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COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON THE DEPARTMENT OF HOMELAND SECURITY'S REQUEST FOR COMMENT, "EVALUATION OF EXISTING COAST GUARD REGULATIONS, GUIDANCE DOCUMENTS, INTERPRETIVE DOCUMENTS, AND COLLECTIONS OF INFORMATION"

DOCKET NO. USCG-2017-0480
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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers ("AFPM") welcomes this opportunity to comment on the Department of Homeland Security's ("DHS" or "The Department") request for comment entitled, "Evaluation of Existing Coast Guard Regulations, Guidance Documents, Interpretive Documents, and Collections of Information." On June 8, 2017, DHS issued this notice on existing policy statements, guidance documents, and regulations that should be repealed, replaced, or modified. This request for comment is broadly focused on regulations, guidance documents, and interpretive documents that should be repealed, replaced or modified. AFPM supports and will continue to support the mission of the U.S. Coast Guard ("USCG" or "Coast Guard") and believes it is always a worthy endeavor to periodically review existing regulations, guidance, and policies to improve and streamline wherever possible. AFPM appreciates the opportunity to provide public comment on these matters.

A. AFPM's Interest in the Notice

AFPM is a national trade association representing nearly 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. Millions of Americans use products produced by AFPM members every day. Our members serve the American people responsibly and effectively by manufacturing valuable fuels and petrochemicals, strengthening economic and national security, and providing jobs directly and indirectly for more than 5.5 million people.

To produce these essential goods, AFPM member companies rely on safe transportation infrastructure to transport materials to and from refineries and petrochemical facilities. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil and natural gas as feed stocks for the transportation fuels and petrochemicals they manufacture. AFPM members have a long history of working with the USCG—from spill response to recently implementing the Maritime Transportation and Security Act ("MTSA") of 2002.

These comments are divided into security and other issues.

II. SECURITY ISSUES

AFPM has been an active partner with the USCG in implementing MTSA regulations as well as working together on guidance such as Policy Advisory Circulars ("PACs") Memorandums and Navigation and Vessel Inspection Circulars ("NVICs") since 2002. An important component of MTSA is the Transportation Worker Identification Credential ("TWIC") program.

A. TWIC READER RULE

The final TWIC reader rule[1] made an unintended and substantive change by extending the concept of "facilities that handle Certain Dangerous Cargoes ("CDC") in bulk" beyond the maritime operations of facilities in contravention of long-standing Coast Guard policy. That policy as reflected in PAC 20-04[2] limits the scope of CDC regulation to the areas within a facility that transfer CDC to or from a vessel, or in other words, where there is a maritime nexus. The preamble to the final rule, however, states, "a MTSA regulated facility would be classified as Risk Group A if it handled bulk CDC offloaded by train or other non-maritime means" (81 FR 57681). This was included without any prior notice in the proposed versions of the rule. The import of this change between the rule as proposed and the final rule would be to roughly quadruple the number of facilities covered by the rule and to increase by 50 percent or more the cost to covered facilities of installing electronic verification capability.

The final rule established a compliance date of August 23, 2018. After 11 months of discussions, the Coast Guard agreed to extend the compliance date and reopen the rule for comment once the risk and economic analyses are revised. Until the compliance extension and revision notice is published in a *Federal Register*, AFPM members are faced with regulatory and compliance uncertainty. AFPM members and the Coast Guard share the same goal of protecting the facilities critical to our nation. However, members are reluctant to incur unnecessary costs that may require investing in multiple modifications of the same physical access control systems at facilities that members had no reason to believe would be considered CDC facilities. To avoid those outcomes, AFPM, the American Chemistry Council ("ACC"), and the International Liquid Terminals Association ("ILTA") petitioned the Coast Guard to conduct a new rulemaking focused on the narrow issue of what constitutes a facility that handles CDC, and a more expedited rulemaking to extend the compliance date of the final rule for CDC facilities until two years after issuance of a revised final rule.[3] The USCG has yet to formally respond to our petition; however, Rear Admiral Paul Thomas publicly stated in a recent meeting with Representative Sam Graves (R-MO) that the Coast Guard will initiate a rulemaking to extend the compliance date of the TWIC reader rule until August 2021 for all CDC facilities, and during that time will conduct another rulemaking to address the issues raised in the petition. This is encouraging news, and we commend the Coast Guard for taking such action. We eagerly await the *Federal Register* notice and continue to believe a regulatory solution is more desirable than continuing to follow the course of an administrative appeal or resorting to litigation.

B. TWIC PROGRAM MANAGEMENT

AFPM supports the use of the TWIC card, but there are several areas of the rule that could be streamlined to enable better use of the card. Below is a list of suggestions AFPM believes will help alleviate unnecessary burdens for both the USCG and stakeholders.

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[1] *See* 81 Fed. Reg. 57652 (August 23, 2016) https://www.federalregister.gov/documents/2016/08/23/2016-19383/transportation-worker-identification-credential-twic-reader-requirements.

[2] *See* http://www.chemicalsecurity.com/mtsa/mtsa-overview/policy-advisory-council-pac-documents.

[3] *See* attached Petition for Rulemaking on the TWIC Reader Rule, May 16, 2017.

1. STREAMLINE JURISDICTION TO ONE AGENCY OVERSEEING THE CARD'S PRODUCTION, INTEGRITY, AND ENFORCEMENT

Currently, the Transportation Security Administration ("TSA" or "the agency") manufactures the card, but most of the program's enforcement jurisdiction falls under the USCG. Instead, production and enforcement should be handled by the same agency, which would allow the program and enforcement efforts surrounding the program to run more smoothly. This would also reduce or eliminate unnecessary confusion at MTSA sites.

2. MANDATE THE DISQUALIFYING CRITERIA BE FOLLOWED AS WRITTEN AND IMPROVE THE SCRUTINY OF THE WAIVER AND APPEAL PROCESS

At this time, TSA mostly only considers the highest level of offenses (*e.g.*, treason, inclusion on the terrorist watch list, espionage) as disqualifiers to the TWIC program. However, there are many other disqualifying offenses that TSA should be considering just as seriously. Given insider threats, workplace violence, and self-radicalization by those previously unidentified and unaffiliated with organized terrorist networks, it is imperative that these and other criteria also be strongly considered. AFPM also believes that the waiver option for a program that is serious about screening against the Terrorism Screening Database should be used judiciously. AFPM supports an appeal process; however, the integrity of this process is essential. There have been too many instances of applicants getting waivers multiple times or who would not pass a company's own security background checks.

3. EXPAND THE LIST OF DISQUALIFYING OFFENSES TO INCLUDE PERSONS ON THE TERRORIST WATCH LIST

TSA recently added language on their website[4] stating that they "*may* consider" (emphasis added) denying TWIC to applicants who are included on the Terrorist Watch List. AFPM is highly concerned by this language, as it is fundamentally inconsistent with the core purpose of the TWIC program. The main purpose of the TWIC program is to vet people against the Terrorist Watch List so that no potentially bad actors may gain easy access to MTSA sites. As such, inclusion on the Terrorist Watch List should be considered an instantaneous disqualifying offense. Otherwise, the program's credibility and core purpose of protecting against security threats are at risk.

4. FURTHER STRENGTHEN THE APPLICATION OF DISQUALIFYING CRITERIA AND REQUIRE A *FEDERAL REGISTER* NOTICE AND COMMENT PERIOD FOR ANY CHANGES

The TSA Policy Office has amended their disqualifying criteria list periodically over the years. However, this list is not federally mandated and the agency has the authority to make changes at will and without public notice or comment. TSA has decided (without publicizing the reasons) that only four of almost 30 Part A and Part B disqualifying offenses apply to the

[4] *See* https://www.tsa.gov/disqualifying-offenses-factors.

program. AFPM strongly recommends that TSA review the disqualifying criteria and the frequency of disqualifying violations and develop a strong set of disqualifying factors that should be weighed when deciding whether an applicant qualifies for a TWIC card.

5. CLARIFY OVERLAPPING JURISDICTION

More broadly, AFPM asks that the Coast Guard take this opportunity to reduce the regulatory burden on industry resulting from confusing, and at times overlapping, jurisdiction. Companies continue to struggle to determine which agency has jurisdiction over certain assets at industrial sites. Unfortunately, agencies are often only willing to commit to a point-of-view regarding jurisdiction in the context of an enforcement action. For example, there is jurisdictional ambiguity regarding a variety of regulations and policies among the Environmental Protection Agency ("EPA"), USCG, and PHMSA, including but not limited to requirements for deep water port licensing, Marine Transfer Facilities, ballast water treatment, and liquefied natural gas (LNG) facilities.

Therefore, the Coast Guard should take this opportunity to clearly delineate jurisdiction among the Coast Guard, EPA, and the Pipelines and Hazardous Materials Safety Administration ("PHMSA"). Only one agency should have jurisdiction over a given asset. Where there is any ambiguity or good faith question of which agency has jurisdiction, it should then be within the facility's discretion which regulatory scheme with which it will comply. Other agencies would then be prohibited from attempting to exercise concurrent jurisdiction or second-guessing company decisions where the Coast Guard or other agency cannot provide a clear delineation of jurisdiction.

III. NON-SECURITY ISSUES

A. DEEPWATER PORT LICENSING PROGRAM AND POLICY

Reliable inland waterways and import / export facilities are essential infrastructure for AFPM member companies to efficiently move their products both domestically for U.S. consumer use and internationally for export. American trade is a key element for continued growth in U.S. refining and petrochemical manufacturing. To that end, the U.S. Department of Transportation's ("DOT") Maritime Administration ("MARAD") works closely with the USCG to promote the use of waterborne transportation and its seamless integration with other segments of the intermodal transportation system.

In response to both the nation's growing energy and security needs, Congress accelerated the deep water port licensing process to promote the importation of oil and natural gas to offshore energy receiving facilities, as well as the export of oil and natural gas to offshore energy transfer facilities. MARAD oversees this deep water port licensing application process. The process is designed to streamline the review and construction of liquefied natural gas ("LNG") and oil deep water ports. MARAD and USCG have noted they are committed to expediting the application process while striving to protect the nation's environment, meeting our growing energy needs, and improving waterborne transportation efficiencies.[5] Typically, the approval

[5] *See* MARAD Licensing Process and Requirements, https://www.marad.dot.gov/ports/office-of-deepwater-ports-and-offshore-activities/licensing-process-and-requirements/.

process for deep water ports takes one year with two-thirds of the time devoted to National Environmental Protection Act ("NEPA") analysis and review. The USCG manages the development of a single Environmental Impact Statement ("EIS") for compliance with NEPA for deep water port license applications and associated federal permits.

On May 7, 2015, MARAD issued its final policy[6] regarding the review and processing of applications for the export of oil and natural gas from offshore deep water port facilities under the Deepwater Port Act. Under this policy, MARAD and the USCG state they use the existing deep water port licensing framework and regulations (33 CFR Parts 148, 149, and 150) to evaluate and process export license applications. The final policy clarifies key points regarding the processing of export applications. Importantly, MARAD and USCG will treat all requests for export authorization, including the conversion of existing facilities, as new license applications requiring a comprehensive review and public engagement process. For the conversion of existing facilities, a new EIS under the NEPA may be required. However, MARAD noted that a supplemental EIS ("SEIS") or environmental assessment ("EA") may potentially be used instead to meet NEPA review requirements. In that case, the SEIS or EA would focus on analyzing the differences in impacts of regasification and liquefaction technologies and operations, or impacts from bi-directional operations.

AFPM supports the streamlining of deep water port permitting processes and believes that MARAD and USCG have made considerable strides to address changing energy markets. Although the final policy notes that for a conversion of an existing facility a SEIS or EA may potentially be used instead to meet NEPA review requirements, it is unclear under what circumstances this would be permitted. AFPM supports a review of this policy to find any efficiencies and elements of review that can avoid being repeated and thus expedite the conversion process of existing facilities.

In addition to the MARAD final policy, on April 9, 2015, the USCG published a notice of proposed rulemaking ("NPRM") related to deep water port regulations.[7] This NPRM proposed revisions to its regulations for the licensing, construction, design, equipment, and operation of deep water ports used as ports or terminals for the import or export of oil and natural gas. The proposed revisions would provide additional information, clarify existing regulations, provide additional regulatory flexibility, and add new requirements to ensure safety. Specifically, the proposed revisions are expected to help expedite licensing reviews by clarifying the regulatory process and cooperating agency requirements, and updating the regulations to account for modern technologies and uses, including LNG exports. To date, a final rule based on these proposals has not been published. Its projected final rule date was listed as December 2017 in the Spring 2017 Semiannual Regulatory Agenda.

Although AFPM did not provide comments on the April 2015 NPRM, we are encouraged by efforts to streamline and improve the licensing, construction, design, equipment, and operation of deep water ports, used as ports or terminals for the import or export of oil and

[6] *See* Docket No. MARAD–2014–0132, 80 Fed. Reg. 26321 (May 7, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10619.pdf.
[7] *See* Docket No. USCG-2012-0061-0001, 80 Fed. Reg. 19118 (April 9, 2015) https://www.regulations.gov/document?D=USCG-2012-0061-0001.

natural gas. While we look forward to the publication of the final rule, we trust that any regulatory revisions in that final rule be consistent with the principles of Executive Orders 13771, "Reducing Regulation and Controlling Regulatory Costs"[8]; 13777, "Enforcing the Regulatory Reform Agenda"[9]; and 13783, "Promoting Energy Independence and Economic Growth."[10]

B. MARINE TRANSFER FACILITIES

Some AFPM member companies include facilities that lie at the nexus of two federal regulatory programs and agency authorities. Such is the case with certain fuel and petrochemical facilities regulated by both the USCG and EPA. While sometimes necessary, this dual regulation can be duplicative without a corresponding safety or environmental benefit.

While the USCG and EPA confer during the rulemaking process, the USCG requirements in some circumstances still overlap with existing EPA requirements. Specifically, certain facilities (*e.g.*, marine transfer facilities that also house aboveground storage tanks) can be regulated by both EPA requirements for oil spill prevention, preparedness, and response and USCG requirements for marine security. Although the USCG's 33 CFR Part 105[11] mandates the details of facility security planning and the EPA's 40 CFR Part 112[12] pertains to oil spill prevention and response planning, there are several overlapping provisions. A high-level description of each requirement and some examples of overlap are described below.

Under the Clean Water Act and the Oil Pollution Act of 1990, EPA promulgated regulatory provisions for non-transportation related facilities that handle, store, or transport oil. These rules include Spill Prevention Control and Countermeasure ("SPCC") prevention requirements (40 CFR Part 112). The SPCC requirements are designed to prevent oil from reaching navigable waters and adjoining shorelines, and to contain discharges of oil. The scope of these regulations is for oil facilities with more than 1,320 gallons of aboveground storage capacity.

Under 40 CFR Part 112, facilities that transport or store larger amounts of oil[13] are required to have a Facility Response Plan ("FRP") to avoid events with the potential to cause

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[8] *See* "Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs," January 30, 2017, https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

[9] *See* "Executive Order 13777: Enforcing the Regulatory Reform Agenda," February 24, 2017, https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda.

[10] *See* "Executive Order 13873: Promoting Energy Independence and Economic Growth," March 28, 2017, https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

[11] *See* 33 CFR Part 105 https://www.law.cornell.edu/cfr/text/33/part-105

[12] *See* 40 CFR Part 112 https://www.law.cornell.edu/cfr/text/40/part-112

[13] A facility may pose "substantial harm" according to the FRP rule if it: (1) transfers oil over water to or from vessels and has an oil storage capacity of 42,000 gallons or more, or (2) it has an oil storage capacity of one million gallons or more, and meets at least one of four other facility characteristics related to proximity to sensitive environments or drinking water intakes, spill history, and lack of secondary containment. *See* https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/facility-response-plan-frp-applicability

"substantial harm" or "significant and substantial harm" to the environment. Many EPA-regulated facilities also are subject to part 105 of the USCG rules, such as facilities transferring oil or hazardous materials in bulk to or from a vessel (33 CFR part 154). EPA's FRP requirements address responses to worst-case discharges, which can damage the facility, disrupt waterborne commerce, and cause substantial economic or environmental damage. The USCG's 40 CFR Part 112 on maritime security aims to prevent the consequences of a worst-case discharge.

Areas of overlap related to 40 CFR Part 112 and 33 CFR Part 105 include, but are not limited to: notification, physical security, evacuation, and assessment requirements. Both EPA and USCG include requirements in their respective plans to notify emergency response personnel. While the security and emergency response settings differ, in many instances these individuals are the same entities (*e.g.*, first responders). That said, there is opportunity here for a single notification system. Regarding physical security, 40 CFR Part 112 and 33 CFR Part 105 are nearly identical, both requiring "measures to restrict access" to cargo areas. The same is true of the requirements for evacuation procedures with both FRPs and USCG facility plans. Lastly, plans under 40 CFR Part 112 and 33 CFR Part 105 require an assessment. While hazard evaluation and security evaluation differ, the principles of risk analysis apply to both, and the potential for streamlining is apparent.

As the above examples demonstrate, there is considerable overlap between EPA, 40 Part 112, and USCG, 33 CFR Part 105, planning requirements. While there are unique aspects that differentiate security and emergency response planning, there is an opportunity for EPA and USCG to collaborate and streamline these requirements. Revision of the current requirements to limit overlap, reference other requirements in lieu of creating duplicative ones, or develop a single plan that addresses both EPA and USCG authorities would be in line with the principles put forth in Executive Orders 13771, 13777, and 13783. AFPM supports exploring ways to streamline the 40 CFR Part 112 and 33 CFR Part 105 planning requirements and, where appropriate, revise requirements to eliminate duplicative efforts.

C. VESSEL GENERAL PERMIT

The Vessel General Permit ("VGP"), issued by EPA, allows certain large commercial vessels to release specific types of vessel discharge. EPA first issued the VGP in 2008 and subsequently reissued it in 2013. The VGP provides for National Pollutant Discharge Elimination System ("NPDES") permit coverage for incidental discharges into waters of the U.S. from commercial vessels greater than 79 feet in length and for ballast water from commercial vessels of all sizes. EPA estimates that approximately 69,000 vessels (U.S.- and internationally-flagged) require VGP permit coverage for such incidental discharges.

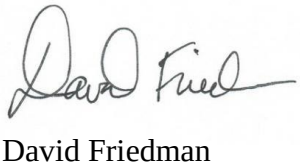
Currently, EPA and the Coast Guard both have the authority to set standards for how clean water should be treated before it is released under a VGP, and every state with a port has the freedom to create and enforce their own standards. EPA mandates that VGPs include certification conditions from 25 states, which creates a patchwork of regulatory requirements. The current regulatory regime can result in duplicative and sometimes conflicting federal (USCG and EPA) and state regulations, severely complicating compliance for vessel operators.

AFPM supports regulatory revisions that would eliminate the patchwork of duplicative and sometimes conflicting federal and state regulations and create a uniform standard nationwide. If a regulatory solution is not feasible, legislative solutions such as the Commercial Vessel Incidental Discharge Act could be explored to resolve this issue.

IV. CONCLUSION

AFPM thanks DHS for the opportunity to provide input on the regulatory process. AFPM views this notice as a meaningful step in the right direction that will help inform decisions at the operating administrations. Given the collective knowledge and long working experience with the Coast Guard of our almost 400 members, we feel AFPM could provide indispensable input related to regulatory reform of the USCG. Please contact me at (202) 602-6604 or dfriedman@afpm.org if you wish to discuss these issues further.

Sincerely,



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