



U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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May 20, 2011

MEMORANDUM

TO: Members, Subcommittee on Coast Guard and Maritime Transportation
FROM: Staff, Subcommittee on Coast Guard and Maritime Transportation
RE: Hearing on Creating U.S. Maritime Industry Jobs by Reducing Regulatory Burdens

PURPOSE

On Tuesday, May 24, 2011, at 9:30 a.m., in room 2167 of the Rayburn House Office Building, the Subcommittee on Coast Guard and Maritime Transportation will meet to review the status of the Coast Guard's rulemaking program. The Subcommittee will examine backlogs in the Service's rulemaking program, as well as pending and current regulations which may be unnecessary or overly burdensome.

BACKGROUND

The Rulemaking Process

The Federal Government creates or modifies rules and regulations through a rulemaking process guided by the Administrative Procedures Act (APA), codified in title 5 of the United States Code. The process involves notice in the *Federal Register* and the opportunity for public comment in the docket maintained by the regulating agency. This is a lengthy process and often requires several layers of bureaucratic review prior to the rule becoming final.

In addition to complying with the APA, the Coast Guard must also promulgate regulations and rules in compliance with other statutory mandates and authorities, such as Executive Order (EO) 12866, and Service rules and policies.

The Coast Guard's Regulatory Development Program begins with the identification of a possible need for new or changed regulations and culminating in the publication of final, enforceable regulations in the *Federal Register*.

After identifying the need for regulatory action, usually as the result of a public petition, internal review, casualty investigation, or an act of Congress, the Coast Guard forms a rulemaking team. The rulemaking team creates a detailed and comprehensive work plan, which summarizes and defines the rulemaking project and ensures the availability of proper resources. The rulemaking team typically drafts a Notice of Proposed Rulemaking (NPRM) for publication in the *Federal Register*. The NPRM must contain: (1) details on how the public may submit comments; (2) the basis of the proposed rule; (3) the terms or substance of the proposed rule; (4) an economic impact analysis; and (5) a response to certain comments previously received by the Coast Guard related to the rulemaking (certain circumstances warrant the use of other proposed rule documents such as an Advanced Notice of Proposed Rulemaking or Supplemental Notice of Proposed Rulemaking). Prior to publication in the *Federal Register*, the NPRM must be cleared through several internal Coast Guard offices, and externally through the Department of Homeland Security and the Office of Management and Budget.

The Coast Guard typically accepts public comments in response to an NPRM for 90 days. The rulemaking team reviews the public comments and develops responses in accordance with APA requirements. The rulemaking team posts all *Federal Register* documents and public comments (provided they do not contain classified or other restricted information) to a public docket accessible via the www.Regulations.gov website.

After considering public comments, the rulemaking team typically drafts a final rule for publication in the *Federal Register*. The final rule must contain: (1) the regulatory text; (2) a concise general statement of the rule's basis and purpose; and (3) a discussion of the public comments and Coast Guard responses (certain circumstances warrant the use of other final rule documents such as an Interim Final Rule, Direct Final Rule or Temporary Final Rule, or may warrant termination of the rulemaking project, for which withdrawal procedures exist). Prior to publication in the *Federal Register*, the final rule must be cleared in a manner similar to the clearance process described above.

The final rule includes an effective date (typically 90 days after publication of the final rule in the *Federal Register*). The regulatory process is completed as of the effective date, however, once the rulemaking is effective, it is open to litigation by those with standing.

Major Rulemaking

Major rulemaking is defined by the Congressional Review Act (5 U.S.C. § 804) as one that is likely to have an annual effect on the economy of \$100 million or more; or result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or adversely affect in a significant way competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Under the Congressional Review Act, an agency must submit its major rulemakings to each house of Congress. Within 60 legislative days after Congress receives an agency's rule, a Member of Congress can introduce a resolution of disapproval that, if passed and enacted into law, can nullify the rule, even if it has already gone into effect. Congressional disapproval under the CRA also prevents the agency from promulgating a "substantially similar" rule without subsequent statutory authorization.

Currently, the Coast Guard has one NPRM pending that meets the definition of "major rule": Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (RIN 1625-AA32) (see below for discussion).

Status of Coast Guard Rulemaking

Rulemaking Completed in Fiscal Year 2010:

The Coast Guard achieves progress on a rulemaking by meeting internal milestones (*e.g.*, completing a draft rulemaking document, completing review, obtaining clearance) or by meeting a public milestone (*e.g.*, forwarding a rulemaking document to the Office of Management and Budget (OMB)) for review or publication of a rulemaking document in the Federal Register).

In fiscal year 2010, the Coast Guard published 26 rulemaking documents achieving public milestones for 18 rulemaking projects: 14 final rules (5 were technical and conforming amendments); 1 interim rule; and 11 proposed rulemakings (9 of which were closed out with final rules). At the end of 2010, over 60 rulemakings remained to be closed out on the Coast Guard docket.

Rulemaking Planned for 2011:

To date, the Coast Guard has published 9 rulemaking documents: 6 final rules or direct final rules, 2 interim rules, and 1 proposed rulemaking in fiscal year 2011. The

Coast Guard has set the following rulemaking objectives for the remainder of the fiscal year:

- Move forward approximately 50 top rulemaking projects, as well as other lower priority rulemaking projects.
- Achieve rulemaking deadlines required by the Coast Guard Authorization Act of 2010 (CGAA) (P.L. 111-281). These include:
 - o October 15, 2011, for Inspection of Towing Vessels (rulemaking first required under the Coast Guard and Maritime Transportation Act of 2004); Oil Transfers from Vessels; and Higher Volume Port Area Regulatory Definition Change.
 - o January 1, 2012, for Offshore Supply Vessel regulations;
 - o April 15, 2012, for Marine Transportation-Related Facility Response Plans for Hazardous Substances; Vessel Response Plans for Hazardous Substances; and Nontank Vessel Response Plans (rulemakings originally required under the Oil Pollution Act of 1990).

Regulatory Program Backlog

Current Backlog:

In fiscal years 2008 and 2009, the Service received funding to substantially increase the number of personnel assigned to its regulatory program. The addition of these personnel enabled the Coast Guard to reduce its regulatory backlog by 35% as of the end of calendar year 2010. However, the Coast Guard still has a backlog of over 60 rulemaking projects, ranging in age from 1 to 21 years old. For instance, the Oil Pollution Act of 1990 required the filing of oil spill response plans for nontank vessels. The Service finally issued an NPRM to implement this 21 year old statutory requirement on August 31, 2009. A final rule is still under development.

In the current fiscal year, the Coast Guard expects to add approximately 30 new rulemakings projects resulting from enactment of the CGAA and the Cruise Vessel Security and Safety Act of 2010 (P.L. 111-207). In addition, the Service expects to add several new projects resulting from the BP Deepwater Horizon oil spill. As a result, it is unlikely that the Coast Guard will lower its backlog below 60 projects and the backlog may actually increase.

Administration of the Rulemaking Process:

The Coast Guard continues to lack a knowledge management system to organize, catalog, and track rulemakings as they move through the process. Such a system would provide the Coast Guard with the capacity to effectively and efficiently plan and track

rulemaking progress, effort, and communications among stakeholders. The Service had planned to implement a knowledge management system in fiscal year 2010, but failed to do so because it could not determine the exact system specifications it required and thus could not determine if and when available systems would meet this requirement.

Significant Final, Proposed, and Future Rulemakings

Recent Significant Final Rulemakings:

Passenger Weight and Inspected Vessel Stability Requirements (RIN 1625-AB20) - The Coast Guard amended its regulations governing the maximum weight and number of passengers that may safely be permitted on board a vessel. The Coast Guard determined the maximum number of persons permitted on a vessel by several factors, including an Assumed Average Weight per Person (AAWPP). As part of this rule, the Coast Guard increased the AAWPP to 185 lb because the average American now weighs significantly more than the assumed weight per person utilized in the previous regulations (160 lbs). This new regulation has the effect of reducing the number of individuals legally permitted to board certain passenger vessels. Coast Guard estimates that the ten-year cost of this rulemaking to be between \$24.6 million and \$28.7 million. The Coast Guard did not estimate any quantifiable benefits for this rule, but noted the rule would result in “increased safety and reduced risk of casualties”. The final rule was published on December 14, 2010.

Significant Proposed Rulemakings:

Marine Vapor Control Systems (RIN 1999-5150) - The Coast Guard is in the process of revising existing safety regulations for facility and vessel vapor control systems (VCSs). The proposed changes would make VCS requirements more compatible with new Federal and State environmental requirements, reflect industry advancements in VCS technology, and codify the standards for the design and operation of a VCS at tank barge cleaning facilities. These changes are intended to increase the safety of operations by regulating the design, installation, and use of VCSs, but would not require anyone to install or use VCSs. The Coast Guard estimates that this proposed rule would affect 234 facilities with VCSs, 25 certifying entities, 15 tank barge cleaning facilities, 216 U.S.-flagged tank barge owners, and owners of 338 foreign-flagged tank barges. Over a 10-year period of analysis, the Coast Guard estimates the total cost of the rulemaking to be between \$8.8 million and \$10.3 million, while the monetized benefits would total approximately \$2.7 million. The NPRM was published on October 21, 2010.

Vessel Requirements for Notice of Arrival and Departure, and Automatic Identification System (RIN 1625-AA99) - The Coast Guard is proposing to expand the applicability of notice of arrival and departure (NOAD) and automatic identification system (AIS) requirements to more commercial vessels. This proposed rule would

expand the applicability of notice of arrival (NOA) requirements to additional vessels, and establish a separate requirement for certain vessels to submit notices of departure (NOD). In addition, this proposed rule would expand the requirement for AIS carriage smaller commercial vessels, as well as to regulated vessel transiting all U.S. navigable waters. The Coast Guard estimates that the 10-year total cost of the proposed rule to U.S. vessel and foreign-flagged vessel owners is between \$181 million and \$236 million, while the benefits in the form of reduced property damage could also total \$236 million. The NPRM was issued on December 16, 2008.

Nontank Vessel Response Plans and Other Vessel Response Plan Requirement (RIN 1625-AA32) – As required by the Oil Pollution Act of 1990, the Coast Guard issued a NPRM to require the owners and operators of nontank vessels greater than 400 gross tons which carry oil for fuel to prepare and submit oil spill response plans. The Coast Guard estimates that the 10-year total cost of the proposed rule to U.S. and foreign-flagged vessel owners is between \$263.0 million and \$318.4 million. The Coast Guard did not provide an estimate on monetized benefits, but did estimate the rules could prevent the discharge of as much as 2,446 barrels of oil over a ten year period. The NPRM was issued on August 31, 2009.

Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (RIN 1625-AA32) - The Coast Guard proposes to amend its regulations on ballast water management by establishing standards for the allowable concentration of living organisms in ships' ballast water discharged in U.S. waters. The Service also proposes to establish an approval process for the types, installation and maintenance of ballast water management equipment. These new regulations are intended to control the introduction and spread of non-indigenous species from ships discharging ballast water in U.S. waters. The Coast Guard estimates the 10-year total cost of the proposed rule on U.S. vessel owners could exceed \$1.1 billion. The Service estimates benefits could total between \$43 million and \$3.8 billion depending on the effectiveness of the ballast water management systems in stopping the spread of invasive species. The NPRM was issued August 28, 2009.

Significant Future Rulemakings:

Towing Vessel Safety - The Coast Guard Authorization Act of 2004 required the Coast Guard to develop regulations to govern the safety and inspection of towing vessels. A draft rule was developed in cooperation with the Towing Vessel Safety Advisory Committee and has received strong support from industry. The CGAA established a January 15, 2011 deadline for the NPRM and an October 15, 2011 deadline for the issuance of a final rule. The NPRM has not yet been issued.

TWIC Relief for Individuals Not Needing Unescorted Access to Secure Areas - Section 809 of the CGAA removed the requirement for individuals to purchase and carry a Transportation Worker Identification Credential (TWIC) if they do not need unescorted

access to secure areas of vessels or facilities. The Coast Guard and TSA are developing a regulation to implement this section. In the interim, the Service is still requiring these individuals to obtain a TWIC.

Fishing Vessel Safety - Section 604 of the CGAA requires over 30,000 fishing vessels to undergo dockside examinations every two years to ensure compliance with certain vessel safety standards. Vessel operators are also required to keep records of equipment maintenance, and safety drills for Coast Guard examination. Vessels that do not receive their first examination prior to October 2012 will not be allowed to sail until they do so. The Coast Guard has indicated that its current workforce of approximately 60 qualified full or part time inspectors will not be sufficient to complete examinations on all vessels by the October 2012 deadline.

Section 604 also requires the Coast Guard to issue regulations to establish a safety training program to certify fishing vessel masters and maintain such certification.

Cruise Vessel Safety and Security – Section 3 of the Cruise Vessel Security and Safety Act of 2010 requires the Coast Guard to issue regulations governing the installation and maintenance of certain safety and security equipment aboard cruise vessels operating in U.S. waters, as well as procedures for the vessel operator to follow in the event of a sexual assault or other crime.

Foreign Rebuild Determination – In 2010 a coalition of U.S. flagged vessel operators, maritime unions and domestic shipbuilders petitioned the Coast Guard to initiate a rulemaking to clarify the extent to which a vessel can be rebuilt in a foreign shipyard and still maintain its eligibility under the Jones Act (the Jones Act requires vessels carrying merchandise or passengers between two points in the United States to be U.S. built, U.S. owned, U.S. flagged, and U.S. crewed). The Coast Guard issued a request for comments to determine if a rulemaking should be initiated.

WITNESSES

**Rear Admiral Kevin Cook
Director of Prevention Policy
United States Coast Guard**

**Mr. Calvin Lederer
Deputy Judge Advocate General
United States Coast Guard**