



U.S. House of Representatives
Committee on Transportation and Infrastructure

Washington, DC 20515

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April 20, 2012

MEMORANDUM

TO: Members, Subcommittee on Coast Guard and Maritime Transportation

FROM: Staff, Subcommittee on Coast Guard and Maritime Transportation

RE: Hearing on “Recent Regulation of the Maritime Industry: Ensuring U.S. Job Growth While Improving Environmental and Worker Safety”

PURPOSE

On Thursday, April 26, 2012, at 9:00 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 regulations by the United States Coast Guard and the Environmental Protection Agency (EPA) and how such regulations impact the maritime industry.

BACKGROUND

The Rulemaking Process

The Federal Government creates or modifies rules and regulations through a rulemaking process guided by the Administrative Procedure 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 a 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 the Service’s own rules and policies.

The Coast Guard's Regulatory Development Program begins with the identification of a possible need for new or changed regulations and culminates 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, change in an international treaty, 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 (OMB).

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 which is 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

A major rulemaking is defined by the Congressional Review Act (CRA) (5 U.S.C. § 804) as a rule 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 rulemaking 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 2011:

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

In fiscal year 2011, the Coast Guard advanced a cumulative total of 85 ongoing, new, and completed rulemaking projects. In doing so, the Service published 28 rulemaking documents. Of these, 14 were either final rules, interim final rules, or direct final rules. Three rulemakings were technical and conforming amendments. Another 11 published rulemaking documents were notices of intent, advance notices of proposed rulemaking, supplemental notices of proposed rulemaking, or notices of proposed rulemaking. At the end of 2011, 68 rulemakings remained to be closed out on the Coast Guard docket (see attached).

Rulemaking Planned for Fiscal Year 2012:

The Coast Guard has published eight rulemaking documents in fiscal year 2012: one final rule, one direct final rule, two interim final rules, one notice of proposed rulemaking, one supplemental notice of proposed rulemaking, and two notices of intent. 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.
- Publish a final rule on the Inspection of Towing Vessels. The Coast Guard Authorization Act of 2010 (CGAA) (P.L. 111-281) set a deadline for issuing a final rule by October 14, 2011.
- Achieve the CGAA rulemaking deadline of April 15, 2012, for:
 - Marine Transportation-Related Facility Response Plans for Hazardous Substances;
 - Tank Vessel Response Plans for Hazardous Substances;

- Nontank Vessel Response Plans.
- Publish an interim rule to implement CGAA section 617 for Offshore Supply Vessels (deadline October 15, 2011); a notice of proposed rulemaking for section 702 on Oil Transfers from Vessels (deadline January 12, 2012); and a final rule for section 710 on the Higher Volume Port Area in the Strait of Juan de Fuca (October 15, 2011 deadline to initiate a rulemaking was met).

Current Regulatory Program Backlog

In fiscal years 2008 and 2009, the Service received funding from Congress 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 55 percent as of the end of calendar year 2011. However, the Coast Guard still has a backlog of over 60 rulemaking projects. These rulemakings range in age from 1 to 21 years old with an average age of four years. The oldest pending rulemaking stems from a provision in the Oil Pollution Act of 1990 which requires nontank vessel owners to file oil spill response plans. 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.

Significant Coast Guard Final, Proposed, and Future Rulemakings

Recent Significant Final Rulemakings:

Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters (RIN 1625-AA32) - On March 23, 2012, The Coast Guard published its final rule for Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters. 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 final rule would require the installation of ballast water treatment technologies on ocean going vessels. The treatment technology must be certified by the Coast Guard to ensure it would prohibit the release of ballast water containing more than 10 organisms that are greater than 10 micrometers in size per cubic meter of ballast water or certain concentrations of smaller size classes of organisms. This is the same standard proposed by the International Maritime Organization (IMO). Under the final rule, installation of ballast water treatment technology would begin with new vessels constructed after December 1, 2013, and would be phased in for existing vessels over the next five years. The Coast Guard estimates the 10-year total cost of the proposed rule on U.S. vessel owners could exceed \$645 million. The Service estimates benefits could total between \$989 million and \$1.6 billion depending on the effectiveness of the ballast water treatment technologies in stopping the spread of invasive species.

Significant Proposed Rulemakings:

Towing Vessel Safety (RIN 1625-AB06) – The Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241), required the Coast Guard to publish a rulemaking providing for the inspection of towing vessels. The CGAA established a January 15, 2011 deadline for the NPRM

and an October 15, 2011 deadline for the issuance of a final rule. On August 11, 2011, the Coast Guard published the notice of proposed rulemaking for Inspection of Towing Vessels (76 FR 49976). The comment period closed on December 9, 2011. The Coast Guard is currently analyzing the comments and working to finalize this rulemaking. Over a 10-year period of analysis, the Coast Guard estimates the total cost of the rulemaking on industry could total \$130 million, while the monetized benefits could reach \$200 million.

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 on industry 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 to smaller commercial vessels, as well as to other vessels transiting U.S. waters including commercial fishing vessels. 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. The final rule is in agency review.

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 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. The final rule is in agency review.

Significant Future Rulemakings:

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. As of April 1, 2012, 11 percent of fishing vessels were in compliance with this requirement.

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.

Finally, section 604 requires new commercial fishing vessels built after August 1, 2012 to be certified by the American Bureau of Shipping or other Coast Guard recognized classification societies to ensure the vessel is built to the latest marine construction standards. The Coast Guard has yet to issue a definition of “built” and only DNV has issued construction standards for fishing vessels.

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. The deadline for vessels to come into compliance with the new law was January 27, 2012. The Coast Guard plans to meet the statutory mandates of the Cruise Vessel Security and Safety Act of 2010 and has highlighted these rulemakings as a milestone for FY 2012.

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. On March 20, 2012, the Coast Guard denied the petition for rulemaking.

Significant EPA Regulations Affecting the Maritime Industry

Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels – Pursuant to a federal court order, in December 2008, the EPA promulgated final regulations establishing a Vessel General Permit (VGP) under the Clean Water Act’s National Pollution Discharge Elimination System program to govern ballast water and other discharges incidental to the normal operation of vessels. The VGP requires vessel operators to be in compliance with best management practices covering 26 types of discharges incidental to normal vessel operations, including deck runoff, air conditioner condensate, bilge water, graywater, and cooling system discharges. With respect to ballast water, the VGP incorporates the Coast Guard’s previous regulation requiring mandatory ballast water exchange. The VGP also

incorporates local water quality regulatory requirements added by 26 states, two Indian tribes, and one territory that vessel operators must comply with while transiting those jurisdictions. As a result, to transit U.S. waters, vessel operators must ensure they are in compliance with Coast Guard and EPA regulations, as well as over two dozen state, territory, or tribal regulations governing 26 discharges. Approximately 45,000 vessels currently operate under the VGP.

On November 30, 2011, the EPA released a draft VGP to replace the current VGP which expires on December 18, 2013. The draft VGP would require the installation of ballast water treatment technology on certain vessels operating in U.S. waters carrying more than 8 cubic meters of ballast water. Similar to the Coast Guard ballast water rule, treatment technologies under the VGP would need to be certified by the Coast Guard to prohibit the release of ballast water containing more than 10 organisms that are greater than 10 micrometers in size per cubic meter of ballast water or certain concentrations of smaller size classes of organisms (the same as the IMO standard). In addition to regulating 26 other incidental discharges, the draft VGP also proposes to regulate effluent, including ice slurry, from fish holds on commercial fishing vessels. The EPA estimates that over 70,000 vessels will need to comply with the draft VGP at a cost of up to \$20 million annually. This estimate does not include the cost to purchase and install ballast water treatment technologies on board a vessel or the cost of additional regulatory requirements which may be added by the states. The EPA anticipates there will be monetized benefits as a result of the implementation of the draft VGP, but it could not calculate them.

On November 30, 2011, the EPA also released a draft Small Vessel VGP (sVGP) to cover commercial vessels less than 79 feet in length which are currently subject to a moratorium from compliance with the VGP. The moratorium passed by Congress in July 2010 expires on December 18, 2013 (P.L. 111-215). The draft sVGP requires these vessels to comply with best management practices for the same 27 incidental discharges as the draft VGP. The EPA estimates that up to 138,000 vessels will need to comply with the draft VGP at a cost of up to \$12 million annually (this estimate does not include the cost of additional regulatory requirements which may be added by the states). The EPA anticipates there will be monetized benefits as a result of the implementation of the draft sVGP, but it did not estimate them.

North American Emission Control Area – On March 26, 2010, at the request of the EPA and the Coast Guard, the U.S. and Canadian delegations to the IMO convinced the organization to amend the International Convention for the Prevention of Pollution from Ships (MARPOL) to designate specific portions of U.S. and Canadian waters as an Emission Control Area (ECA) to address exhaust emissions from vessels. Beginning on August 1, 2012, vessels operating in the North American ECA will be required to burn fuel with a lower sulfur content (1 percent) or install scrubbers in their exhaust systems to reduce emissions of sulfur oxides and nitrogen oxides. Beginning in 2015, the sulfur fuel standard will be further reduced to 0.1 percent sulfur. The EPA estimates it will cost industry approximately \$3.2 billion by 2020 to comply with the North American ECA. The EPA estimates the monetized benefits to be between \$47 and \$110 billion by 2020.

Significant Transportation Security Regulations Affecting the Maritime Industry

Transportation Worker Identification Credential (TWIC) – Section 102 of the Maritime Transportation Security Act of 2002 (P.L. 107-295) required the Secretary of Homeland Security to prescribe regulations requiring individuals that required unescorted access to secure areas of certain vessels and maritime facilities to be issued a biometric identification, now known as a TWIC. The Security and Accountability for Every (SAFE) Port Act of 2006 (P.L. 109-347) established a deadline of July 1, 2007 for the deployment of TWIC to individuals employed at the 10 largest U.S. ports and then subsequent deadlines for the remaining U.S. ports. The Transportation Security Administration (TSA) began issuing TWICs in October 2007. Over 2.1 million individuals are currently enrolled in the TWIC program.

- *TWIC Relief for Individuals Not Needing Unescorted Access to Secure Areas* – Section 104 of the SAFE Port Act authorized the Secretary of Homeland Security to process applications for Merchant Mariner Credential (MMC) and TWICs concurrently and to issue TWICs to “other individuals as determined appropriate”. The Coast Guard interpreted Section 104 to require credentialed mariners (those with MMCs) to also carry TWICs. Section 809 of the CGAA clarified that was not the intent of Congress and removed the requirement for mariners to purchase and carry a 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 Coast Guard released guidance in December 2011 to provide relief to certain mariners. Under the guidance, the Coast Guard is no longer requiring mariners to purchase and carry a TWIC if they are renewing their MMC and do not need unescorted access to secure areas of vessels or facilities. However, such mariners applying for an MMC for the first time must still apply for a TWIC and pay the processing fee for a TWIC even though they are no longer required to carry a TWIC.
- *Requirement to Appear Twice* – Under current policy, individuals applying for a TWIC must appear in person at a TWIC processing center twice: once to supply their biometric information and once to receive the credential. The CGAA required the Government Accountability Office (GAO) to report on the possibility of reducing the number of required visits to one. In April 2011, the GAO reported that in order for TWIC to remain compliant with federal security standards governing identity control, reducing the number of visits is not possible.
- *TWIC Readers* – Section 104 of the SAFE Port Act required the Secretary of Homeland Security to conduct a pilot program to test technology to read TWIC and established a deadline of April 13, 2009 to issue final rules for the deployment of TWIC readers. The TSA did not complete the pilot program until February 27, 2012. Shortly thereafter, the Coast Guard began the process of developing a NPRM for the deployment of TWIC readers. The Coast Guard does not expect to publish it until the fall of 2012. The implementation of a final rule could take up to a year after the NPRM is published.

WITNESSES

Panel I

Vice Admiral Brian Salerno
Deputy Commandant for Operations
United States Coast Guard

Accompanied by:

Mr. Jeffrey Lantz
Director of Commercial Regulations and Standards
United States Coast Guard

Mr. James Hanlon
Director, Office of Wastewater Management
Office of Water
United States Environmental Protection Agency

Panel II

Mr. Chris Koch
President & CEO
World Shipping Council

Mr. James Gutowski
Fisheries Survival Fund
Barnegat Light, NJ

Mr. Jimmy Lafont
Callais and Sons
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Mr. Don Marcus
Secretary-Treasurer
International Organization of Masters, Mates & Pilots

Mr. Paul Cozza
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