Before the United States Coast Guard
U.S. Department of Homeland Security

Petition for Rulemaking Regarding the Final Rule Entitled "Transportation Worker Identification Credential (TWIC)— Reader Requirements" 81 Fed. Reg. 57652 (August 23, 2016)

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PETITION FOR RULEMAKING

I. Introduction & Statement of Interest

Pursuant to 33 C.F.R. § 1.05-20, the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, and the International Liquid Terminals Association (the Associations) hereby submit this petition for rulemaking to the United States Coast Guard (USCG or the Coast Guard). This petition respectfully requests the Coast Guard to initiate a new rulemaking on a narrow but extremely important issue regarding the applicability of the final rule entitled "Transportation Worker Identification Credential (TWIC)—Reader Requirements," issued by USCG under the authority of the Maritime Transportation Security Act (MTSA) (the final rule).[1]

Specifically, the petition requests the Coast Guard to promptly initiate a rulemaking that would amend the final rule to conform its coverage of "facilities that handle Certain Dangerous Cargoes (CDC) in bulk" to those portions of facilities where the transfer to or from a vessel of CDCs in bulk occurs or is capable of occurring. This revised scope would be consistent with long-standing Coast Guard policy regarding CDC facilities and the requirement of a maritime nexus. It is also what was contemplated in both proposed versions of the final rule. The petition also seeks an expedited rulemaking to extend the compliance date of the final rule for CDC facilities until two years after issuance of a revised final rule. Notably, the Associations are not asking USCG to exempt facilities from MTSA regulation, but only to restore the scope of the requirement to electronically verify TWIC to the universe of facilities and operations outlined in the proposed rules. All other MTSA Part 105 requirements would continue to apply to these facilities.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. The business of chemistry is a $797 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. The American Fuel & Petrochemical Manufacturers is a trade association comprising approximately 400 members that represent virtually the entire U.S. refining and petrochemical manufacturing capacity. The International Liquid Terminals Association represents operators of approximately 600 bulk liquid terminals in the United States, storing petroleum and petroleum products, chemicals, liquid food products and animal fats.

Collectively, the membership of the Associations comprises hundreds of facilities regulated under the MTSA. As a result of the Coast Guard's failure to provide notice of its expansion of "facilities that handle Certain Dangerous Cargoes (CDC) in bulk," an enormous number of these facilities that would not have been required under proposed versions of the rule to conduct electronic verification of TWIC are now

[1] 81 Fed. Reg. 57652 (August 23, 3016).

being compelled to install TWIC readers, or to modify their physical access control systems (PACS), in order to do so. Other facilities that would have been subject to the requirement under the proposed rules are being forced to install substantially more readers, or make substantially more PACS modifications, under the terms of the final rule. We estimate that this unanticipated expansion has quadrupled the number of facilities among the Associations' membership covered by the requirement and greatly increased the costs of complying with the requirement. The Associations all filed comments on numerous aspects of the proposed rules and would have strongly opposed this expansion had the Coast Guard properly provided notice of the issue.

Part II of this petition explains the authority under which it is being filed. Part III describes the pre-existing regulatory backdrop against which the proposed versions of the rule necessarily were interpreted by external stakeholders. In particular, it lays out in detail the historical Coast Guard policy statements that clearly circumscribed the limitations of the Coast Guard's jurisdiction over CDC facilities. Part IV describes in detail the two notices proposing the TWIC reader rule, documenting their careful and deliberate consistency with then-current policy. Part V explains how, in the final rule, the Coast Guard imposed – but did not fully evaluate the impact of – a surprising and unprecedented expansion of the rule's scope. Part VI explains how this departure renders the final rule both procedurally and substantively flawed and thus subject to judicial reversal. Finally, Part VII articulates the relief sought by the Associations.

II. Authority

The final rule was issued under the MTSA. The MTSA does not provide for "petitions for reconsideration" or otherwise address the topic of rulemaking beyond simply authorizing the Secretary of Homeland Security to issue rules.[2] Section 553(e) of the Administrative Procedure Act (APA) provides: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[3] USCG has issued rules regarding such rulemaking petitions.[4] Accordingly, this petition is filed pursuant to the APA and those rules.[5]

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[2] 46 U.S.C. § 70124. The Secretary has delegated that authority to the Commandant of the Coast Guard. *See* 33 C.F.R. § 1.05-1(a).

[3] 5 U.S.C. § 553(e).

[4] 33 C.F.R. § 1.05-20.

[5] Case law clearly establishes that agencies are obligated to respond to rulemaking petitions within a reasonable period of time. *See, e.g.,* Families for Freedom v. Napolitano, 628 F. Supp. 2d 535 (S.D.N.Y. 2009). USCG's own rules commit it to doing so as well. *See* 33 C.F.R. § 1.05-20(b). The denial of a rulemaking petition is subject to judicial review, *see, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007), as is unreasonable delay in responding, *see Families for Freedom, supra.* Such review can result in the agency being ordered to initiate a rulemaking. *See, e.g.,* Public Citizen

In light of the long and successful history of cooperation between the Associations and the Coast Guard, the Associations are filing this petition to promote a quick resolution of their concerns with the final rule, founded in part on the recent Maritime Commons blog post on the subject of this petition, to the extent that it states: "the Coast Guard is considering . . . regulatory updates at this time."[6]

Given the investment and lead time that will be required to procure, install, test, and train for the additional TWIC readers or PACS expansions required by the final rule, we respectfully request that USCG act on this petition by June 5. By filing this petition, however, the Associations are not waiving their right under Section 702 of the APA to seek judicial review of the final rule, and they explicitly reserve the right to seek such review without further notice.

III. Background

The fundamental issue addressed in this petition arises from the interaction between USCG's historic practice of regulating the safety of dangerous cargoes, going back over eighty years, and its post-9/11 pronouncements, particularly in connection with implementing the MTSA. Those two strands of authority converged in 2004, and the integration between them that the Coast Guard articulated at that time remained unchanged in the intervening twelve years – until it was suddenly upended by the final rule. As discussed below, long-standing Coast Guard policy statements have clearly defined the scope of "CDC facilities" in a manner that applied the Coast Guard's jurisdiction over such facilities to portions thereof with a "maritime nexus."

The Coast Guard conducted an extended process of public outreach in the course of its development of the final rule, issuing both an Advance Notice of Proposed Rulemaking (ANPRM) in 2009 and a Notice of Proposed Rulemaking (NPRM) in 2013. Both proposals referred to "facilities that handle CDC in bulk." As explained below, such terms were immediately understood by all interested members of the public in light of the long-standing and frequently-articulated policy positions just mentioned. These positions formed an obvious and exclusive context for all concerned to interpret the meaning of the proposed rule's terms. And, as documented in Part IV, neither proposal gave any indication that the Coast Guard intended to broaden those terms.

Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983); Public Citizen v. Heckler, 653 F. Supp. 1229 (D.D.C. 1986).

[6] "3/31/2017: TWIC reader rule update," available at http://mariners.coastguard.dodlive.mil/2017/03/31/3312017-twic-reader-rule-update/. The other options the blog entry offers ("implementation guidance [and] policy determinations") are of course not satisfactory, because these steps cannot change the literal wording of the current regulation.

A. Historic Regulation of "Certain Dangerous Cargos"

USCG has had "dangerous cargo" rules since the Tank Vessel Act of 1936. These rules have primarily regulated the construction of ships carrying such cargoes and their handling. The first regulatory use of the phrase "certain dangerous cargoes" traces back to 1958, and applied to "certain dangerous cargoes in bulk."[7] It prescribed, for example, the types of tanks that could be used to store bulk cargoes of elemental phosphorus in water.[8]

Within weeks of 9/11, USCG issued its first security-related rules regarding CDCs, publishing a temporary final rule that extended the period of prior notice that covered vessels had to give before arriving at a port, changed the destination of such notices to the new National Vessel Movement Center, and made minor additions to the definition of "CDC."[9] USCG then published a proposed rule on these topics, which it finalized in 2003. This rule maintained a purely maritime focus: "The Coast Guard agrees that the definition of CDC should be limited to those cargoes that pose the greatest risk to maritime safety and security."[10] The rule's enumerated list of CDCs comprised primarily bulk materials.[11]

B. The Maritime Transportation Security Act

Enacted in 2002, the MTSA required USCG to issue rules addressing, among other things, security plans for "facilities on or adjacent to the waters subject to the jurisdiction of the United States" that "pose a high risk of being involved in a transportation security incident."[12] The statute also required persons seeking unescorted access to secure areas of facilities to possess TWICs.[13]

The first MTSA facility security rules were issued on July 1, 2003 on an interim basis.[14] They included a section establishing "Additional requirements-Certain Dangerous Cargo (CDC) facilities."[15] This was the first time the phrase "CDC facility" was used in either the Federal Register or the Code of Federal Regulations. The term was not defined, or even discussed, in the interim rule, however. Rather, that

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[7] *See* 23 Fed. Reg. 4824, 4829 (June 28, 1958) (new 46 C.F.R. Part 98).
[8] *Id.* at 4830 (46 C.F.R. Part 98, Subpart 98.05).
[9] *See* 66 Fed. Reg. 50565 (Oct. 4, 2001).
[10] 68 Fed. Reg. 9537, 9539 (Feb. 28, 2003).
[11] *Id*. at 9544 (33 C.F.R. § 160.204).
[12] 46 U.S.C. §§ 70102(a), 70103(c)
[13] *Id.* § 70105(a).
[14] 68 Fed. Reg. 39315 (July 1, 2003) (new 33 C.F.R Part 105). Section 102(d)(1) of the MTSA instructed USCG to issue these without a prior proposal.
[15] 68 Fed. Reg. 39330 (new 33 C.F.R. § 105.295; principally addressed searching of waterfront before ship arrival, alternate power sources for security and communications systems, guarding, and patrolling).

subpart relied on definitions of "facility" and "CDCs" contained in the MTSA general provisions, issued contemporaneously. The definition of "facility" tracked the statutory definition closely,[16] and "CDCs" was defined simply by reference to the preexisting CDC rules just discussed above.[17]

USCG sought comments on the interim rules and finalized them in October 2003 without any material change to these provisions.[18] In other words, the October final rule also did not define the term "CDC facility." Rather, the preamble simply stated: "A CDC facility is a 'facility' that handles 'certain dangerous cargo (CDC).' Both of these terms are defined in § 101.105."[19] The preamble did, however, emphasize the Coast Guard's understanding of the importance of continuing to harmonize the MTSA rules with the prior regulation of CDCs. The preamble also made the first of the Coast Guard's many commitments to making changes to these topics through notice and comment rulemaking:

> It should be noted that when defining what constitutes a CDC, we referenced § 160.204 to ensure consistency in Title 33. We are constantly reviewing and, when necessary, revising the CDC list based on additional threat and technological information. Changes to § 160.204 would affect the regulations in 33 CFR subchapter H [Maritime Security] because any changes to the CDC list would also affect the applicability of subchapter H. *Any such change would be the subject of a future rulemaking*.[20]

How the terms "CDC" and "facility" were meant to be integrated, and the meaning of "handle," were not self-evident, however. In response to questions on those topics, USCG issued Policy Advisory Council (PAC) 20-04,[21] discussed next.

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[16] *See* 68 Fed. Reg. 39240, 39280 (July 1, 2003) (new 33 C.F.R. § 101.105).
[17] *Id*. at 39279. That definition was then located at 33 C.F.R. § 160.203. At the same time, the Coast Guard was careful not to extend MTSA regulation to materials posing low risks, such as asphalt. *See, e.g.,* PAC 02-11 ("Waiving Facilities that Transfer Certain Low Risk Commodities.")(July 26, 2011).
[18] *See* 68 Fed. Reg. 60515, 60542 (Oct. 22, 2003).
[19] *See id*. at 60530.
[20] *Id.* (emphasis added). The commitment to rulemaking was also a recognition that the list of CDCs, being established by regulation, can only be changed by regulation.
[21] This document does not appear to be available on a Coast Guard website. It is available at http://www.chemicalsecurity.com/mtsa/mtsa-overview/policy-advisory-council-pac-documents.

C. Integration of CDC and MTSA Practice Was Accomplished by Two USCG Policy Documents. These Documents Established the Context on Which the TWIC Rulemaking Was Overlaid.

1. PAC 20-04

The MTSA Policy Advisory Council issued PAC 20-04 on May 6, 2004 – barely six months after the MTSA rules were finalized – to answer the question: "What is a CDC facility?" Noting that "[t]he final rule preamble does not define what the word handles means, and [that] the purpose of this paper is to decide how to interpret this term," PAC 20-04 announced USCG's "[d]ecision": "In order for a facility to be classified as a CDC Facility, a vessel-to-facility interface must occur, or be capable of occurring, and involve the transfer of CDC's in bulk."

PAC 20-04's decision had two key elements. First, "CDC facilities" were limited to those handling CDCs "*in bulk*." PAC 20-04 did not explain this in further detail, but "bulk or in bulk" was then defined in the MTSA rules' general provisions as follows:

> Bulk or in bulk means a commodity that is loaded or carried on board a vessel without containers or labels, and that is received and handled without mark or count.[22]

The second key element of the PAC 20-04 decision is that *transfer* of bulk CDCs from a vessel to the facility (or vice versa) must occur or be capable of occurring. The decision called that "Scenario A," and then distinguished four other, different scenarios to illustrate the limitations of the scope of the term "CDC facility." This part of PAC 20-04 is reprinted verbatim in pertinent part below because it so important to the subject of this petition; emphases are added:

> **Scenario B**: Facilities that receive vessels and engage in vessel-to-facility interfaces that involves the transfer of *packaged* Certain Dangerous Cargoes from the vessels that they receive.
> **Scenario B Decision**: *Facilities would not be required to comply with 33 CFR 105.295. . . .*
> **Scenario C**: Facilities that receive vessels that carry CDC's in bulk but *the transfer of CDC's does not occur* between the vessels and the facility.
> **Scenario C Decision**: *Facilities would not be required to comply with 33 CFR 105.295. . . .*
> **Scenario D**: Facilities, already subject to 33 CFR Part 105, receiving Certain Dangerous Cargoes from *entities other than vessels, such as rail cars and tanker trucks.*
> **Scenario D Decision**: *Facilities would not be required to comply with 33 CFR 105.295. . . .*

[22] *See* 68 Fed. Reg. 39240, 39279 (33 C.F.R. § 101.105).

> **Scenario E**: Facilities, already subject to 33 CFR Part 105, *through which train cars travel carrying CDC's*. These CDC's are not received at the facility, but the *train cars might be present for extended periods of time.*
> **Scenario E Decision**: *Facilities would not be required to comply with 33 CFR 105.295*. . . .

PAC 20-04 explained how MTSA facilities should address these four scenarios in their Facility Security Plans (FSPs). But it clearly excluded them from coverage under Section 105.295 – the only MTSA provision at the time that applied just to CDC facilities.

Thus, USCG historically restricted the term "CDC facility" to facilities where a vessel-to-facility interface occurred, or was capable of occurring, and involved the transfer of CDCs in bulk. As explained below, this restriction was consistent with the focus of the Coast Guard's security efforts, under the MTSA and the preexisting International Maritime and Port Security Act,[23] to operations with a *maritime nexus*.

2. NVIC 03-03

While PAC 20-04 was obviously prompted by questions, the decision it announced was not a surprise or an aberration. The linkage of the Coast Guard's security efforts to operations with a maritime nexus had been made clear in the MTSA context only two months after issuance of the final MTSA rules by Navigation and Vessel Inspection Circular (NVIC) 03-03, "Implementation Guidance for the Regulations Mandated by the Maritime Transportation Security Act of 2002 (MTSA) for Facilities."[24] That document's Enclosure 5, "Additional Applicability Guidance," spelled this out most clearly:

> [F]or the purposes of accurately identifying that portion of a facility's operation that is to be regulated under the rule, it is critical that close attention be given by plan submitters, reviewers and approvers when identifying exactly where a facility's maritime nexus begins and ends. *[T]he facility's MTSA regulated area(s) [are] to encompass only those aspects of operation that have, or in practicality cannot be functionally separated from, a maritime nexus.* The FSP must mitigate the exploitation of FSA identified vulnerabilities, in the context of the maritime nexus, which could result in a Transportation Security Incident (TSI).[25]

NVIC 03-03 Changes 1 and 2, issued in 2004 and 2009 respectively, maintained this discussion verbatim.[26]

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[23] Pub. L. No. 99-399 (Aug. 27, 1986), 33 U.S.C. § 1226.
[24] Issued originally in December 2003.
[25] *Id*. Enclosure 5, p. 5-1, § 5.1.2 (emphasis added).
[26] Change 1, issued May 27, 2004, available at https://www.uscg.mil/hq/cg5/nvic/pdf/2003/NVIC_03-03.pdf. Change 2, issued

In conclusion, PAC 20-04 and NVIC 03-03 jointly restricted the concept of a "CDC facility" to the maritime operations of a facility where the transfer to or from a vessel of CDCs in bulk occurred or was capable of occurring. This concept of limiting USCG regulation to aspects of the facility with a maritime nexus was well-established when the TWIC reader rule was proposed.

IV. The TWIC ANPRM and Proposed Rule Maintained the Historic Integration of CDC and MTSA Regulation, and Gave No Indication That USCG Was Planning a Significant Expansion

As explained below, until last year, the Coast Guard's MTSA rulemaking efforts regarding CDC facilities were carefully coordinated with its existing CDC rules. USCG said as much in statements leading up to the TWIC final rule. It also promised repeatedly to make any changes in scope of the term's coverage via rulemaking, after opportunity for comment. The Associations are now petitioning USCG to restore the historic interrelation of its CDC and MTSA rules.

A. TWIC Reader Background

Section 70105(a) of the MTSA required persons seeking unescorted access to secure areas of an MTSA-regulated facility to possess a new kind of credential, the TWIC.[27] Responsibility for implementing this authority was assigned to USCG and the Transportation Security Administration, which initiated a joint rulemaking on the topic in 2006.[28] Driven by controversy over the ability of potential TWIC readers to function effectively in harsh marine environments, Congress later that same year enacted the SAFE Port Act of 2006.[29] That law required a TWIC reader pilot program and required the final TWIC reader rule to be issued only after a USCG report to Congress on results of the pilot, and to be "consistent with the findings of the pilot program." The SAFE Port Act also required notice and comment rulemaking and a public hearing.[30]

B. ANPRM

In March 2009, while the TWIC pilot was still ongoing, USCG issued an advance notice of proposed rulemaking (ANPRM) on the precise applicability of the TWIC reader requirement.[31] In the ANPRM, USCG adopted a risk-based approach to determining which facilities and vessels would require TWIC readers to control

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Feb. 28, 2009, available at https://www.uscg.mil/hq/cg5/nvic/pdf/2003/NVIC_03-03_CHANGE_2.pdf.

[27] 46 U.S.C. § 70105(a).

[28] 71 Fed. Reg. 29396 (May 22, 2006).

[29] Pub. L. No. 109-347 (Oct. 13, 2006), 46 U.S.C. § 70105(g)-(m).

[30] *See* 46 U.S.C. § 70105(k).

[31] 74 Fed. Reg. 13360 (March 27, 2009).

access to secure areas. It applied its Maritime Security Risk Analysis Model (MSRAM) and Analytic Hierarchy Process (AHP) to rank classes of facilities and vessels by risk. It then had the resulting analysis peer reviewed by the Homeland Security Institute.[32]

Summarizing the results of USCG's analysis, the ANPRM said:

> In determining the cut offs between risk groups, risk rankings were graphed to identify any natural breaks that occurred in the data. For vessels, these breaks generally occurred where there was a change in the hazardous nature of the cargo or where the number of passengers carried aboard a vessel increased. The breaks were similar for facilities *where these vessels called*. These breaks were used in defining risk groups A, B, and C.[33]

As the italicized words reveal, as early as the ANPRM stage, USCG was tying covered facilities to presence of *vessels*. There was no indication that other modes of transport could be relevant. This was, of course, entirely consistent with the concept of maritime nexus articulated in NVIC 03-03 – and maintained in Change 2 to that document, issued just one month earlier.

The ANPRM went on to say that "suggested risk groups" for Risk Group A included "[f]acilities that handle CDC in bulk."[34] It noted that "[w]e have also considered the possibility that facilities could be permitted to move between risk groups based on vessel interface or cargo operations." This language was entirely consistent with not only the maritime nexus aspect of NVIC 03-03 but the vessel interface discussion of PAC 20-04. There was no implication anywhere in the ANPRM that "handle" would mean anything different than defined in PAC 20-04.

C. NPRM

USCG published the proposed TWIC reader rule in March 2013.[35] The NPRM largely reaffirmed the approach outlined in the ANPRM:

> Based on the public comments received in response to the ANPRM, the findings of the DHS pilot program, and further analysis of the relevant issues, this NPRM reiterates many of the ANPRM's proposals, including retaining the ANPRM's risk-based framework for classifying vessels and facilities into the same three risk groups.[36]
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> After considering these wide-ranging comments that fell on both sides of the

[32] *Id*. at 13363.
[33] *Id*. at 13363 (emphasis added).
[34] *Id*. at 13367.
[35] 78 Fed. Reg. 17782 (March 22, 2013).
[36] *Id* at 17786.

> issue, we continue to believe that the risk-based approach set forth in the ANPRM appropriately categorizes types of vessels and facilities based on their risk of being involved in a TSI, without creating an overly complex categorization system.[37]

The NPRM described how USCG had applied MSRAM and AHP to 68 distinct types of facilities and vessels. Its conclusion was to leave proposed Risk Group A unchanged; that group included "Facilities that handle CDC in bulk."[38] As with the ANPRM, there was nothing to indicate that the Coast Guard contemplated any departure from PAC 20-04's decision regarding the scope of that term.

In retaining the ANPRM's risk analysis and the resulting categorization of facilities, USCG was heavily driven by considerations of risk and cost – as required by statute.[39] Declaring "[w]e . . . believe it is necessary to carefully weigh the costs and benefits of TWIC reader requirements on the regulated population,"[40] the NPRM engaged in a cost/benefit analysis of applying the requirement of electronic verification of TWIC to various classes of facilities (and vessels). The Coast Guard looked at 532 facilities,[41] and based on its risk and cost/benefit analyses, proposed to require electronic verification only for Risk Group A:

> This approach is designed to target the use of TWIC readers at the highest risk entities while minimizing the overall burden of the rule. . . . Several commenters cautioned us to implement TWIC reader requirements in a manner that does not unnecessarily burden affected industries. . . . We believe the requirements proposed in this NPRM achieve that goal.[42]

USCG considered shifting three categories of Risk Group B facilities into Risk Group A: petroleum refineries, non-CDC bulk hazardous materials facilities, and petroleum storage facilities. But it decided not to, for two reasons. First, it concluded that these categories of facilities "pose less operational risk" than Risk Group A facilities.[43] Second, USCG found that moving these facilities into Risk Group A would

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[37] *Id.* at 17796.
[38] *Id*. at 17786, Table ES-1.
[39] The universe of vessels and facilities that can be subjected to MTSA regulation are those "that pose a *high risk* of being involved in a transportation security incident." 46 U.S.C. § 70102(a) (emphasis added). Facility security plans are required to incorporate "security measures necessary to deter *to the maximum extent practicable* a transportation security incident or a substantial threat of such a security incident." *Id.* § 70103(c)(3)(D) (emphasis added).
[40] 78 Fed. Reg at 17790.
[41] *Id*. at 17787.
[42] *Id.* at 17790.
[43] *Id.* at 17815.

more than double the number of covered facilities (from 532 to 1,174); annualized costs would have burgeoned similarly from $26.5 million to $59.7 million.[44]

The NPRM invited comments on over two dozen specific issues,[45] but none of those invitations might have led commenters to think the Coast Guard was considering redefining "handle" to mean anything different than the definition of that term in PAC 20-04. Indeed, the questions it asked often had at their foundation a presumption that the Coast Guard was retaining its definition of "handle":

- Question 14 asked for comments on vessel/facility interactions,[46] but did not ask about interactions with non-maritime modes of transportation like rail or trucks. Nothing there or elsewhere suggested any relaxation of the maritime nexus requirement expressed in NVIC 03-03.
- Question 20 asked for comment on including in Risk Group A the three categories of Risk Group B facilities discussed above.[47] But it never asked about other definitional or scope changes that might have expanded the regulated universe by a similar extent.

The NPRM also never asked for comment on the issue of vessels being "received" at facilities that do not have the capability to unload them.[48] Understandably, none of the Associations addressed any of these unexpressed issues in their comments.

Finally, no less than *three times*, the NPRM promised that USCG would go through notice and comment rulemaking before making any changes to the universe of facilities (and vessels) that it proposed to subject to the requirement to electronically verify TWIC:

> We will continue to analyze risk data on MTSA-regulated vessels and facilities and consider whether additional or modified TWIC reader requirements are warranted in future rulemakings.[49]
>
> We will continue to gather and analyze data to determine how the use of TWIC readers might be appropriate for each risk group. Any future changes will be made through rulemaking and the public will have an opportunity to

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[44] *Id.* at 17824.
[45] *Id.* at 17816-17.
[46] *See id*. at 17817.
[47] *Id*.
[48] The NPRM claimed to "have clarified in the preamble to this NPRM that a facility that receives Risk Group A vessels would be categorized as a Risk Group A facility," *id.,* but that assertion was inconsistent with the proposed regulatory text, which listed facilities in Risk Group A only if they handled CDCs in bulk (or received vessels certificated to carry over 1,000 passengers, or were barge fleeting facilities receiving barges carrying CDCs in bulk). *See id.* at 17831 (proposed § 105.253(a)).
[49] *Id*. at 17785.

comment.[50]

> As noted earlier, if the Coast Guard changes the risk groupings, it will be done through rulemaking and the public will have an opportunity to comment.[51]

In sum, the NPRM gave no indication that the Coast Guard was contemplating a change to the scope of "facilities that handle CDC in bulk" and the Associations did not infer any such intent – reasonably, since the NPRM repeatedly promised that any further changes in the scope of the proposal would be subject to notice and comment in the future.

V. The Final Rule

In light of the foregoing, the scope of the 2016 final rule was a complete surprise to the regulated community. Mistakenly, it said "we have decided to largely retain the overall structure of how Risk Group A is structured."[52] But the final rule dramatically expanded, in two different ways, the applicability of the TWIC reader requirement to facilities handling CDC in bulk. First, it made the rule applicable to facilities that only receive vessels carrying CDCs in bulk, even where no transfer of bulk CDCs occurs:

> Proposed § 105.253(a)(1) categorizes facilities that handle CDC in bulk as Risk Group A facilities, but commenters had questions about how to interpret this phrase. These commenters requested clarification on how a facility would be classified if a vessel carrying CDC in bulk were to stop at a facility, but not transfer any of the bulk CDC cargo there. After considering the comments, and to clarify risk groups, we have determined that any facility that handles or receives vessels carrying CDC in bulk will be classified as Risk Group A. While moored at a facility, a vessel must rely on the facility's security program to adequately secure the interface between the facility and vessel and mitigate the threat of a TSI. For that reason, the facility should conduct electronic TWIC inspection to meet the security needs associated with handling or receiving vessels that carry CDC in bulk.[53]

The preamble never mentioned PAC 20-04, but it effectively overturned USCG's prior "decision," expressed there, regarding Scenario C. The final rule added the phrase "or receive vessels carrying CDC in bulk" to the proposed regulatory text regarding "facilities that handle Certain Dangerous Cargoes (CDC) in bulk."[54]

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[50] *Id.* at 17786.
[51] *Id*. at 17811.
[52] 81 Fed. Reg. 57652, 57679 (Aug. 23, 2016).
[53] *Id*. at 57681.
[54] *Id.* at 57712 (new 33 C.F.R. § 105.253(a)(1)).

The second major expansion in scope created by the final rule was to apply the TWIC reader requirement to facility operations that "handle" bulk CDCs but have no maritime nexus:

> Discussions at public meetings prompted the Coast Guard to clarify the term ''handle'' as it related to non-maritime commerce. Specifically, the question was raised whether a facility would be classified as Risk Group A if it was used to transfer CDC in bulk through rail or other non-maritime means. In this situation, such a facility would be considered to ''handle CDC in bulk'' and would be classified as Risk Group A. This is because the bulk CDC would be on the premises of a MTSA-regulated facility, and thus the facility's access control system would need to be used to mitigate the risk of a TSI.[55]

The final rule thus also overturned USCG's prior PAC 20-04 decision regarding Scenario D. To effectuate this change, the final rule deleted the words "on board a vessel" from the proposed rule's MTSA general provisions definition of "bulk or in bulk."[56] In so doing, the final rule also created new uncertainties regarding what constitutes "bulk" shipments by rail or, especially, truck for USCG purposes. No guidance was provided on this topic because the issue was not even acknowledged.

The latter expansion also created uncertainty in another circumstance. The justification for coverage of non-maritime CDC operations quoted above was that "the bulk CDC would be on the premises of a MTSA-regulated facility." This statement implies that USCG was also reversing its decision in PAC 20-04 regarding Scenario E, where train cars travel through a facility and are not received, but "might be present for extended periods of time."

These two changes dramatically increased the number of facilities required to conduct electronic verification of TWIC under the rule. Across the Associations, we have found consistently that the number of facilities subject to the electronic verification requirement under the final rule is *four times* the number that would have been required to do so under the proposals. If this experience can be extrapolated across the universe of Risk Group A facilities, that would mean in the vicinity of 2,000 covered facilities, rather than ~500. This quadrupling of covered facilities is *double* the number of facilities that would have been covered under the option of adding petroleum refineries, non-CDC bulk hazardous materials facilities, and petroleum storage facilities – an option that USCG rejected on cost/benefit grounds.[57]

It is not difficult to understand why the final rule would reach so much more broadly. Virtually every refinery and gasoline storage terminal stores bulk quantities of butane for blending into gasoline to meet seasonal blend specifications.

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[55] *Id.* at 57681.
[56] *Id.* at 57708 (revised 33 C.F.R. § 101.105).
[57] *See* text accompanying note 44, *supra*.

Indeed, we estimate that essentially all petroleum refineries are covered under the final rule, notwithstanding the final rule's stated goal *not* to cover them.[58] This butane is typically supplied by tanker trucks or rail cars, and its transfer and storage typically has no maritime nexus.

A vast number of facilities also possess storage tanks of propane used for space heating or to fuel vapor combustion units. Such tanks are typically not located in the maritime areas of facilities, and are uniformly delivered or supplied by truck. Yet these tanks would drag all facilities possessing them into the rule, even if the only cargo that crosses the vessel-to-facility interface is something as low-risk as wood chips or asphalt.

The number of electronic verification points of entry required for each covered facility among the Associations' membership has also increased multiple times under the final rule. Facilities that anticipated requiring at least one such point of entry typically envisioned fewer than 10 per facility, and sometimes only one. Now the covered facilities anticipate about a 50% increase, but in at least one case going from one to 16 points of entry, in order to enable electronic verification at secure areas having no maritime nexus.

The final rule estimated that TWIC readers would cost slightly over $5,000 apiece for fixed readers and over $7,000 for portable units, plus installation.[59] The Associations' members anticipate installed costs to be on the order of $20,000, and sometimes substantially more. If the Coast Guard's estimate of annualized costs for Risk Group A facilities ($26.5 million) is right, a four-fold increase alone would mean annualized costs of $106 million. But with costs to purchase, install, and operate TWIC readers, or to modify PACs, likely to be greater than USCG estimated for the Associations' members, actual costs could well be three to four times higher than the Coast Guard's original estimate.

And that estimate also failed to recognize the additional problems of delays associated with processing literally thousands of people at a time through points of entry. One member company of one of the Associations is a small (85,000 bbl crude/day) refinery. During turnarounds, the facility routinely has between 1,750-2,100 people (mainly contractors) on site during the day and between 750-900 at night. Under the proposed rule, this facility would not have been required to verify TWIC electronically, but under the final rule, it will. Assuming 7.5 seconds to process each individual, it would require between 1.5 to 4.4 hours to process everyone. Such a facility would clearly need to install multiple points of entry – far more than needed for normal operations – to make turnarounds even feasible. Lengthy delays would, of course, also be unfair to workers, particularly if they were not being paid for all the time they were standing in line waiting to be verified. The costs of the final rule are thus vastly greater and more varied than USCG estimated.

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[58] *See* 81 Fed Reg. 57685.

[59] *See* 81 Fed. Reg. 57698 ($8.247M/1,535 fixed readers; $2.054/292 portable).

The final rule offered facilities the possibility of amending their FSPs to redefine their MTSA footprints to carve out non-maritime CDC operations:

> We note that there are provisions where non-maritime activities of a facility can be located outside of the facility's MTSA footprint. In that situation, where the bulk CDC is not a part of the maritime transportation activities, it may be that a facility could define its MTSA footprint in such a way as to exclude that area. In such a case, the TWIC reader requirements that are being implemented in this final rule would not apply in that area.[60]

The NPRM also discussed the prospect of facilities redefining their secure area(s) to exclude CDC operations without a maritime nexus.[61] Both notices also discussed the prospect of obtaining a waiver where electronic verification of TWIC is unnecessary.[62] And the Coast Guard has repeatedly cited these options in discussions since the final rule.

As recognized by the use of "may be" in the quote above, however, none of these options is a complete or reliable solution for this expansion of the TWIC reader requirement, for multiple reasons:

- First, redefining the MTSA footprint or secure area(s) simply may not be practicable, depending on the configuration of the facility.
- Second, these options require approval by the cognizant Captain of the Port (COTP). As USCG knows, COTPs have great independence, and Coast Guard Headquarters rarely, if ever, enforces uniformity among COTPs on such issues or reverses their exercise of discretion. As a result, a company may not get approval. Indeed, at least one member company of the Associations has already had a COTP reject just this type of request. And many of the Associations' members have facilities in multiple COTP zones, so they face the challenge of persuading multiple COTPs to reach a consistent conclusion.
- Third, even where companies have been able to obtain COTP approval of a reduced MTSA footprint or secure area, they have sometimes had new Marine Science Technicians (typically petty officers) issue "Notices of Merchant Marine Inspection Requirements" to them ordering them to redraw these boundaries.[63] So the issue is not necessarily settled even after obtaining COTP approval.
- Fourth, preparing and negotiating with the Coast Guard over an application for an amended FSP can impose very substantial costs (often involving

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[60] *Id.* at 57681.
[61] 78 Fed. Reg. 17797.
[62] *Id*., 81 Fed. Reg. 57682 (citing 33 C.F.R. § 105.130).
[63] We note that issuance of such notices for this purpose is procedurally improper; the proper remedy would be for the COTP to proceed under 33 C.F.R. § 105.415(a)(ii).

> consultants) and frequently lengthy delays, on the order of months. As just noted, many companies would have to prosecute several of these applications in parallel, incurring these costs over and over. And the Coast Guard has not offered (even assuming it could) to extend the compliance date for facilities pursuing one of these options – so that pursuing one shortens the time available to comply if the request is denied.

Remarkably, the preamble never acknowledges the prospect that, by these changes, USCG vastly increased the number of facilities included in Risk Group A, or their costs of compliance – despite USCG's "goal" of "target[ing] the use of TWIC readers at the highest risk entities while minimizing the overall burden of the rule."[64] As noted above, the NPRM estimated that 532 facilities would need TWIC readers. The Final rule estimated 525 – seven *fewer,* due to deletion of "barge fleeting facilities" as a separate category of covered facilities.[65] In fact, based on the limited data the Associations have been able to assemble thus far, the changes to the scope of the final rule may actually increase the number of covered facilities by a factor of four – and may additionally increase at least the Associations' member companies' per-facility compliance costs by about 50% due to the greater number of points of entry they will require. The Coast Guard's failure to analyze the additional compliance costs associated with so dramatically increasing the universe of covered facilities is particularly disturbing given that USCG *did* redo these analyses to evaluate the possibility of more than doubling the number of Risk Group A facilities by expanded coverage to petroleum refineries, non-bulk CDC facilities and petroleum storage facilities – an option USCG abandoned in part due to increased compliance costs.

The preamble also gives no indication that USCG applied its MSRAM/ACH risk analysis to the additionally covered facilities and operations to assess the operational risks arising from (i) mere receipt of CDC vessels or (ii) receiving – or mere presence of – bulk CDCs onboard trucks and trains. Again, this omission is all the more striking because USCG did re-run these analyses, as discussed earlier, to evaluate the risks associated with petroleum refineries, non-bulk CDC facilities and petroleum storage facilities. As to those latter facilities, the final rule said:

> We agree with the argument put forth by commenters that before extending electronic TWIC inspection requirements, a revised analysis of the costs and benefits should be undertaken and that opportunity to comment on those proposed requirements should be provided.

Based on that analysis, USCG decided that regulating such facilities failed a cost/benefit test.[66] But USCG did not conduct a similar analysis for the expansions at issue in this Petition.

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[64] 78 Fed. Reg. 17790.
[65] 81 Fed. Reg. 57703.
[66] *Id.* at 57703-04.

In sum, the final rule extended electronic TWIC inspection requirements to potentially four times more facilities than USCG estimated, and required purchase, installation and operation of roughly twice as many electronic verification points of entry. These are enormous burdens on an absolute basis – in the range of $100-200 million in annualized costs. These costs must also be considered in light of the Coast Guard's estimate that the entire final rule will likely prevent a Transportation Security Incident only once every 229 years, or almost exactly from when the Constitution was ratified until the present day. But USCG did not evaluate whether those newly-covered facilities and operations pose high risks, it did not perform a revised analysis of the costs it was imposing, and it did not seek public comment on any of these issues.

As discussed next, the result of these omissions is that the final rule is procedurally and substantively invalid.

VI. The Final Rule is Procedurally and Substantively Flawed and Vulnerable to Judicial Reversal

A. USCG Violated APA § 553 by Not Giving Prior Notice of, or Seeking Comment on, Extending the Electronic Verification Requirement to Scenarios C, D and E

Section 553(b) of the APA requires "[g]eneral notice of proposed rulemaking [to] be published in the Federal Register. . . ."[67] Section 553(c) says that, "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through the submission of written data, views, or arguments . . . ."[68] Failing these steps, Section 706(2)(D) requires "[t]he reviewing court [to] . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law."[69]

Courts routinely strike down final agency rules for including provisions that had not been presented for comment in the proposed rule. There can be no question that USCG failed to give notice of the dramatic expansion of coverage of CDC facilities accomplished by the final TWIC reader rule. It never sought comments on applying the electronic verification requirement to either (i) facilities that receive but do not unload vessels with bulk CDC cargos or (ii) non-maritime CDC operations at MTSA facilities. It never even mentioned either scenario as a possibility. Instead, the

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[67] 5 U.S.C. § 553(b).

[68] *Id*. § 553(c).

[69] *Id.* § 706(2)(D). This provision requires courts to take "due account . . . of the rule of prejudicial error," but the error here was clearly prejudicial. The Associations certainly would have commented on these issues if they had had any idea they were in play. The opportunity to do so could well have led to a different outcome, saving the Associations' members the tens of millions dollars they will now have to spend if the final rule is not changed.

public evaluated the two proposed rules against the long-standing policy positions described in Part III: PAC 20-04's decision defining the scope of "handing" CDCs in bulk, including Scenarios C, D & E, and NVIC 03-03's limitation of the Part 105 MTSA rules to facility operations with a maritime nexus. Accordingly, none of the Associations addressed these issues in their comments. They certainly would have if they thought those issues were in play.

Courts may uphold an unnoticed change if it is the "logical outgrowth" of the proposed rule.[70] Courts have implemented that concept by asking whether potential commenters "could . . . reasonably have anticipated the final rulemaking from the draft"[71] or "should have anticipated that the change was possible. . . ."[72] But courts will not require interested parties to "divine [the agency's] unspoken thoughts,"[73] or allow agencies to "turn notice and comment into a guessing game in which the inclusion of one subject indicates that a distant cousin of that subject might be addressed."[74]

The Associations could not reasonably have anticipated that USCG would reverse course on long-standing CDC and MTSA policy reflected in PAC 20-04 and NVIC 03-03. Nothing in the ANPRM or NPRM gave the Associations any reason to anticipate that USCG would reverse its decisions on Scenarios C-E or abandon the "critical" (USCG's word[75]) requirement of a maritime nexus. To the contrary, everything USCG said in the ANPRM and NPRM was consistent with those prior USCG interpretations.

Moreover, the NPRM said, three separate times, that USCG would not change the proposed scope of coverage without first giving the public an opportunity to comment. As shown above, such promises were made as far back as final MTSA rules in October 2003.[76] But these promises were all abrogated in the final rule.

The Associations are sophisticated entities with a long track record of commenting on regulatory changes. They have never hesitated to explain the impact of these changes on their members or to criticize ideas they oppose if they think an agency might have those ideas in mind for a final rule. They would never remain silent on an issue of such enormous impact on their members as the regulatory expansion discussed here. But none of them anticipated this change, nor should they reasonably have been expected to.

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[70] *E.g.,* American Water Works Ass'n v. EPA, 40 F.3d 1266, 1275 (D.C. Cir. 1994); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004).
[71] American Water Works, 40 F.3d at 1275.
[72] Northeast Maryland Waste Disposal Auth., 358 F.3d at 952.
[73] International Union, UMW of Am. v. MSHA, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005).
[74] Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991).
[75] *See* NVIC 03-03, Enclosure 5, p. 5-1, § 5.1.2.
[76] *See* text accompanying note 20, *supra*.

The final rule is thus invalid and likely would be set aside by a court, if the Associations were to challenge it.

B. The Final Rule Is Also Arbitrary and Capricious

The APA also requires courts to strike down agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[77] The Supreme Court has said that a rule is arbitrary and capricious if is not "the product of reasoned decisionmaking,"[78] a prime example of which is "if the agency has . . . entirely failed to consider an important aspect of the problem. . . ."[79]

The MTSA is focused exclusively on "vessel types and United States facilities that pose a *high risk* of being involved in a transportation security incident."[80] FSPs are required to incorporate "security measures necessary to deter *to the maximum extent practicable* a transportation security incident or a substantial threat of such a security incident."[81] USCG thus is required by law to consider both risk and cost in its MTSA rulemakings.

As required by MTSA's risk-based focus, USCG did conduct an exhaustive MSRAM/ACH risk analysis in support of the ANPRM and NPRM, and had that analysis peer reviewed. USCG grouped facilities where it saw "natural breaks" in risks presented. And it re-ran these risk analyses to evaluate shifting some categories of Risk Group B facilities into Risk Group A (petroleum refineries, non-CDC bulk hazardous materials facilities, and petroleum storage facilities).

As required by the MTSA's "practicability" requirement – which necessarily involves considerations of cost – USCG did extensive cost analyses. It chose not to regulate petroleum refineries, non-CDC bulk hazardous materials facilities, and petroleum storage facilities because doing so would have more than doubled the number of covered facilities (from 532 to 1, 174) and the annualized costs (from $26.5 million to $59.7 million).

As previously noted, the NPRM summarized results of these two sets of analyses by saying that "[t]his approach is designed to target the use of TWIC readers at the highest risk entities while minimizing the overall burden of the rule."[82] But USCG failed to update its risk analysis in the final rule to evaluate the much lower risks presented by (i) facilities that receive but do not unload vessels with bulk CDC

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[77] 5 U.S.C. § 706(2)(A).
[78] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 52 (1983).
[79] *Id*. at 43.
[80] 46 U.S.C. § 70102(a) (emphasis added).
[81] *Id.* § 70103(c)(3)(D) (emphasis added).
[82] 78 Fed Reg. at 17790.

cargos or (ii) non-maritime CDC operations at MTSA facilities. And it never re-ran its cost analysis to evaluate the compliance costs incurred by requiring electronic TWIC verification at these operations with no nexus to maritime transportation.

Indeed, the final rule gives no indication that USCG even considered the possibility that extending the reach of the rule in this way would increase the number of facilities subject to it, since the final risk and cost analyses were based on exactly the same number of facilities as in the NPRM's analysis.[83] To the contrary, the final rule gives the clear impression that USCG decided late in the rulemaking to make the two changes at issue in this Petition, but then failed to devote the intellectual capital needed to understand the likely impact of that expansion – an investment that was necessary to prevent the expansion from being arbitrary and capricious.

The situation presented here is thus similar to *Michigan v. EPA*, where the Supreme Court overturned EPA's Mercury and Air Toxics rule on arbitrary and capricious grounds because the agency refused to consider the costs imposed by the rule notwithstanding a statutory requirement to regulate "where appropriate and necessary."[84] The final rule is equally vulnerable to reversal on the same grounds.[85]

Importantly, this means that the final rule could not be fixed on remand merely by seeking comment on expanding the scope of "CDC facilities" – USCG would first need to complete both risk and cost analyses.

But USCG has a faster and less costly alternative, discussed next.

VII. Relief Requested

For the reasons explained above, the Associations hereby request USCG to commit, publicly and promptly, to:

- Initiate a notice and comment rulemaking to revise the final rule.

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[83] 525 facilities, after deleting the barge fleeting facility category excluded in final rule. *See* 81 Fed. Reg. 57703.

[84] Michigan v. EPA, 135 S.Ct. 2699, 2706 (2015) (citing *State Farm*).

[85] "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'" *Id*. at 2707-2708 (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).

- Propose to restore the rule's applicability to "facilities that handle CDC in bulk," with such term to have the same meaning as "CDC facility" as that term was defined in PAC 20-04. At a minimum, this means:
    - Clearly stating in the preamble that Scenarios C-E (as described in PAC 20-04) would not be subject to the requirement to electronically verify TWIC;
    - Proposing to delete the words "or receive vessels carrying CDC in bulk" from 33 C.F.R. § 105.253(a)(1)); and
    - Proposing to restore the words "on board a vessel" to the MTSA general provisions definition of "bulk or in bulk" at 33 C.F.R. § 101.105.
- Separately and as soon as possible, initiate an expedited rulemaking that would extend the August 23, 2018 compliance date for all CDC facilities to the date two years after publication of the revised final rule.[86]

The changes sought by the Associations would restore the historic understandings that previously had always governed USCG's regulation of CDC facilities and the historic limitation of MTSA facility regulation to operations with a maritime nexus.

Importantly, these changes would not result in a gap in security coverage – contrary to the implication of the final rule.[87] MTSA facilities that receive but cannot unload vessels with bulk CDC cargos have been subject to Part 105 of the MTSA rules since 2003 (except for § 105.295). So have non-maritime CDC operations at MTSA facilities. When PAC 20-04 clarified these facilities and operations' exclusion from the additional requirements for CDC facilities established in § 105.295, it also noted what such facilities would be expected to do under the MTSA. That language, omitted from the quotations in Part III above, is reprinted verbatim below:

> **Scenario C**: Under 33 CFR 105. 245(b), prior to the arrival of a vessel to the facility, the Facility Security Officer and the Vessel Security Officer, or their designated representatives, would be required to coordinate security needs and agree upon the contents of a [Declaration of Security]. The vessel and facility representatives would then need to sign and implement this DoS. As part of the [s]ecurity that the two agree upon, provisions should be implemented to safeguard the CDC onb[o]ard the vessel.
> **Scenario D**: The Facility Security Plan for these facilities must address the fact that they handle such cargoes and the provisions that the facilities have to secure such cargoes. At a minimum, these facilities would need to designate the areas where CDC's are present as restricted areas.
> **Scenario E**: The facility should be aware of the movement of such cargoes

[86] EPA recently initiated a similar rulemaking to extend the effective date of recent amendments to its Risk Management Program rules until after the anticipated conclusion of a planned rulemaking to revise those amendments. *See* 82 Fed. Reg. 16146 (April 3, 2017).
[87] *See* preamble text accompanying notes 53 and 55, *supra*.

and have included this in their Facility Security Plans. At a minimum, the facility should incorporate the checking of railcars during security rounds on the facility.

The Associations are not asking USCG to exempt these facilities and operations from MTSA regulation, but only to restore the scope of the requirement to electronically verify TWIC to the universe of facilities and operations outlined in the proposed rules. All other MTSA Part 105 requirements would continue to apply to these facilities.

For the reasons set forth above, the Associations request that USCG grant this petition by June 5.