

Dated: July 13, 2004.

**Robert D. Brenner,**

*Acting Assistant Administrator for Office of Air and Radiation.*

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

#### 46 CFR Part 296

[Docket No. MARAD-2004-18489]

RIN 2133-AB62

#### Maritime Security Program

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Interim final rule and request for comments.

**SUMMARY:** The Maritime Administration (MARAD) is issuing this interim final rule to provide procedures to implement provisions of the National Defense Authorization Act for Fiscal Year 2004, the Maritime Security Act of 2003 (MSA 2003). The MSA 2003 authorizes the creation of a new Maritime Security Program (MSP) that establishes a fleet of active, commercially viable, privately owned vessels to meet national defense and other security requirements and to maintain a United States presence in international commercial shipping. This interim final rule establishes the new MSP and provides, among other things, application procedures and deadlines for enrollment of vessels in the MSP.

**DATES:** *Effective Date:* This interim final rule is effective on October 1, 2004.

*Comment Date:* MARAD will consider comments received not later than August 19, 2004.

*Application Due Date:* Applications for enrollment of vessels in the MSP are due by October 15, 2004, to the address listed in the **ADDRESSES** section below.

**ADDRESSES:** *Comment Submission:* You may submit comments [identified by DOT DMS Docket Number MARAD-2004-18489] by any of the following methods:

- Web site: <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington,

DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number for this rulemaking. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the *Privacy Act* heading under Regulatory Notices.

*Docket:* For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

*Application Submission:* Submit applications for enrollment of vessels in the MSP to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590.

**FOR FURTHER INFORMATION CONTACT:**

Taylor E. Jones II, Director, Office of Sealift Support, Maritime Administration, Telephone 202-366-2323. For legal questions, call Murray Bloom, Chief, Division of Maritime Programs, Maritime Administration, 202-366-5320. For military utility questions, call LTC Todd Robbins, U.S. Transportation Command, 618-229-1451/1529.

**SUPPLEMENTARY INFORMATION:**

**Background**

On October 8, 1996 the President signed the Maritime Security Act of 1996 establishing the Maritime Security Program (MSP) for FYs 1996 through 2005 to provide financial assistance of up to \$2.1 million per vessel per year to operators of U.S.-flag vessels with approved MSP Operating Agreements. The MSP is funded at \$100 million per year for each year from FY 1996 through FY 2005, which covers a maximum of 47 vessels.

On November 24, 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, which contained the MSA 2003 creating a new MSP for FY 2006 through FY 2015. This program also provides financial assistance to operators of U.S.-flag vessels that meet certain qualifications. The MSA 2003 requires that the Secretary of Transportation, in consultation with the Secretary of

Defense, establish a fleet of active, commercially viable, militarily useful, privately-owned vessels to meet national defense and other security requirements. Section 53111 of the MSA 2003 authorizes \$156 million annually for FYs 2006, 2007, and 2008; \$174 million annually for FYs 2009, 2010, and 2011; and \$186 million annually for FYs 2012, 2013, 2014, and 2015 to support the operation of up to 60 U.S.-flag vessels in the foreign commerce of the United States. Payments to participating operators are limited to \$2.6 million per ship per year for FYs 2006 through 2008, \$2.9 million per ship per year for FYs 2009 through 2011, and \$3.1 million per ship per year for FYs 2012 through 2015. Payments are subject to annual appropriations. Participating operators are required to make their commercial transportation resources available upon request by the Secretary of Defense during times of war or national emergency.

Subtitle A, section 3517 of the MSA 2003 provides for a pilot program under which the Secretary of Transportation may enter into an agreement(s) to reimburse MSP vessel operators up to 80 percent of the cost of performing maintenance and repairs in U.S. shipyards versus the cost of performing this work in a geographic region in which the MSP vessel generally operates. Funding to perform qualified maintenance and repair work in the United States on MSP vessels is authorized to be appropriated in the amount of \$19.5 million for each of fiscal years 2006 through 2011.

**Military Utility**

The U.S. Transportation Command, on behalf of the Secretary of Defense, will issue a press release or another form of announcement within 20 days after the issuance of this regulation describing the current operational requirements of the Department of Defense for determining the award of operating agreements within a priority. Current requirements may be stated in terms of capability to perform a particular mission or in terms of vessel characteristics (militarily useful square footage, deck height, deck strength, draft, ammunition certification, etc.) or in other operational terms.

**Rulemaking Analyses and Notices**

*Executive Order 12866 (Regulatory Planning and Review), and Department of Transportation (DOT) Regulatory Policies; Pub. L. 104-121*

This rulemaking is considered to be an economically significant regulatory action under section 3(f) of Executive

Order 12866. This interim final rule is also considered a major rule for purposes of Congressional review under Pub. L. 104–121. Since the program is designed to support up to 60 vessels in FY 2006, each receiving up to \$2.6 million annually, the Maritime Administrator finds that the program may have an annual effect on the economy of \$100 million or more. Thus, it is considered to be a significant rule under Executive Order 12866 and DOT's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and has been reviewed by OMB. Changes made in response to OMB suggestions or recommendations will be documented in the public record. Under Executive Order 12866, MARAD is required to provide an analysis of information developed as part of its decisionmaking process, including the benefits anticipated from the regulatory action, the costs anticipated from the action, and an assessment of the costs and benefits of potentially effective and reasonably feasible alternatives to the regulatory action. MARAD's regulatory analysis follows.

#### *Background*

The Maritime Security Act of 1996 (MSA) was passed with strong bipartisan support in Congress and was signed into law on October 8, 1996. The MSA outlined, in detail, the establishment of a fleet of vessels, pursuant to agreement, engaged in U.S. foreign commerce and available for use by the Department of Defense during times of war or national emergency. Based on the success of the program under the original MSA, Congress, as part of the recently enacted Maritime Security Act of 2003 (MSA 2003), created a new program that permits an increase in both the number of participant vessels as well as the payment amounts such vessels will receive under the program.

#### *Benefits*

The major benefit of the MSA 2003 is that it will provide the Department of Defense (DOD) with assured access of up to 60 vessels that may be used during times of war or national emergency. The existing MSP fleet of 47 vessels consists primarily of containerships, which are mainly designed for the sustainment phase of sealift operations that support military operations. In Operation Iraqi Freedom, 35 MSP vessels were employed in support of military operations. In addition, the MSP provides necessary support to help maintain a U.S.-flag presence in international commerce. The MSP vessels are a major component of the

U.S.-flag capability that contributes to the U.S. mariner base for utilization on both commercial and DOD organic fleet.

#### *Costs*

From the inception of the program, Congress set strict limits, not subject to the Secretary of Transportation's discretion, on the number of participant vessels and the annual payment per vessel. The MSA 2003 will permit an increase in the number of participant vessels from 47 authorized under the original MSA (for FYs 1996–2005) to 60 (authorized for FYs 2006–2015). Similarly, the payments per vessel may be increased from \$2.1 million (under the original MSA for FYs 1997–2005) to \$2.6 million (for FYs 2006–2008); \$2.9 million (for FYs 2009–2011); and \$3.1 million (for FYs 2012–2015). The maximum programmatic payment that Congress directed through the MSA 2003 is \$156 million, \$174 million, and \$186 million per year for FYs 2006–2008, 2009–2011, and 2012–2015 respectively, subject to appropriation.

#### *Analysis of Alternatives*

The MSA 2003 expands the MSP program that was originally established by Congress in 1996 by increasing the number of participant vessels, annual funding amounts, and expenditure amounts for the new MSP program. However, beyond the increased size of the new MSP program under the MSA 2003, the underlying statutes are substantially similar, and envision a new MSP program that is essentially a continuation of the prior MSP program under the original MSA. Under both the original MSA and the MSA 2003, Congress prescribed the salient details of the MSP program, including ship ownership, vessel eligibility, vessel documentation, program duration, the number of participants, the amount of funding, and, under the MSA 2003, guidelines regarding the composition of the fleet. Since the MSA 2003 provides detailed requirements for continuing the MSP program, MARAD has little discretion to propose regulatory options. In fact, given the highly prescriptive nature of both the original MSA and MSA 2003, MARAD believes that no viable regulatory alternatives exist in lieu of implementing these regulations, which continue and expand the current MSP program.

#### *Administrative Procedure Act*

Pursuant to authority granted by section 3533 of the MSA 2003, which provides an exception from compliance with the notice and comment requirements of section 553 of Title 5, United States Code, MARAD is

publishing this rule as an interim final rule. This will facilitate establishment of the new MSP as early as possible. A final rule will be published in the **Federal Register** after MARAD has had an opportunity to consider all comments on this interim final rule. Section 3533 provides that all interim rules under that section that are not superseded earlier by final rules shall expire no later than 270 days after the effective date of Subtitle C, or October 1, 2004. Accordingly, these interim regulations shall no longer be effective after June 27, 2005.

#### *Executive Order 13132*

We have analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism") and have determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The regulations have no substantial effects on the States, the current Federal-State relationship, or the current distribution of power and responsibilities among various local officials. Therefore, consultation with State and local officials was not necessary.

#### *Executive Order 13175*

MARAD does not believe that this interim final rule will significantly or uniquely affect the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive Order do not apply.

#### *Regulatory Flexibility*

Because no notice of proposed rulemaking is required for this interim final rule, as set forth in section 3533 of Subtitle C, Title XXXV, of the National Defense Authorization Act for Fiscal Year 2004, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. However, the Maritime Administrator certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. We anticipate that few, if any, small entities will participate in this program due to the nature of the shipping industry and the capital costs associated with ships that are eligible for the program.

#### *Unfunded Mandates Reform Act of 1995*

This interim final rule will not impose an unfunded mandate under the Unfunded Mandates Reform Act of

1995. It will not result in costs of \$100 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector. This interim final rule is the least burdensome alternative that achieves this objective of U.S. policy.

#### *Environmental Assessment*

We have analyzed this interim final rule for purposes of compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and we have concluded that, under the categorical exclusions provision in section 4.05 of Maritime Administrative Order (MAO) 600-1, "Procedures for Considering Environmental Impacts," 50 FR 11606 (March 22, 1985), neither the preparation of an Environmental Assessment, an Environmental Impact Statement, nor a Finding of No Significant Impact for this rulemaking is required. This interim final rule does not change the environmental effects of the current MSP, which has been operational since FY 1997, and thus no further analysis under NEPA is required. The vessels eligible for the MSP under the MSA 2003 (1) will continue to operate under the U.S. flag, and will continue to be governed by U.S.-flag state control while operating in the foreign commerce of the United States; and (2) are and will continue to be designed, constructed, equipped and operated in accordance with stringent United States Coast Guard and International Maritime Organization standards for maritime safety and maritime environmental protection.

#### *Paperwork Reduction*

MARAD has requested that the Office of Management and Budget revise its approval of an information collection under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*). The title of the information collection is Application and Reporting Elements for Participation in the Maritime Security Program, OMB #2133-0525.

This information collection requires vessel operators to continue to submit initial applications, amendments to applications (if necessary), and monthly and annual reports. We estimate that the number of annual respondents under the new MSP program will increase from 12.5 to 15, the average total number of annual responses will increase from 132 to 198.5, and that the average annual recordkeeping and reporting burden program total will increase from 152 hours to 224 hours. We estimate that the total average annual cost burden associated with this information collection will be \$10,726.65, or \$715.11 per respondent.

In accordance with the Paperwork Reduction Act, MARAD published a 60-day notice in the **Federal Register** seeking public comment on the information collection on May 28, 2004 (69 FR 30744).

#### *Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

#### **List of Subjects in 46 CFR Part 296**

Assistance payments, Maritime carriers, Reporting and record keeping requirements.

■ Accordingly, Part 296 is added to 46 CFR Chapter II, Subchapter C, to read as follows:

#### **PART 296—MARITIME SECURITY PROGRAM (MSP)**

##### **Subpart A—Introduction**

Sec.

- 296.1 Purpose.
- 296.2 Definitions.
- 296.3 Applications.
- 296.4 Waivers.

##### **Subpart B—Eligibility**

- 296.10 Citizenship requirements of owners, charterers and operators.
- 296.11 Vessel requirements.
- 296.12 Applicants.

##### **Subpart C—Priority for Granting Applications**

- 296.20 Tank vessels.
- 296.21 Participating Fleet Vessels.
- 296.22 Other vessels.

##### **Subpart D—Maritime Security Program Operating Agreements**

- 296.30 General conditions.
- 296.31 MSP assistance conditions.
- 296.32 Reporting requirements.

##### **Subpart E—Payment and Billing Procedures**

- 296.40 Billing procedures.
- 296.41 Payment procedures.

##### **Subpart F—Appeals Procedures**

- 296.50 Administrative determinations.

##### **Subpart G—Maintenance and Repair Reimbursement Pilot Program**

- 296.60 Applications.

**Authority:** Pub. L. 108-136, 117 Stat. 1392; 46 App. U.S.C. 1114(b), 49 CFR 1.66.

#### **Subpart A—Introduction**

##### **§ 296.1 Purpose.**

This part prescribes regulations implementing the provisions of Subtitle C, Maritime Security Fleet Program, Title XXXV of the National Defense Authorization Act for Fiscal Year 2004, the Maritime Security Act of 2003 (MSA 2003), governing Maritime Security Program (MSP) payments for vessels operating in the foreign trade or mixed foreign and domestic commerce of the United States allowed under a registry endorsement issued under 46 U.S.C. 12105. The MSA 2003 provides for joint responsibility between the Department of Defense (DOD) and the Department of Transportation (DOT) for administering the law. These regulations provide the framework for the coordination between DOD and DOT in implementing the MSA 2003. Implementation of the MSA 2003 has been delegated by the Secretary of Transportation to the Maritime Administrator, U.S. Maritime Administration and by the Secretary of Defense to the Commander, U.S. Transportation Command, respectively.

##### **§ 296.2 Definitions.**

For the purposes of this part:

*Act* means the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1101 *et seq.*).

*Administrator* means the Maritime Administrator, U.S. Maritime Administration (MARAD), U.S. DOT, who is authorized by the Secretary of Transportation to administer the MSA 2003, in consultation with the Commander, U.S. Transportation Command (USTRANSCOM).

*Agreement Vessel* means a vessel covered by an MSP Operating Agreement.

*Applicant* means an applicant for an MSP Operating Agreement.

*Bulk Cargo* means cargo that is loaded and carried in bulk without mark or count.

*Chapter 121* means the vessel documentation provisions of chapter 121 of title 46, United States Code.

*Citizen of the United States* means an individual who is a United States citizen, or a corporation, partnership or association as determined under section 2 of the Shipping Act, 1916, as amended (46 App. U.S.C. 802).

*Commander* means Commander, USTRANSCOM, who is authorized by the Secretary of Defense to administer the MSA 2003, in consultation with the Administrator.

*Contracting Officer* means the Associate Administrator for National Security, MARAD.

*Contractor* means the owner or operator of a vessel that enters into an

MSP Operating Agreement for the vessel with the Secretary of Transportation (acting through MARAD) pursuant to section 53103 of the MSA 2003.

*Documentation Citizen* means an entity able to document a vessel under 46 U.S.C. chapter 121. This definition includes a trust.

*DOD* means the U.S. Department of Defense.

*Domestic Trade* means trade between two or more ports and/or points in the United States.

*Eligible Vessel* means a vessel that meets the requirements of section 53102(b) of the MSA 2003.

*Emergency Preparedness Agreement (EPA)* means the agreement, required by section 53107 of the MSA 2003, between a Contractor and the Secretary of Transportation (acting through MARAD) to make certain commercial transportation resources available during time of war or national emergency or whenever determined by the Secretary of Defense to be necessary for national security or contingency operation.

*Enrollment* means the entry into an MSP Operating Agreement with MARAD to operate a vessel(s) in the MSP Fleet in accordance with § 296.30.

*Fiscal Year* means any annual period beginning on October 1 and ending on September 30.

*Fleet* means the Maritime Security Program Fleet established under section 53102(a) of the MSA 2003.

*Foreign Commerce means:*

(1) For any vessel other than a liquid or a dry bulk carrier, a cargo freight service, including direct and relay service, operated exclusively in the foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement under section 12105 of title 46, United States Code, where the origination point or the destination point of cargo carried is the United States, regardless of whether the vessel provides direct service between the United States and a foreign country, or commerce or trade between foreign countries; and

(2) For liquid and dry bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit United States-documented vessels to freely compete with foreign-flag bulk carrying vessels in their operation or in competing for charters.

*LASH Vessel* means a lighter aboard ship vessel.

*Militarily Useful* is defined, in terms of minimum military capabilities, according to DOD Joint Strategic

Planning Capabilities Plan (JSCAP) guidance.

*MSP Fleet* means the fleet of vessels operating under MSP Operating Agreements.

*MSP Operating Agreement* means the agreement between a Contractor and MARAD that provides for MSP payments.

*MSP Payments* means the payments made for the operation of U.S.-flag vessels in the foreign commerce.

*Noncontiguous Domestic Trade* means transportation of cargo between a point in the contiguous 48 states and a point in Alaska, Hawaii, or Puerto Rico, other than a point in Alaska north of the Arctic Circle.

*Operating Day* means any calendar day during which a vessel is operated in accordance with the terms and conditions of the MSP Operating Agreement.

*Operator* is a person that either owns a vessel or charters in a vessel at a financial risk through a demise charter that transfers virtually all the rights and obligations of the vessel owner to the vessel operator, such as that of crewing, supplying, maintaining, insuring and navigating the vessel.

*Owner* means an entity that has title and/or beneficial ownership of a vessel. Only an owner that is a person is eligible to enter into an MSP Operating Agreement.

*Participating Fleet Vessel* means any vessel that:

(1) On October 1, 2005—

(i) Meets the citizenship requirements of paragraph (1), (2), (3), or (4) of section 53102(c) of the MSA 2003;

(ii) Is less than 25 years of age, or is less than 30 years of age in the case of a LASH vessel; and

(2) On December 31, 2004, is covered by an MSP Operating Agreement.

*Person* includes corporations, limited liability companies, partnerships, and associations existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country. A trust is not a person.

*Roll-on/Roll-off Vessel* means a vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required.

*SecDef* means Secretary of Defense acting through the Commander USTRANSCOM.

*Secretary* means the Secretary of Transportation acting through the Maritime Administrator.

*Section 2 Citizen* means a United States citizen within the meaning of section 2 of the Shipping Act, 1916, 46 U.S.C. 802, without regard to any statute

that “deems” a vessel to be owned and operated by a Section 2 citizen.

*Tank Vessel* means, as stated in 46 U.S.C. 2101(38), a self-propelled tank vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue. In addition, the vessel must be double hulled and capable of carrying simultaneously more than two separated grades of refined petroleum products.

*Transfer of an MSP Operating Agreement* includes any sale, assignment or transfer of the MSP Operating Agreement, either directly or indirectly, or through any sale, reorganization, merger, or consolidation of the MSP Contractor.

*United States* includes the 50 U.S. states, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

*United States Citizen Trust* means:

(1) Subject to paragraph (3), a trust that is qualified under this definition.

(2) A trust is qualified only if:

(i) Each of the trustees is a citizen of the United States under section 2 of the Shipping Act, 1916, as amended; and

(ii) The application for documentation of the vessel under 46 U.S.C. chapter 121, includes the affidavit of each trustee stating that the trustee is not aware of any reason involving a beneficiary of the trust that is not a citizen of the United States, or involving any other person that is not a citizen of the United States, as a result of which the beneficiary or other person would hold more than 25 percent of the aggregate power to influence or limit the exercise of the authority of the trustee with respect to matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States.

(3) If any person that is not a citizen of the United States has authority to direct or participate in directing a trustee for a trust in matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States or in removing a trustee for a trust without cause, either directly or indirectly through the control of another person, the trust instrument provides that persons who are not citizens of the United States may not hold more than 25 percent of the aggregate authority to so direct or remove a trustee.

(4) This definition shall not be considered to prohibit a person who is not a citizen of the United States from holding more than 25 percent of the beneficial interest in a trust.

*United States Documented Vessel* means a vessel documented under 46 U.S.C. chapter 121.

### § 296.3 Applications.

(a) *Action by MARAD.—Time deadlines.* Applications for enrollment of vessels in the MSP are due by October 15, 2004 to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. If, for any reason, after the award of an Operating Agreement, the Contractor is unwilling or unable to enter into an MSP Operating Agreement, MARAD may award that contract to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement. MARAD may also open a new round of applications at a later date. Any applications received before October 15, 2004 shall be deemed to have been submitted on October 15, 2004. Within 90 days after receipt of a completed application, the Secretary shall approve the application, in conjunction with the SecDef, or provide in writing the reason for denial of that application. Execution of a standard MSP Operating Agreement shall take place reasonably soon after approval of the application.

(b) *Action by the applicant.* Each applicant for an MSP Operating Agreement shall submit an application under OMB control number 2133-0525 to the Secretary, Maritime Administration in the manner prescribed on that form. Applicants may request an application form from MARAD's Office of Sealift Support, or the application form can be downloaded from the MARAD Web site, [www.marad.dot.gov](http://www.marad.dot.gov), and completed using Microsoft Word. Completed forms must be received by MARAD no later than close of business (5 p.m. Eastern Time) on October 15, 2004, and may be submitted in person, by U.S. mail, Federal Express, United Parcel Service, or DHL. Information required shall include:

(1) An *affidavit of U.S. citizenship* that comports with the requirements of 46 CFR part 355, if applying as a Section 2 citizen. Otherwise, an affidavit which demonstrates that the applicant is qualified to document a vessel under 46 U.S.C. chapter 121. If the applicant is a vessel operator and proposes to employ a vessel manager, then an affidavit of U.S. citizenship meeting the same requirements as applicable to the operator is required from the vessel manager;

(2) *Certificate of Incorporation;*

(3) *Copies of by-laws or other governing instruments;*

(4) *Maritime related affiliations;*

(5) *Financial data:*

(i) Provide an audited financial statement or a completed MARAD Form MA-172 dated within 120 days after the close of the most recent fiscal period; and

(ii) Provide estimated annual forecast of maritime operations for the next five years showing revenue and expense, including explanations of any significant increase or decrease of these items;

(6) *Intermodal network:*

(i) If applicable, a statement describing the applicant's operating and transportation assets, including vessels, container stocks, trucks, railcars, terminal facilities, and systems used to link such assets together;

(ii) The number of containers and their twenty-foot equivalent units (TEUs) by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased; and

(iii) The number of chassis by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased;

(7) *Diversity of trading patterns:* A list of countries and trade routes serviced along with the types and volumes of cargo carried;

(8) *Applicant's record of owning and/or operating vessels:* Provide number of ships owned and/or operated, specifying flag, in the last ten years, trades involved, number of employees in your ship operations department, vessel or ship managers utilized in the operation of your vessels, and any other information relevant to your record of owning or operating vessels;

(9) *Bareboat charter arrangements,* if applicable;

(10) *Vessel data including vessel type, size, and construction date;*

(11) *Military Utility:* An assessment of the value of the vessel to DOD sealift requirements. Provide characteristics which indicate the value of the vessels to DOD including items of specific value, e.g., ramp strengths, national defense sealift features;

(12) *Special Security Agreements:* If applicable, provide a copy of your Special Security Agreement;

(13) If applicable, *Certification from documentation citizen who is the demise charterer of the MSP vessel:* In a letter submitted at the time of the application addressed to the Administrator and the Commander from the Chief Executive Officer, or equivalent, of a documentation citizen

that is the proposed Contractor of an MSP Operating Agreement, provide a statement that there are no treaties, statutes, regulations, or other laws of the foreign country of the parent, that would prohibit the proposed Contractor from performing its obligations under an MSP Operating Agreement. The statement should be substantially in the following format:

"I, \_\_\_\_\_, Chief Executive Officer of \_\_\_\_\_, certify to you that there are no treaties, statutes, regulations, or other laws of the foreign country(ies) of \_\_\_\_\_'s ultimate foreign parent or intermediate parents that would prohibit \_\_\_\_\_ from performing its obligations under an Operating Agreement with the Maritime Administration pursuant to the Maritime Security Act of 2003.";

(14) *Agreement from the ultimate foreign parent of the documentation citizen:* An agreement to be signed and submitted at the time of application from the equivalent of the Chief Executive Officer of the ultimate foreign parent of a documentation citizen not to influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States. The Agreement should be substantially in the following format:

"I, \_\_\_\_\_, am the Chief Executive Officer [or equivalent] of \_\_\_\_\_, the ultimate foreign parent of \_\_\_\_\_, a documentation citizen of the United States that is applying for an MSP Operating Agreement. I agree on behalf of the "foreign parent" that neither \_\_\_\_\_ (the ultimate foreign parent) nor any representative of \_\_\_\_\_ (the ultimate foreign parent) will in any way influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States.";

(15) *Replacement vessel plan and age waiver:* If applicable, an applicant must submit a replacement vessel plan along with an age waiver request if the applicant seeks an age waiver for an existing vessel(s). Arrangements to obtain replacements for over-age vessel(s) must be approved by the Secretary at the same time as the application for an MSP Operating Agreement. The age restriction for over-age vessels shall not apply to a Participating Fleet Vessel during the 30-month period beginning on the date the vessel begins operating under an MSP Operating Agreement under the MSA 2003 provided that the Secretary has determined that the Contractor has entered into an arrangement for a replacement vessel that will be eligible to be included in an MSP Operating Agreement, and;

(16) *Anti-Lobbying Certificate:* A certificate as required by 49 CFR part 20

stating that no funds provided under MSP have been used for lobbying to obtain an Operating Agreement.

(Approved by the Office of Management and Budget under Control Number 2133-0525)

#### § 296.4 Waivers.

In general. In special circumstances, and for good cause shown, the procedures prescribed in this part may be waived in writing by the Secretary, by mutual agreement of the Secretary in consultation with the SecDef, and the Contractor, so long as the procedures adopted are consistent with the MSA 2003 and with the objectives of these regulations.

#### Subpart B—Eligibility

##### § 296.10 Citizenship requirements of owners, charterers and operators.

Citizenship requirements are deemed to have been met if during the period of an operating agreement under this chapter that applies to the vessel, all of the conditions of any of the paragraphs (a), (b), (c), or (d) of this section are met, and subject to conditions in paragraph (e):

(a) A vessel to be included in an MSP Operating Agreement is owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802)(Section 2 citizens).

(b) A vessel to be included in an MSP Operating Agreement is owned by a person that is a Section 2 citizen or a United States Citizen Trust, and the vessel is demise chartered to a person—

(1) That is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Whose chairman of the board of directors, chief executive officer, and a majority of the members of the board of directors are Section 2 citizens; and are appointed and subjected to removal only upon approval by the Secretary as follows:

(i) Proposed changes to the chairman of the board, chief executive officer, and membership of the board of directors must be submitted to the Administrator 60 days before scheduled to take effect; and

(ii) MARAD must approve or disapprove changes within 30 days of receiving the proposed changes;

(3) That certifies to the Secretary in a format substantially similar to the format at § 296.3(b)(13) that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an Operating Agreement at the time of application for an MSP Operators Agreement; and

(4) The ultimate foreign parent of that person proffers, at the time of

application for an MSP Operating Agreement, an agreement in a format substantially similar to the format at § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(c) A vessel to be included in an MSP Operating Agreement is owned by a defense contractor who is a person that:

(1) Is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Operates or manages other United States-documented vessels for the SecDef, or charters other vessels to the SecDef;

(3) Has entered into a special security agreement with the SecDef;

(4) Certifies to the Secretary, at the time of application, in a format substantially similar to the format of § 296.3(b)(13), that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an Operating Agreement; and

(5) Has its ultimate foreign parent proffer, at the time of application for an MSP Operating Agreement, an agreement in a format substantially similar to the format of § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(d) The vessel is owned by a documentation citizen and demise chartered to a Section 2 citizen.

(e) Where applicable, the Secretary and the SecDef shall notify the Senate Committees on Armed Services, and Commerce, Science, and Transportation and the House of Representatives Committee on Armed Services that they concur with the certifications by the documentation citizens under § 296.3(b)(13) and that they have reviewed the agreements proffered by the ultimate foreign parent under § 296.3(b)(14), and agree that there are no other legal, operational, or other impediments that would prohibit the contractors for the vessels from performing their obligations under MSP Operating Agreements.

##### § 296.11 Vessel requirements.

(a) *Eligible vessel.* A vessel is eligible to be included in an MSP Operating Agreement if:

(1) The vessel is:

(i) Determined by the SecDef to be suitable for use by the United States for national defense or military purposes in time of war or national emergency; and

(ii) Determined by the Secretary to be commercially viable;

(2) The vessel is operated or, in the case of a vessel to be purchased or constructed, will be operated to provide transportation in the foreign commerce of the United States;

(3) The vessel is self-propelled and is:

(i) A Roll-on/Roll-off vessel with a carrying capacity of at least 80,000 square feet or 500 twenty-foot equivalent units and is 15 years of age or less on the date the vessel is included in the MSP;

(ii) A tank vessel that is constructed in the United States after November 24, 2003;

(iii) A tank vessel that is 10 years of age or less on the date the vessel is included in the MSP Fleet;

(iv) A LASH vessel that is 25 years of age or less on the date the vessel is included in the fleet; or

(v) Any other type of vessel that is 15 years of age or less on the date the vessel is included in the fleet;

(4) The vessel is:

(i) A United States documented vessel under 46 U.S.C. chapter 121; or

(ii) Not a United States-documented vessel under 46 U.S.C. chapter 121, but the owner of the vessel has demonstrated an intent to have the vessel documented under 46 U.S.C. chapter 121 at the time the vessel is to be included in the MSP fleet; and

(5) The vessel is eligible for a certificate of inspection if the Secretary of the Department in which the United States Coast Guard is operating determines that:

(i) The vessel is classed and designed in accordance with the rules of the American Bureau of Shipping (ABS) or another classification society accepted by such Secretary;

(ii) The vessel complies with applicable international agreements and associated guidelines as determined by the country in which the vessel was documented immediately before becoming a U.S.-flag vessel; and

(iii) The flag country has not been identified by such Secretary as inadequately enforcing international vessel regulations.

(b) *Waiver of age restriction of vessels.* The SecDef, in conjunction with the Secretary, may waive the age restriction in paragraph (a) of this section if the Secretaries jointly determine that the waiver:

(1) Is in the national interest;

(2) Is appropriate to allow the maintenance of the economic viability of the vessel and any associated operating network; and

(3) Is necessary due to the lack of availability of other vessels and operators that comply with the requirements of the MSA 2003.

##### § 296.12 Applicants.

*Applicant.* Owners or operators of an eligible vessel may apply to MARAD for inclusion of that vessel in the MSP Fleet

pursuant to the provisions of the MSA 2003. Applications shall be addressed to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

### Subpart C—Priority for Granting Applications

#### § 296.20 Tank vessels.

(a) First priority for the award of MSP Operating Agreements under MSA 2003 shall be granted to a tank vessel that is constructed in the United States after October 1, 2004.

(b) First priority for the award of MSP Operating Agreements under the MSA 2003 may be granted to a tank vessel that is less than ten years of age on the date it enters an MSP Operating Agreement:

(1) Provided that a binding contract for a replacement vessel to be operated under the MSP Operating Agreement and to be built in the United States has been executed and approved by the Secretary not later than nine months after the first date appropriated funds are available for construction assistance; and

(2) No payment can be made for an existing tank vessel granted priority one status after the earlier of:

(i) Four years after the first date appropriated funds are available to carry out the construction of a tanker in the United States; or

(ii) The date of delivery of the replacement tank vessel.

(c) A tank vessel under this section must be eligible to be included in the MSP under § 296.11(a);

(d) A tank vessel under this section must be owned and operated during the period of the operating agreement by one or more persons that are citizens of the United States under section 2 of the Shipping Act of 1916 (46 App. U.S.C. 802); and

(e) The Secretary will not enter into more than five Operating Agreements for tank vessels under this priority. If the five tank vessel Operating Agreement slots are not fully subscribed, the Secretary, in consultation with the SecDef, may award the non-subscribed slots to lower priority vessels, if deemed appropriate. If the Secretary determines that no funds are, or are likely to be, allocated for any tank vessel construction in the United States, the five slots may be awarded permanently to non-tank vessels. The Secretary may temporarily award a slot reserved for a tank vessel under construction to a lower priority vessel during the construction period of

that vessel if an existing tank vessel offered by the tank vessel Contractor is not eligible for priority for that slot. If no existing tank vessel is offered by the tank vessel Contractor, the Secretary may temporarily award an MSP Operating Agreement to a non-tank vessel of another Contractor until a new tank vessel's construction is completed in the United States. Such temporary agreements shall be terminated at the convenience of the Secretary under terms set forth in the temporary MSP Operating Agreement.

#### § 296.21 Participating Fleet Vessels.

(a) *Priority.* To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, the second priority is applicable to Participating Fleet Vessels.

(b) *Number of Operating Agreements.* MARAD will not enter into more than 47 Operating Agreements for Participating Fleet Vessels.

(c) *Reduction of Participating Fleet Vessel Operating Agreements.* The number of Operating Agreements available to Participating Fleet Vessels shall be reduced by one for:

(1) Each Participating Fleet Vessel for which an application for enrollment in the MSP is not received by the Secretary, Maritime Administration on October 15, 2004; or

(2) Each Participating Fleet Vessel for which an application for enrollment in the MSP is received by the Secretary, Maritime Administration on October 15, 2004, but the application is not approved by the Secretary of Transportation and the SecDef by January 12, 2005.

(d) *Authority to enter into an Operating Agreement.* (1) Applications for inclusion of a Participating Fleet Vessel under the priority in paragraph (a) of this section will be accepted only from a person that has authority to enter into an MSP Operating Agreement for the vessel with respect to the full term of the Operating Agreement. Applicants must certify that they have the requisite authority and provide the basis on which they rely for such certification, such as a copy of a vessel title of ownership or a demise charter.

(2) The full term of the Operating Agreement is the period from October 1, 2005 through September 30, 2015. If a vessel proposed to be included in the MSP will become ineligible for the program prior to September 30, 2015, due to vessel age restrictions, then the full term of the Operating Agreement for that vessel for purposes of paragraph (d)(1) of this section is the period the vessel meets the applicable age restrictions. MARAD may still award an

operating agreement through September 30, 2015, to an applicant having authority to enter into an MSP Operating Agreement for a vessel whose age eligibility expires before that date, provided an appropriate replacement vessel is approved by MARAD.

(3) For the purposes of paragraph (d)(1) of this section, in the case of a vessel that is subject to a demise charter that terminates by its terms on September 30, 2005 (without giving effect to any extension provided therein for completion of a voyage or to effect the actual redelivery of the vessel), or that is terminable at will by the owner of the vessel after such date, only the owner of the vessel (provided the owner of the vessel is a "person" as defined in § 296.2) shall be treated as having the authority referred to in paragraph (d)(1) of this section.

(4) If two or more applicants claim authority for the same vessel, the Secretary may request additional information bearing on the issue of which party has authority to enter into an Operating Agreement, and the Secretary shall, in his/her sole discretion, decide the matter as he/she deems appropriate.

(e) During the 30-month period commencing October 1, 2005, the age restrictions set forth under § 296.11(a) and § 296.41(c) do not apply to a Participating Fleet Vessel operating under an MSP Operating Agreement, provided:

(1) The Contractor has entered into an arrangement to obtain and operate under that MSP Operating Agreement a replacement vessel for that Participating Fleet Vessel; and

(2) The Secretary determines that the replacement vessel will be eligible to be included in the MSP Fleet under § 296.11(a).

#### § 296.22 Other vessels.

(a) *Third priority.* To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, and the second priority, Participating Fleet Vessels, in § 296.21, the third priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a), and that, during the period of that Agreement, will be:

(1) Owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802); or

(2) Owned by a person that is eligible to document the vessel under 46 U.S.C. chapter 121 and operated by a person that is a citizen of the United States

under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802).

(b) *Fourth priority.* To the extent that appropriations are available after applying the first priority in § 296.20, the second priority in § 296.21, and the third priority in paragraph (a) of this section, the fourth priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a).

(c) *Discretion within priority.* The Secretary—

(1) Subject to paragraph (c)(2) of this section, may award operating agreements within each priority as the Secretary considers appropriate; and

(2) Shall award Operating Agreements within a priority—

(i) In accordance with operational requirements specified by the SecDef;

(ii) In the cases of the priorities listed in paragraphs (a) and (b) of this section, according to the applicants' records of owning and operating vessels; and

(iii) Subject to the approval of the SecDef.

#### Subpart D—Maritime Security Program Operating Agreements

##### § 296.30 General conditions.

(a) *Approval.* (1) The Secretary, in conjunction with the SecDef, may approve applications to enter into an MSP Operating Agreement and make MSP Payments with respect to vessels that are determined by the Secretary to be commercially viable and those that are deemed by the SecDef to be militarily useful for meeting the sealift needs of the United States in time of war or national emergencies. The Secretary will announce an initial award of no more than 60 MSP Operating Agreements and announce those applications deemed ineligible by January 12, 2005. In addition, the Secretary will advise those applicants found to be eligible but not included in the initial award that those applicants will be wait-listed for an award of an MSP Operating Agreement if additional slots become available.

(2) The Commander will establish general evaluation criteria for operational requirements for considering replacement vessels described in § 296.21(e), and for vessels eligible under the third and fourth priorities described in § 296.22. These general evaluation criteria will be made available by the Commander in sufficient time for preparing applications.

(b) *Effective date.* (1) *General rule.* Unless otherwise provided, the effective date of an MSP Operating Agreement is October 1, 2005.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in an MSP Operating Agreement that is on charter to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Program Agreement provided by section 53107 of the MSA 2003, unless an earlier date is requested by the applicant, the effective date for an MSP Operating Agreement shall be:

(i) The expiration or termination date of the Government charter covering the vessel; or

(ii) Any earlier date on which the vessel is withdrawn from that charter, but not before October 1, 2005.

(c) *Replacement vessels.* A Contractor may replace an MSP vessel under an MSP Operating Agreement with another vessel that is eligible to be included in the MSP under § 296.11(a), if the Secretary, in conjunction with the SecDef, approves the replacement vessel. The replacement vessel must qualify with the same or with more militarily useful capability as the MSP vessel to be replaced for operational requirements as determined by the Commander.

(d) *Termination by the Secretary.* If the Contractor materially fails to comply with the terms of the MSP Operating Agreement:

(1) The Secretary shall notify the Contractor and provide a reasonable opportunity for the Contractor to comply with the MSP Operating Agreement;

(2) The Secretary shall terminate the MSP Operating Agreement if the Contractor fails to achieve such compliance; and

(3) Upon such termination, any funds obligated by the relevant MSP Operating Agreement shall be available to the Secretary to carry out this chapter.

(e) *Early termination by Contractor, generally.* An MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies the Secretary not later than 60 days before the effective date of the proposed termination that the Contractor intends to terminate the Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments, and by its Emergency Preparedness Agreement for the full term, from October 1, 2005 through September 30, 2015, of the MSP Operating Agreement.

(f) *Early termination by Contractor, with available replacement.* An MSP Operating Agreement shall terminate without further obligation on the part of the Contractor upon the expiration date of the three-year period beginning on

the date a vessel begins operating under the MSP, if:

(1) The Contractor notifies the Secretary, by not later than two years after the date the vessel begins operation under an MSP Operating Agreement, that the Contractor intends to terminate the Agreement; and

(2) The Secretary, in conjunction with the SecDef, determines that:

(i) An application for an MSP Operating Agreement has been received for a replacement vessel that is acceptable to the Secretaries; and

(ii) During the period of an MSP Operating Agreement that applies to the replacement vessel, the replacement vessel will be:

(A) Owned and operated by one or more persons that are citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802); or

(B) Owned by a person that is a Documentation Citizen and operated by a person that is a citizen of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802).

(g) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority of MSA 2003 for that fiscal year, the Secretary shall notify the Senate's Committees on Armed Services and Commerce, Science, and Transportation, and the House of Representatives' Committee on Armed Services, that MSP Operating Agreements for which sufficient funds are not available, will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If only partial funding is appropriated by the 60th day of such fiscal year, then the Secretary, in consultation with the SecDef, shall select the vessels to retain under MSP Operating Agreements, based on the Secretaries' determinations of the most militarily useful and commercially viable vessels. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated and, each Contractor shall be released from its obligations under the MSP Operating Agreement. Final payments under the terminated agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former operating agreements may be reinstated if mutually acceptable to the Administrator and the Contractor provided the MSP vessel remains eligible.

(h) *Release of vessels from obligations:* If an MSP Operating Agreement is terminated by the Contractor, with available replacement



under paragraph (f) of this section, or if sufficient funds are not appropriated for payments under an MSP Operating Agreement for any fiscal year by the 60th day of that fiscal year, then—

(1) Each vessel covered by the terminated MSP Operating Agreement is released from any further obligation under the MSP Operating Agreement;

(2) The owner and operator of a non-tank vessel may transfer and register the applicable vessel under a foreign registry deemed acceptable by the Secretary and the SecDef, notwithstanding section 9 of the Shipping Act, 1916 (46 App. U.S.C. 808) and 46 CFR part 221;

(3) The owner and operator of a tank vessel must formally apply to MARAD pursuant to section 9 of the Shipping Act, 1916 to transfer and register the vessel under a foreign registry; and

(4) If section 902 of the Act is applicable to a vessel that has been transferred to a foreign registry due to a terminated MSP Operating Agreement, then that vessel is available to be requisitioned by the Secretary pursuant to section 902 of the Act.

(5) Paragraph (h) of this section is not applicable to vessels under MSP Operating Agreements that have been terminated for any other reason.

(i) *Foreign transfer of vessel.* A Contractor may transfer a non-tank vessel to a foreign registry, without approval of the Secretary, if the Secretary, in conjunction with the SecDef, determines that the contractor will provide a replacement vessel:

(1) Of equal or greater military capability or of a capacity that is equivalent or greater as measured in deadweight tons, gross tons, or container equivalent units, as appropriate;

(2) That is a documented vessel under 46 U.S.C. chapter 121 by the owner of the vessel to be placed under a foreign registry; and

(3) That is not more than 10 years of age on the date of that documentation.

(j) *Transfer of Operating Agreements.* A Contractor subject to an MSP Operating Agreement may transfer that Agreement (including all rights and obligations under that Agreement) to any person eligible to enter into an Operating Agreement under § 296.10 provided that prior approval to transfer the Agreement is granted by the Secretary and the SecDef. The Contractor should allow at least 90 days for processing of a transfer request.

#### § 296.31 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements are authorized for ten years, starting on

October 1, 2005 and ending on September 30, 2015, but payments to Contractors are subject to annual appropriations each fiscal year. MARAD may enter into MSP Operating Agreements for a period less than the full term authorized under the MSA 2003.

(b) *Terms under a Continuing Resolution (CR).* In the event funds are available under a CR, the terms and conditions of the MSP Operating Agreements shall be in force provided sufficient funds are available to fully meet obligations under MSP Operating Agreements, and only for the period stipulated in the applicable CR. If funds are not appropriated at sufficient levels for any portion of a fiscal year, the Secretary shall determine to which MSP Operating Agreement to apply the available funds. With regard to an MSP Operating Agreement that does not receive funds, the terms and conditions of any applicable MSP Operating Agreement may be voided and the Contractor may request termination of the MSP Operating Agreement.

(c) *National security requirements.* Each MSP Operating Agreement shall require the owner or operator of an Eligible Vessel included in that agreement to enter into an EPA pursuant to section 53107 of the MSA 2003. The EPA shall be a document incorporating the terms of the Voluntary Intermodal Sealift Agreement (VISA), as approved by the Secretary and the SecDef, or other agreement approved by the Secretaries.

(d) *Vessel operating agreements.* The MSP Operating Agreement shall require that during the period an Eligible Vessel is included in that Agreement, the Eligible Vessel shall:

(1) *Documentation:* Be documented as a U.S.-flag vessel under 46 U.S.C. chapter 121;

(2) *Operation:* Be operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105, except for tankers, which may be operated in foreign-to-foreign commerce, and shall not otherwise be operated in the coastwise trade of the United States; and

(3) *Noncontiguous domestic trade:* Not receive MSP payments during a period in which the Contractor participates in noncontiguous domestic trade unless the Contractor is a citizen within the meaning of section 2(c) of the Shipping Act, 1916.

(e) *Obligation of the U.S. Government.* The amounts payable as MSP payments under an MSP Operating Agreement shall constitute a contractual obligation

of the United States Government to the extent of available appropriations.

(f) *U.S. Merchant Marine Academy cadets.* The MSP Operator shall agree to carry two U.S. Merchant Marine Academy cadets, if available, on each voyage.

#### § 296.32 Reporting requirements.

The Contractor shall submit to the Director, Office of Financial and Rate Approvals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590, one of the following reports, including management footnotes where necessary to make a fair financial presentation:

(a) *Form MA-172:* Not later than 120 days after the close of the Contractor's semiannual accounting period, a Form MA-172 on a semiannual basis, in accordance with 46 CFR 232.6; or

(b) *Financial Statement:* Not later than 120 days after the close of the Contractor's annual accounting period, an audited financial statement in accordance with 46 CFR 232.6 and the most recent vessel operating cost data submitted as part of its Emergency Preparedness Agreement.

(Approved by the Office of Management and Budget under Control Number 2133-0005.)

### Subpart E—Billing and Payment Procedures

#### § 296.40 Billing procedures.

*Submission of voucher.* For contractors operating under more than one MSP Operating Agreement, the contractor may submit a single monthly voucher applicable to all its agreements. Each voucher submission shall include a certification that the vessel(s) for which payment is requested were operated in accordance with § 296.31(d) and applicable MSP Operating Agreements with MARAD, and consideration shall be given to reductions in amounts payable as set forth in § 296.41(b) and (c). All submissions shall be forwarded to the Director, Office of Accounting, MAR-330, Room 7325, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901.

#### § 296.41 Payment procedures.

(a) *Amount payable.* An MSP Operating Agreement shall provide, subject to the availability of appropriations and to the extent the agreement is in effect, for each Agreement Vessel, an annual payment of up to \$2,600,000 for FY 2006, FY 2007, FY 2008; \$2,900,000 for FY 2009,

FY 2010, FY 2011; and \$3,100,000 for FY 2012, FY 2013, FY 2014, FY 2015. This amount shall be paid in equal monthly installments at the end of each month. The annual amount payable shall not be reduced except as provided in paragraphs (b) and (c) of this section.

(b) *Reductions in amount payable.* (1) The annual amount otherwise payable under an MSP Operating Agreement shall be reduced on a *pro rata* basis for each day less than 320 in a fiscal year that an Agreement Vessel:

(i) Is not operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105, except for tank vessels, which may be operated in foreign-to-foreign commerce;

(ii) Is operated in the coastwise trade; or

(iii) Is not documented under 46 U.S.C. chapter 121.

(2) To the extent that a Contractor operates MSP vessels less than 320 days under the provisions of § 296.31(d), payments will be reduced for each day less than 320 days.

(c) *No payment.* (1) Regardless of whether the Contractor has or will operate for 320 days in a fiscal year, a Contractor shall not be paid:

(i) For any day that an MSP Agreement Vessel is engaged in transporting more than 7,500 tons (using the U.S. English standard of short tons, which converts to 6,696.75 long tons, or 6,803.85 metric tons) of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b of the Act, provided that it is bulk cargo;

(ii) During a period in which the Contractor participates in noncontiguous domestic trade, unless that Contractor is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802(c));

(iii) While under charter to the United States Government other than a charter pursuant to an Emergency Preparedness Agreement under section 53107 of the MSA 2003. A voyage charter that is essentially a contract of affreightment will not be considered to be a charter;

(iv) For a vessel in excess of 25 years of age, except for a LASH vessel in excess of 30 years of age or a tank vessel which is limited to 20 years of age, unless the vessel is a participating fleet vessel meeting the requirements of § 296.21(e);

(v) For days in excess of 30 days in a fiscal year in which a vessel is drydocked or undergoing survey, inspection, or repair unless prior to the expiration of the vessel's 30-day period, approval is obtained from MARAD for

an extension beyond 30 days. Drydocking, survey, inspection, or repair periods of 30 days or less are considered operating days; and

(vi) If the contracted vessel is not operated or maintained in accordance with the terms of the MSP Operating Agreement.

(2) To the extent that non-payment days under paragraph (c) of this section are known, Contractor payments shall be reduced at the time of the current billing. The daily reduction amounts shall be based on the annual amounts in paragraph (a) of this section divided by 365 days (366 days in leap years) and rounded to the nearest cent. Daily reduction amounts shall be applied.

(3) MARAD may require, for good cause, that a portion of the funds payable under this section be withheld if the provisions of § 296.31(d) have not been met.

(4) Amounts owed to MARAD for reductions applicable to a prior billing period shall be electronically transferred using MARAD's prescribed format, or a check may be forwarded to the Maritime Administration, P.O. Box 845133, Dallas, Texas 75284-5133, or the amount owed can be credited to MARAD by offsetting amounts payable in future billing periods.

#### Subpart F—Appeals Procedures

##### § 296.50 Administrative determinations.

(a) *Policy.* A Contractor who disagrees with the findings, interpretations or decisions of the Contracting Officer with respect to the administration of this part may submit an appeal to the Administrator. Such appeals shall be made in writing to the Secretary, within 60 days following the date of the document notifying the Contractor of the administrative determination of the Contracting Officer. Such an appeal should be addressed to the Maritime Administrator, Attn.: MSP Contract Appeals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590.

(b) *DOD determinations.* The MSA 2003 assigns joint and separate roles and responsibilities to the Secretary and to the SecDef. The Administrator and the Commander will enter into an agreement describing the interagency process for making joint and separate findings, interpretations, and decisions necessary to implement the MSA 2003. A Contractor who disagrees with the initial findings, interpretations or decisions regarding the implementation of the MSA 2003—whether joint or separate in nature—shall communicate such disagreement to the Contracting Officer. Pursuant to the interagency

agreement or other agreement of the Administrator and the Commander, any disagreement or dispute of a Contractor may, where appropriate, be transferred to the Director, Policy and Plans, U.S. Transportation Command (Director), for resolution. A Contractor who disagrees with the findings, interpretations, or decisions of the Director, with respect to the administration of this part, may submit an appeal to the Commander. Such an appeal shall be made in writing to the Commander within 60 days following the date of the document notifying the Contractor of the administrative determination of the Director. Such an appeal should be addressed to the Commander, U.S. Transportation Command, 508 Scott Drive, Scott Air Force Base, IL 62225-5357.

(c) *Process.* The Administrator, or the Commander in the case of a DOD determination, may require the person making the request to furnish additional information, or proof of factual allegations, and may order any proceeding appropriate in the circumstances. The decision of the Administrator, or the Commander in the case of a DOD determination, shall be final.

#### Subpart G—Maintenance and Repair Reimbursement Pilot Program

##### § 296.60 Applications.

Section 3517, Subtitle A of Title XXXV establishes a five-year pilot program for MSP vessels to perform maintenance and repair (M&R) work in United States shipyards.

(a) The M&R pilot program is authorized at \$19.5 million per year for FYs 2006–2011.

(b) The M&R pilot program is a voluntary program and MSP operators are not required to participate.

(c) Subject to available funding, expenses are reimbursable at 80 percent of the difference between the fair and reasonable costs of the repairs in a foreign shipyard in the geographic region in which the MSP vessel operates and the fair and reasonable costs of performing the repairs in a United States shipyard.

(1) An MSP operator must apply at least 180 days in advance of anticipated M&R work.

(2) The application must include estimates of M&R costs in the United States and outside the United States in the geographic region in which the MSP vessel operates.

(d) MARAD has 60 days to notify the M&R applicant if the repair work meets the requirements of the M&R pilot program, if there is a shipyard in the

United States that can perform the approved repairs, and whether funds are available.

(e) Qualified M&R work includes any required inspection and any M&R work determined in the course of an inspection that is necessary to comply with the laws of the United States.

(f) Qualified M&R work does not include routine M&R or emergency M&R that is necessary to enable a vessel to return to a port in the United States.

Dated: July 15, 2004.

By Order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

[FR Doc. 04-16454 Filed 7-19-04; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 030630163-4205-03, I.D. 052303F]

RIN 0648-AR15

#### Authorization for Commercial Fisheries under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the ideal of eliminating mortality and serious injury of marine mammals incidental to commercial fishing operations. In 1994, Congress amended the MMPA and established a requirement for fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. This requirement is commonly referred to as the Zero Mortality Rate Goal (ZMRG). To implement the ZMRG, NMFS must establish a threshold level for mortality and serious injury to meet this requirement. This final rule establishes an insignificance threshold as 10 percent of the Potential Biological Removal level (PBR) of a stock of marine mammals.

**DATES:** Effective August 19, 2004.

**ADDRESSES:** A copy of the Environmental Assessment prepared for this action may be obtained by writing P. Michael Payne, Chief, Marine

Mammal Conservation Division, Office of Protected Resources, NMFS (PR2), 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Tom Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713-2322, ext. 105, or email [Tom.Eagle@noaa.gov](mailto:Tom.Eagle@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Information related to this final rule, including the associated environmental assessment (EA), public comments on related actions, guidelines for differentiating serious and non-serious injury, and the guidelines for preparing marine mammal stock assessment reports, is available on the Internet at <http://www.nmfs.noaa.gov/pr/> (see "Recent News and Hot Topics").

##### Background

On July 9, 2003 (68 FR 40888), NMFS published an advance notice of proposed rulemaking (ANPR) describing options for defining provisions of the ZMRG, including the requirement under the MMPA for commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. On April 29, 2004, NMFS issued a proposed rule (69 FR 23477) defining an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries considered to be insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the PBR for a stock of marine mammals. If certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's PBR) can be estimated or otherwise modified from default values, the Assistant Administrator for Fisheries (Assistant Administrator) may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected population stock and provide a rationale for using the modification. The preamble to the proposed rule described the ZMRG under MMPA section 118(b), in simple form, to include the following:

(1) A target for reducing incidental mortality and serious injury and a

deadline by which the target is to be achieved;

(2) A statement to exclude fisheries achieving and maintaining such levels of incidental mortality from the requirement to further reduce incidental mortality and serious injury;

(3) A requirement for submitting a report to Congress describing fisheries' progress toward the target and noting fisheries for which additional information is required to assess levels of incidental mortality and serious injury; and

(4) A mechanism (the TRP process) to reduce levels of incidental mortality and serious injury for fisheries not meeting the target. The economics of the fishery, availability of existing technology, and existing fishery management plans must be taken into account in the long-term goal of a TRP to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate.

The preamble to the proposed rule also addressed key issues related to the implementation of the ZMRG. The key issues were summarized under headings posing the following questions:

(1) What is an insignificant level of incidental mortality and serious injury;

(2) Why is the deadline important;

(3) How will incidental mortality and serious injury levels approach a zero rate; and

(4) Would a fishery be closed if it missed the target mortality and serious injury level by the deadline?

Details of the options NMFS considered for implementing the ZMRG and a detailed description of the implementation of the ZMRG are included in the ANPR and proposed rule. The ANPR summarized the legislative history of the ZMRG within the MMPA. These descriptions are not repeated in the preamble to this final rule.

#### Comments and Responses

NMFS received letters with comments from 12 organizations or agencies, five of which were from the conservation community, five were from the fishing industry, and two were from governmental agencies. Several of the letters appended comments on the ANPR. Comments on the ANPR were summarized, and responses to these summary comments were included, in the preamble to the proposed rule; these comments and responses are not repeated here.

*Comment 1:* We support the proposed threshold of 10 percent of the PBR level as the most effective means to meet the ZMRG.