19, 2015)] [Proposed Rules] [Pages 9151-9187]

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Commercial Diving Operations Notice of Proposed Rulemaking issued by the US Coast Guard

Commercial diving is a very dangerous occupation that is needlessly taking the lives of hard working Americans trying to make a living for themselves and their families. The hazards they face are numerous dealing with such activity as strenuous demolition or repair work using cutting and welding tools and heavy equipment. Often the work is performed in low visibility and low water temperatures (Occupational Safety & Health Administration [OSHA], n.d.).

In the notice of proposed rulemaking (NPRM), the Coast Guard states:

> We are aware of continuing issues such as proper dive manning, drill, medical and audit practices/requirements among others that have continued to be evident in the industry. Consequently, in this NPRM, we propose a complete revision of the commercial diving operation regulations in 46 CFR part 197, subpart B (Federal Register [FR], 2/19/2015, section IV, par. 3).

Despite the Coast Guard's awareness of "continuing issues" and a pattern of death and injuries of commercial divers, that would have possibly seen a quicker response to regulation revisions from other federal agencies, there have been no revisions since the 1978 enactment of the code.

Using OSHA statistics, the Centers for Disease Control and Prevention (CDC) found that commercial divers have a death rate that is 40 times the death rate for all workers (Centers for Disease Control and Prevention [CDC], 6/12/1998). The dangers to commercial divers are also a problem that the Coast Guard has been well aware of for many years.

The process for this NPRM actually began in 1994 at the request of the Association of Diving Contractors International (ADC) with an advanced notice of proposed rulemaking (ANPRM) being issued in 1998 (FR, 2/19/2015, section IV, par. 2). At that time, the Coast

Guard noted that the commercial diving regulations were "already 20 years old and did not reflect the latest safety and technology standards and industry best practices" (FR, 2/19/2015, section IV, par. 2). Although the public can understand that the Administrative Procedures Act forces agencies into a time consuming process, there is a strong probability that lives would have been saved had it not been for the approximately twenty-year delay after the process was started to when this proposed rule might be implemented.

In 2009, the Coast Guard issued another ANPRM that "discussed in detail the public comments we received for the 1998 ANPRM…" (FR, 2/19/2015, section IV, par. 2). The Coast Guard's comments about the 2009 ANPRM were, "Our position in the 2009 ANPRM was to encourage continued industry interest in this rulemaking and to solicit a new round of public comments" (FR, 2/19/2015, section IV, par. 2).

After nearly 40 years of regulating commercial diving activities on the Outer Continental Shelf (OCS) with commercial diving regulations that had been in need of revision for many decades and with death rates at 40 times the rate of all workers, the Coast Guard has belatedly taken the initiative to issue this NPRM.

The question that the public needs to ask is whether it will take another 40 years for the Coast Guard to make a second revision if the proposed rules are enacted and found to be in need of further revision due to the amount of commercial divers potentially being killed.

Concerning the process of rulemaking, the Coast Guard is faced with the same difficulties as other federal agencies. In a recent statement by the Chairman of the Chemical Safety Board (CSB):

> OSHA recognizes today that their systems for making regulations are broken and doesn't work," he says. "You cannot pretend to apply 40 year old regulations to modern industry. Many of the regulations on the books are obsolete. And they

> don't have any way to improve them. There has to be different approaches in the short term to deal with the paralysis at OSHA and EPA (Corporate Crime Reporter, 3/19/2015).

This paralysis observed by the CSB Chairman, Rafael Moure-Eraso, could equally apply to the Coast Guard's four decades old regulations of the commercial diving industry that it is now trying to revise.

Three of the areas of the Coast Guard's proposed revisions include:

- Proper Manning of Dive Operations
- Raising standards to comply with the IMO Code
- The use of third party organization auditors

1. Proper Manning of Dive Operations.

> In some diving accidents, the dive team has been so small that it was unable to respond to the emergency or retrieve a disabled diver in time to avoid a serious injury or death. Often, a single dive team member holds multiple duties (for example serving as both the dive supervisor and as a standby diver). This NPRM proposes new minimum standards for the size and composition of dive teams. We also propose prohibiting standby divers from having multiple duties that could interfere with their ability to focus on their primary role or respond adequately to an emergency (FR, 2/19/2015, section VI, par. 3).

<u>Comments on Proper Manning of Dive Operations:</u>

Because time is of the essences to extinguish a fire when it first begins, it would be very dangerous to have a fire-watch over a welding operation to have the additional responsibility of being a welder's assistant. In a diving emergency, time is also of the essence and standby divers should have no other responsibilities that could delay a quick response. I am in strong support of

this proposal because it is a serious safety issue when standby divers, tasked with the responsibility of rescue, are distracted with other responsibilities.

The language of the proposed rule is more stringent than the language of the *International consensus standards for commercial diving* which states:

> A standby diver will be continuously prepared to enter the water when directed by the diving supervisor" (Association of Diving Contractors International [ADC], 2011, p.139).

The ADC language gives too much room for additional responsibility to be added to the standby diver that could delay a response with companies arguing that, regardless of the additional duties, the diver was continuously prepared to make the dive.

In the Coast Guard's commercial diving accident investigation involving a fatality onboard a mobile offshore drilling rig on 4 March 1996, it found that:

> A contributing cause of the casualty was lack of a standby diver. A ready standby diver likely would have been able to save Pilkington's life. Lack of a ready standby diver with his own gear and air supply created an almost 30 minute delay in the rescue attempt (United States Coast Guard [USCG], 2001, p. 50).

A recommendation resulting from the investigation at that time was:

> Commandant should require a standby diver dressed out and with a separate air supply, ready to quickly deploy for all commercial diving operations regardless of depth" (USCG, 2001, p. 2).

2. Raising standards to comply with the IMO Code.

We propose requiring U.S. inspected vessels conducting commercial diving operations in any waters and foreign vessels conducting diving operations on the U.S. Outer Continental Shelf to meet the IMO's International Code of Safety for Diving Systems. This will help ensure that diving systems are designed, constructed, and surveyed in

> accordance with an accepted international standard. A diving system safety certificate would provide evidence of compliance. This certificate would be issued to a U.S. vessel by a recognized classification society; a foreign vessel's certificate would be issued by its flag state or their delegated authority (FR, 2/19/2015, section VI, par. 4).

Comments on Raising Standards to Comply with IMO Code

Commercial diving often involves dive teams on international assignments and it would be good for the occupation to learn and understand one international set of standards instead of having to learn and understand a set of standards for each of the countries and jurisdictions where they may be called to work. However, adopting the IMO code will not fulfill the Coast Guards objective as described under the Basis and Purpose section of the NPRM which states:

> The purpose of the NPRM is to propose revisions and updates to our existing commercial diving regulations, to improve safety, to reflect current industry best practices…" (FR, 2/19/2015, section III, par. 2).

The IMO's International Code of Safety for Diving Systems was adopted in 1983 and has had no revisions since that time. As described in the Preamble, it was designed to be the "minimum" standards that companies should comply with and fails to establish the need for companies to follow recognized best practices by the industry. On the other hand, there are forty-one countries that have pledged their compliance with the Association of Diving Contractors International's (ADC) *International consensus standards for commercial diving and underwater operations.* From the outset it states:

> The purpose of these consensus standards is to provide best industry practices in a clear and complete format in order to contribute to the safety and well-being of all those

> working in the commercial diving industry, especially commercial divers, tenders, deck support personnel and supervisors" (ADC, 2011, p. 20).

It will be confusing for companies to try to comply with international consensus standards (as it may be legally obligated to do), the IMO's *International code of safety for diving systems* (which is more than three decades old), and the applicable *Code of federal regulations* (currently four decades old).

Because of the decades of long delay that it could take for the Coast Guard or the IMO to revise their requirements to match existing best practices, the requirements to follow industry best practices should be codified into the CFR. For this reason, the Coast Guard should drop the proposal for adopting the IMO's *International Code of Safety for Diving Systems* and should establish a rule requiring companies to follow industry best practices as established by the ADC or other professional commercial diving organization.

3. The use of third party organization auditors.

> We propose using Third-party organizations (TPO) to audit Commercial Diving Operators (CDO) and determine, on our behalf, whether or not those CDOs are in compliance with our regulations. Our proposed use of TPOs to perform delegated regulatory oversight functions is similar to our longstanding use of recognized classification societies to perform delegated Coast Guard vessel inspection and certification functions, as described in 46 CFR part 8 subpart B. These arrangements enable the Coast Guard to make use of a commercial organization's trained personnel and resources. However, the Coast Guard specifically seeks public input on the following question: What merits and drawbacks can be associated with the proposed use of third

parties acting on behalf of the Coast Guard to conduct audits of commercial diving operations? (FR, 2/19/2015, section VI, par. 5).

Comments on the use of TPOs to audit CPOs.

In addressing this proposed rule, it is important to understand why this is being proposed in the first place. It is because the Coast Guard does not have the manpower, resources, and the expertise to conduct its own audits to determine whether or not CDOs are in compliance with Coast Guard regulations. To correct this weakness, the answer is not to farm out the Coast Guard's mission to TPOs but to prioritize resources so that it can accomplish its responsibilities.

The IRS would never consider solely using TPOs to audit banking and financial institution and having them report to the IRS as to whether or not they are in compliance. The IRS has professionally trained and resourced experts that are fully capable of conducting the agency's own audits to determine compliance. Likewise, the Coast Guard should take ownership of its mission instead of trying to contract it away.

The fallacy with the Coast Guard's consideration is that the TPOs would not be working for the Coast Guard as the proposal suggests, but instead they would be working for the operator who is paying the money for the auditing service. Furthermore, companies normally do not like to bite the hand that feeds them so we cannot be sure of the quality of the audits unless the Coast Guard commits the resources to staff, train and empower its own personnel to conduct the audits. The same holds true for the classification societies that are currently conducting questionable audits that the Coast Guard is blissfully accepting in lieu of conducting its own audits.

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