

chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system. A CISWI unit does not include any of the fifteen types of units described in § 60.2555 of this subpart, nor does it include any combustion turbine or reciprocating internal combustion engine.

*Commercial or industrial waste* means solid waste (as defined in this subpart) that is combusted at any commercial or industrial facility using controlled flame combustion in an enclosed, distinct operating unit: Whose design does not provide for energy recovery (as defined in this subpart); or operated without energy recovery (as defined in this subpart). Commercial or industrial waste also means solid waste (as defined in this subpart) combusted in an air curtain incinerator that is a distinct operating unit of any commercial or industrial facility.

\* \* \* \* \*

*Solid waste* means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1342), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

\* \* \* \* \*

**Subpart DDDD—[AMENDED]**

- 3. Section 60.2875 is amended by:
- a. Removing the definition of “commercial and industrial waste”;
- b. Adding the definition of “commercial or industrial waste” in alphabetical order; and
- c. Revising the definitions of “commercial and industrial solid waste incineration (CISWI) unit” and “solid waste” to read as follows:

**§ 60.2875 What definitions must I know?**

\* \* \* \* \*

*Commercial and industrial solid waste incineration (CISWI) unit* means any combustion unit that combusts

commercial or industrial waste (as defined in this subpart), that is a distinct operating unit of any commercial or industrial facility (including field erected, modular, and custom built incineration units operating with starved or excess air), and any air curtain incinerator that is a distinct operating unit of any commercial or industrial facility that does not comply with the opacity limits under this subpart applicable to air curtain incinerators burning commercial or industrial waste. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the commercial or industrial solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the commercial or industrial waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system. A CISWI unit does not include any of the fifteen types of units described in § 60.2555 of this subpart, nor does it include any combustion turbine or reciprocating internal combustion engine.

*Commercial or industrial waste* means solid waste (as defined in this subpart) that is combusted at any commercial or industrial facility using controlled flame combustion in an enclosed, distinct operating unit: Whose design does not provide for energy recovery (as defined in this subpart); or operated without energy recovery (as defined in this subpart). Commercial or industrial waste also means solid waste (as defined in this subpart) combusted in an air curtain incinerator that is a distinct operating unit of any commercial or industrial facility.

\* \* \* \* \*

*Solid waste* means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage,

or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1342), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

\* \* \* \* \*

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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:** Final rule.

**SUMMARY:** This rule revises and adopts as final the interim final rule published in the **Federal Register** on July 20, 2004. The Maritime Administration (MARAD) is issuing this final rule 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.

**DATES:** Effective Date: This final rule is effective November 21, 2005.

**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.

**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 \$98.7 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 specified in the statute at \$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 enter into an Emergency Preparedness Agreement, which would 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.

#### Interim Final Rule

As authorized by section 53103(b)(1) of the MSA 2003, MARAD issued an interim final rule on July 20, 2004 (69 FR 43328), which added a new part 296 to title 46 of the Code of Federal Regulations. The interim final rule established procedures to implement the MSA 2003 with respect to the application for, and award of, MSP Operating Agreements that provide financial assistance to owners and/or

operators of the vessels enrolled in the program. The program will be administered on the basis of one-year renewable MSP Operating Agreements, provided funding is available in subsequent years. Participating operators will receive financial assistance when operating eligible vessels in the foreign commerce of the United States, and certain specified foreign and domestic areas, with a minimum of operating restrictions, for at least 320 days in any fiscal year. Payment under the program will be made on a prorated basis for vessels operated less than 320 days in any year, exclusive of days a MSP vessel is being drydocked, surveyed, or repaired. In addition, no payment will be made for each day any vessel carries civilian bulk preference cargoes of 7,500 tons or more. MARAD's interim final rule solicited applications for participation in the MSP using the application approved under OMB Control No. 2133-0525. MARAD received applications from 26 applicants for 142 applicant vessels; MSP Operating Agreements for 60 vessels were awarded on January 12, 2005.

#### Discussion of Comments and Changes

MARAD received fifteen sets of comments on the interim final rule. MARAD also received comments that were not related to the interim final rule, which will not be addressed in this document. Comments on the interim final rule, MARAD's responses, and changes made to the interim rule, are as follows.

##### 1. Definitions; Section 296.2

###### *Definition of Citizen of the United States*

*Comment:* One commenter approves of the definition of "Section 2 Citizen" but urges that the definition of "Section 2 Citizen" be used in sections 296.20, 296.22, 296.30(f)(2)(ii)A&B, 296.31(d)(3), and 296.41(c)(ii) instead of "citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802)." The commenter urges that the term "Citizen of the United States" not be used because it is duplicative, unnecessary, and confusing.

*Response:* MARAD agrees to substitute "Section 2 Citizen" for "citizens of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802)". In the sections referred to by the commenter, the term "Citizen of the United States" will be deleted from the regulation.

*Comment:* One commenter argued that the last phrase of the definition of "Citizen of the United States"—"or a

corporation, partnership, or association as determined under section 2 of the Shipping Act, 1916, as amended (46 App U.S.C. 802)"—is too restrictive as it defines U.S. citizenship and is not in agreement with section 12102 of title 46, United States Code. The commenter stated that the definition of "Citizen of the United States" should also include documentation citizens.

*Response:* The commenter's suggestion is rejected because the documentation statutes, 46 U.S.C. 12101, *et seq.*, do not contain a definition for "Citizen of the United States".

###### *Definition of Domestic Trade*

*Comment:* One commenter seeks to have the term "domestic trade" conform with terminology used elsewhere in the rule—"coastwise trade".

*Response:* The terms "domestic trade" and "coastwise trade" are used in two contexts in the statute. First, MSP operators may not participate in noncontiguous domestic trade unless they are Section 2 Citizens. Second, MSP vessels may be operated in mixed foreign commerce and domestic trade allowed under a registry endorsement; however, the MSP vessel cannot otherwise be operated in "coastwise trade". The use of both terms in the regulation is consistent with the statute. The statute apparently uses both terms "coastwise trade" and "domestic trade" interchangeably to mean trade between points in the United States. The definition section will reflect both definitions, which have been clarified by removing "two or more ports and/or" as being redundant with the term "points".

###### *Definition of Fleet*

Fleet has been removed as the definition of "Fleet" was redundant to the definition of MSP Fleet.

###### *Definition of Foreign Commerce*

*Comment:* The definition of "foreign commerce" is divided into two paragraphs "the first paragraph concerns vessels other than liquid or dry bulk carriers; the second paragraph concerns liquid and dry bulk carrying services. Three parties commented on the first paragraph. One commenter stated that the term "cargo" in line ten of the definition is ambiguous because it could be interpreted that only cargo originating in or destined for the United States could be carried by a covered vessel. The commenter urged that the definition be clarified by adding the word "any" in front of cargo, enabling a single unit of cargo with origination in or destination to the United States to

qualify the vessel/voyage. Two other commenters stated that 46 U.S.C. 53101(4)(A)(ii) clearly permits "commerce or trade between foreign countries" without restriction. Both commenters urged that the definition be changed to reflect the statute's language.

*Response:* MARAD agrees to add the word "any" regarding origination or destination to the United States to qualify the vessel/voyage and will revise the definition of foreign commerce accordingly. MARAD does not agree that the definition of foreign commerce for MSP liner cargo is intended to be between foreign countries if no cargo originates in or is destined for the United States.

*Comment:* Two parties commented on the second paragraph. Both commenters stated that the definition of "foreign commerce" as written precludes the carriage of cargo between the United States and a foreign port.

*Response:* MARAD agrees that the second paragraph could be interpreted as precluding carriage of cargo between United States ports and foreign ports and needs clarification. We have added a phrase that specifically permits trading between United States ports and foreign ports.

#### *Definition of Militarily Useful*

*Comment:* One commenter stated that the definition of "militarily useful" may limit the discretion of the Secretary of Defense by binding him to "minimum military capabilities, according to the Department of Defense (DOD) Joint Strategic Planning Capabilities Plan (JSCAP) guidance." The commenter "suggests that the definition of "militarily useful" be revised to confirm DOD's unfettered authority" over the vessel selection process.

*Response:* The standards for "militarily useful" are DOD standards. MARAD does not agree that the definition limits the discretion of the Secretary of Defense during the selection of vessels for the MSP.

#### *Definition of MSA 2003*

MARAD has added a definition for "MSA 2003".

#### *Definition of MSP Operating Agreement*

MARAD has clarified the term MSP Operating Agreement by defining it as an assistance agreement as opposed to a procurement.

#### *Definition of Noncontiguous Domestic Trade*

*Comment:* One commenter seeks to include the phrase "including transportation under the Third Proviso to Section 27 of the Merchant Marine

Act of 1920 (the Jones Act) (46 App. U.S.C. 883)" at the end of the definition of "noncontiguous domestic trade".

*Response:* The Third Proviso provides an exception to the prohibition in the Jones Act on the use of non-coastwise vessels for carriage of cargo between points within the continental United States, including Alaska, provided part of the transportation is over Canadian rail lines. However, 46 U.S.C. 53107, specifically prohibits participation by an MSP operator in transportation 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." The question is whether the current definition is sufficient on the prohibition of carriage of cargo in the noncontiguous domestic trades under MSP, even if allowed under the Third Proviso to section 27. In our view, the definition is specific, and the only exception to the MSP prohibition is spelled out "other than a point in Alaska north of the Arctic Circle".

#### *Definition of Operator*

*Comment:* MARAD received two comments that ownership alone does not necessarily qualify an owner as an operator.

*Response:* MARAD agrees and has added the phrase "and operates that vessel directly" immediately after the words "owns a vessel" in the text.

#### *Definition of Person*

*Comment:* MARAD received two comments that the concluding sentence "A trust is not a person" causes unintended consequences particularly with respect to ownership of enrolled vessels.

*Response:* The purpose of this determination is that MARAD did not want to grant an MSP Operating Agreement to a trust, because we believe that an MSP Operating Agreement should be awarded to an entity that can actively manage a vessel in its own right. Accordingly, a corporation, limited liability company, partnership, or individual are all acceptable contractors. However, a trust cannot act in its own right and should not be eligible. Therefore, we are changing the concluding sentence to "For purposes of holding an MSP Operating Agreement, the term "person" excludes a trust." MARAD is adding to the definitions of Applicant and Contractor that "the term, applicant excludes a trust" and "the term, contractor excludes a trust", respectively.

#### *Definition of Section 2 Citizen*

*Comment:* One commenter does not understand or agree with the phrase "without regard to any statute that "deems" a vessel to be owned and operated by a Section 2 Citizen", and urges clarification as to the purpose of this phrase.

*Response:* MARAD used the "deeming" phrase to account for the possibility of future changes to the "deeming" law. The "deeming statute" is cited in 46 U.S.C. 12102(d)(4), as amended, and does not currently apply to chapter 531 of title 46.

#### *Definition of Transfer of an Operating Agreement*

*Comment:* Two commenters objected to the definition of "transfer of an operating agreement". Both commenters wanted the phrase "either directly or indirectly" removed and both did not want the definition to reflect inter-company transfers that, under the existing MSP, do not require an amendment to the MSP Operating Agreement. Both commenters proposed revised language and one offered an additional definition.

*Response:* We do not feel that it is unreasonable to require contractors to report all proposed transfers. A transfer of an MSP Operating Agreement could be accomplished indirectly, if the MSP Operator is acquired by another entity. In such events, MARAD and DOD have a responsibility under the statute to review the transfer. Thus, MARAD declines to revise this definition.

#### *Definition of United States Citizen Trust*

*Comment:* One commenter states that section 53102 of the MSA 2003 requires only that each trustee be a "citizen of the United States" for a trust to qualify, not a Section 2 Citizen, as specified in the definition. The commenter requests that MARAD's definition conform to the law.

*Response:* MARAD believes that the intent of the statute is that each trustee be a Section 2 Citizen. Further, not requiring each trustee to be a Section 2 Citizen defeats the purpose of having a United States Citizen Trust. Therefore, no change will be made to this definition.

#### *2. Applications; Section 296.3*

*Comment:* One commenter notes that the term "contractor" in section 296.3(a) should be replaced by "applicant".

*Response:* MARAD agrees and has amended section 296.3(a) accordingly. The sentence including this change has been moved to a new section 296.24.

*Comment:* One commenter states that MARAD should make clear what sort of

substantiating information is required to establish either ownership or the status of a demise charter for the application to be considered "complete".

*Response:* MARAD is adding to section 296.3(a) the sentence "Contractors of MSP Operating Agreements are required to submit ownership information such as a vessel title of ownership and signed charters to MARAD for approval by July 1, 2005."

*Comment:* One commenter objected to the qualifier "U.S." before citizenship as it applies to vessel managers in paragraph (b)(1).

*Response:* MARAD is requiring that vessel managers meet the same standards of citizenship as the applicant for whom they provide service. We have modified the language to clarify that vessel managers for Section 2 Citizen applicant operators must meet Section 2 Citizenship standards, and vessel managers for documentation citizens must meet citizenship standards for documentation citizens.

*Comment:* One commenter believes that the use of the word "demonstrates" with regard to submitting an affidavit of U.S. citizenship to qualify as being able to document a vessel under 46 U.S.C. chapter 121, needs to be changed to "declare" or "affirm".

*Response:* MARAD does not believe that a change to the definition is necessary as an affidavit is an affirmation.

*Comment:* One commenter requested changing "your" to "any" in section 296.3(b)(12) in reference to supplying special security agreements with the MSP application.

*Response:* MARAD agrees and has changed "your" to "any" in section 296.3(b)(12).

*Comment:* One commenter states that the text of section 296.3(b)(13) limits the scope of the certification from a documentation citizen who is a demise charterer of the MSP vessel to only "the foreign country of the parent" of any documentation citizen required to so certify, whereas the form of the declaration states the scope as "laws of the foreign country(ies) of the [Applicant's] ultimate foreign parent or intermediate parents". \* \* \*

*Response:* MARAD agrees and has changed the text of section 296.3(b)(13) to agree with the declaration.

*Comment:* One commenter argues that section 296.3(b)(15) regarding replacement vessel plans and age waivers is inconsistent with the MSP application form and that the application form should prevail. The commenter notes that item 17 of the MSP application form requires that an applicant for a Participating Fleet Vessel

that is over 15 years of age include detailed information on its intended replacement vessel and item 18 requires an applicant for an age waiver to provide statutory information to support an age waiver. The commenter believes that section 296.3(b)(15) appears to require applicants to provide details of their replacement plan, which is premature.

*Response:* MARAD agrees and has added language regarding the replacement plan to section 296.3(b)(15) that is consistent with the MSP application form.

### 3. Citizenship Requirements of Owners, Charterers and Operators; Section 296.10

*Comment:* One commenter suggests that in order to ensure proper interpretation of MSA 2003 requirements, "entire" should be added to section 296.10 to ensure that citizenship requirements apply throughout the term of an MSP Operating Agreement.

*Response:* MARAD agrees and has amended the regulation to read "Citizenship requirements are deemed to have been met if during the entire period of an MSP Operating Agreement under this chapter". \* \* \*

*Comment:* One commenter requests that the word "person" should be replaced by "non-Section 2 Citizen" so that foreign certification and other documentation requirements would apply to only documentation citizens.

*Response:* MARAD agrees and has amended the regulation to read "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 non-Section 2 Citizen".

*Comment:* One commenter states that MARAD does not cover the procedures it will follow as to the approval of board and executive personnel at the time of application in section 296.10(b)(2).

*Response:* MARAD does not believe that establishing specific procedures for approval of board and executive personnel is necessary. MARAD believes that maintaining flexibility to consider all factors during the evaluation of applications and considering unforeseen events does not require establishment of specific procedures.

*Comment:* One commenter objects to requiring a majority of the members of the board of directors of a Documentation Citizen charterer being Section 2 Citizens and recommends that "section 2" be deleted and "of the

United States" be inserted after "citizens."

*Response:* MARAD's language in section 296.10 conforms to 46 U.S.C. 53102(c)(2)(A)(ii)(II) of the MSA 2003. Thus, no revision is necessary.

*Comment:* One commenter requested that MARAD revise the introductory text of section 296.10(c) by adding the phrase "and operated" to indicate that a vessel to be included in an MSP Operating Agreement must be owned and operated by defense contractors as set forth in paragraph (c). The commenter also suggested that MARAD modify the phrase "owned and operated by a defense contractor" by adding "or a related person to include affiliated or related companies within the same corporate group" as the commenter believes the phrase "who is a person" is too restrictive.

*Response:* MARAD agrees and has added these changes to the section 296.10.

### 4. Vessel Requirements; Section 296.11

*Comment:* One commenter notes that section 296.11(a)(5) should modify section 296.11(a)(4)(ii).

*Response:* MARAD agrees and has renumbered section 296.11(a)(5) to section 296.11(a)(4)(ii)(A) and renumbered sections 296.11(a)(5)(i) through 296.11(a)(5)(iii) to sections 296.11(a)(4)(ii)(A)(1) through 296.11(a)(4)(ii)(A)(3), respectively.

*Comment:* One commenter argues that the reflagging-in requirement as stipulated in section 296.11(a)(4) (which includes the former section 296.11(a)(5)) implies that the vessel standard exception is a threshold for vessel participation in the MSP, rather than an exception from U.S. Coast Guard standards that apply to every other U.S.-flag vessel. The commenter requests that this section be moved to another subsection and clarified to state that a vessel enrolled in the MSP that satisfies the statutory requirements will receive a valid Certificate of Inspection from the U.S. Coast Guard for all purposes.

*Response:* MARAD believes that section 296.11(a)(4) states clearly that in order to be eligible for an MSP Operating Agreement, a foreign flag vessel must meet the Coast Guard standards noted in section 296.11(a)(4)(ii)(A). Whether or not a vessel meets the standards noted in section 296.11(a)(4)(ii)(A) can only be addressed by the U.S. Coast Guard.

*Comment:* One commenter noted that MARAD did not address regulatory relief provided in 46 U.S.C. 53108(c), as enacted in the MSA 2003, regarding telecommunications and other electronic equipment on a foreign vessel

that will be documented under the U.S. flag for operation in the MSP. The commenter suggested that MARAD incorporate the Federal Communications Commission (FCC) regulatory relief provisions into section 296.11(a)(5).

*Response:* MARAD agrees, and is adding the FCC provision under section 296.11(c).

##### 5. Tank Vessels; Section 296.20

*Comment:* One commenter stated that, because of uncertainty of funding for the National Defense Tank Vessel Construction Assistance Program (NDTVCP), the application process for tankers in the MSP should be phased in. The commenter stated the difficulty of providing specific existing vessel information when the uncertainty of funding makes it impossible to know how long the existing vessels need to be contracted for, or even whether NDTVCP funding will eventually occur. The commenter urges MARAD to allow NDTVCP applicants to provide generic information on October 15, regarding vessels for temporary slots, and to fill in the specific data later.

*Response:* MARAD is keenly aware of the dilemma presented to NDTVCP tanker applicants. However, MARAD was required to offer MSP Operating Agreements to operators on January 12, 2005. Those MSP Operating Agreements will, by necessity, include temporary vessel slots for existing tankers or other vessels to temporarily occupy the slots of NDTVCP tankers well in advance of MARAD knowing that tanker construction money will be available. Funding availability will determine when NDTVCP permanent slots are awarded.

*Comment:* One commenter noted that section 296.20(e) specifies that if a tank vessel contractor does not offer an eligible existing tank vessel during construction of the tank newbuilding, then the Secretary may award an MSP Operating Agreement to a non-tank vessel of another contractor until construction of the new tank vessel is completed in the United States. The commenter suggests that another alternative would be to temporarily award an MSP Operating Agreement to a different contractor with an eligible tank vessel.

*Response:* MARAD will amend the language to change "non-tank vessel" to "any eligible vessel". In addition, MARAD is adding to the end of this section further clarification to this section in accordance with MARAD's determination of January 12, 2005 specifying that a Contractor awarded MSP Operating Agreements for three

existing tank vessels must sign and execute a binding agreement for construction in the United States of three replacement tank vessels to be operated under MSP Operating Agreements not later than nine months after construction and MSP operating assistance funding for three tank vessels becomes available.

Section 296.20(b)(1) has been amended for clarity, including that the requirement for a Contractor to enter into a binding agreement only occurs after both construction and operating assistance are available. Sections (b)(2)(i) and (b)(2)(ii) have been rewritten to reflect MSP Operating Agreement language that was not available when the Interim Final Rule was published.

##### 6. Participating Fleet Vessels; Section 296.21

*Comment:* One commenter suggests revising the last sentence in section 296.21(d)(1) by inserting after "Applicants must certify that they will have the requisite authority" the phrase "as of October 1, 2005 and for the full period of the Operating Agreement thereafter" and adding "that remains in effect beyond September 30, 2015" to the end of the sentence.

*Response:* MARAD agrees that this language adds clarity but has changed "beyond" to "until" after "that remain in effect".

*Comment:* One commenter suggests that requesting applicants to name a replacement vessel with their applications as noted in section 296.21(d)(2) is unreasonable and that a "replacement plan" is what should be approved by MARAD.

*Response:* In conjunction with comments on section 296.31, MARAD has decided to change its requirements. For companies requesting age waivers, MARAD will require Applicants to submit a replacement vessel plan at least 120 days before the expiration of age eligibility for the MSP vessel.

*Comment:* One commenter believes that section 296.21(d)(2) is misplaced because it refers to all vessels subject to an age waiver, not just Participating Fleet Vessels. The commenter further believes that MARAD should clarify that the decision to extend an MSP Operating Agreement beyond the date that the vessel becomes 25 years of age will be made during the term of the MSP Operating Agreement when an appropriate vessel can be offered instead of during the application process.

*Response:* Section 296.21(d)(2) refers to the need of the applicant to provide replacement plans for vessels in section

296.21(d)(1) that become over age. This section relates only to Priority II vessels, so no change to this section is required. The statute does not give authority to allow a vessel over 25 years of age in the program unless it is a Priority II vessel, and only during the first 30 months of the program.

*Comment:* One commenter suggested that DOD has the right to reject a Participating Fleet Vessel if it is no longer deemed militarily useful. The commenter states that DOD has authority to specify operational requirements to determine the order of priority within a category of priority and the authority to approve or not approve the award of an MSP Operating Agreement within a priority. The commenter believes that MARAD's reference in section 296.30(a)(2) to the Commander establishing general evaluation criteria for operational requirements \* \* \* for vessels eligible under the third and fourth priorities is incorrect, and should also be applied to the second priority.

*Response:* MARAD does not agree as a determination was made by the U.S. Transportation Command (USTRANSCOM) prior to acceptance of applications that all the Participating Fleet Vessels in Priority II have already been deemed to be militarily useful, and therefore, the Commander's general evaluation criteria will be restricted to Priority III and Priority IV applicants. While some Priority III and Priority IV vessels having greater military usefulness than some Priority II vessels may be rejected, MARAD and the Commander intend to honor the "grandfather" rights of the Participating Fleet Vessels, pursuant to 46 U.S.C. 53103(a)(1)(B). No change needs to be made to the regulation.

*Comment:* One commenter expressed concern over the possibility that a Participating Fleet Vessel may not be available to participate in the MSP on October 1, 2005 due to an unforeseen casualty to the vessel, and suggested that the Contractor be allowed to offer an eligible replacement vessel with a 60 day (or other agreed upon) period to preserve the MSP slot.

*Response:* MARAD agrees to add a new paragraph (f) to section 296.21 to address this concern. Section 296.21(f) will read "In the event that a Participating Fleet Vessel will be unavailable to participate in the MSP on October 1, 2005, due to an unforeseen casualty to the vessel, a Contractor may offer an eligible replacement vessel. The replacement vessel must subsequently be approved by MARAD and DOD. The replacement vessel must operate under an MSP Operating Agreement in

sufficient time to meet the 180 minimum operation days required during the fiscal year to avoid being in default of the MSP Operating Agreement.”

*7. Discretion Within Priority; New Section 296.23*

*Comment:* Several commenters stated that Discretion Within Priority applied to all priorities and placing it in section 296.22, which only references Priority III and Priority IV vessels, implies that Discretion Within Priority applies only to Priority III and Priority IV vessels.

*Response:* MARAD agrees and has moved the provisions regarding Discretion Within Priority to a new section 296.23.

A new subsection has been added stating that the Secretary must follow the priority system established in 46 U.S.C. 53103(c) when awarding initial MSP Operating Agreements. In other words, MARAD cannot, for example, favor a Priority III applicant over a Priority II applicant.

*8. Subsequent Awards of MSP Operating Agreements; New Section 296.24*

*Comment:* One commenter indicated that 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 operating agreement to an applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement or may award that operating agreement following a new round of applications at a later date.

*Response:* MARAD is adding section 296.24 to adopt these views by providing for subsequent awards of MSP Operating Agreements should an opening occur at a later date. Part of section 296.3(a) concerning failure of MSP Operating Agreement holders to commence operations pursuant to the terms of the MSP Operating Agreement has been restated and moved to the new section 296.24. Section 296.24 also provides procedures for awarding replacement MSP Operating Agreements subsequent to October 1, 2005. MARAD retains the discretion envisioned in the statute to award an MSP Operating Agreement either from the original pool of applicants or from a new pool of applicants. At the time subsequent awards are made, MARAD will determine if the original applicant pool is stale. Section 296.24 also states that inasmuch as MSP furthers a public purpose and MARAD does not acquire goods or services through MSP, the selection process for award of MSP Operating Agreements does not

constitute an acquisition process subject to procurement law or the Federal Acquisition Regulations. This determination results from recent “bid protests” that were filed with the Government Accountability Office and subsequently withdrawn.

*Comment:* One commenter argues that MSP applicants meeting the Section 2 Citizenship requirements, whose vessels have been found eligible but are wait listed for an award of an MSP Operating Agreement due to the lack of available slots, should receive first priority consideration if slots become available.

*Response:* Until October 1, 2005 MSP applicants meeting the Section 2 citizenship requirements will get priority because the priority system will apply, subject to approval of USTRANSCOM. After October 1, 2005 MARAD, in conjunction with USTRANSCOM, will select vessels on the basis of military utility and commercial viability, giving priority to applicants that have the same or more restrictive citizenship status as the original awardee of the slot returned to MARAD for reissue. New section 296.24 covers the procedures to be used by MARAD to select vessels if slots become available. No change is necessary in section 296.30.

*9. General Conditions; Approval; Section 296.30*

*Comment:* One commenter stated that MARAD should have the flexibility to consider newbuilds other than tank vessels, but that the language of section 296.30(b) seemed to preclude this as the starting date for the new MSP was established as October 1, 2005. The only exception listed in section 296.30(b)(2) is for vessels under charter to the Government. The commenter recommended language for a second exception specifically for newbuilds.

*Response:* One of the goals of the new MSP is to have 60 vessels selected and ready to enter the program on October 1, 2005. There were a couple of applications that featured newbuilds. For those applications, MARAD has the discretion to offer temporary slots to existing vessels if the newbuilds are selected for future inclusion when they are delivered. MARAD does not believe additional language is necessary.

*Comment:* One commenter noted that the sections under 296.30 address the situation of partial funding by Congress for the MSP, and that section 296.30(g) specifies that a determination on which vessels will be funded will be based on the most militarily useful and commercially viable vessels. The commenter argues that a determining consideration of which vessels will be

funded should also include the Contractors’ services and systems. In addition, the commenter believes that the priority system must be followed.

*Response:* MARAD believes that a determination of “commercially viable” vessels addresses the commenter’s concerns about Contractors’ services and systems. MARAD is not required to follow the initial application priority system in determining which MSP Operating Agreements to fund when the program is partially funded after October 1, 2005.

*Comment:* One commenter stated that tank vessels not built under the NDTVCP should not be treated the same as tank vessels built under the NDTVCP with regard to flagging out vessels in the event of termination of the MSP Operating Agreement with replacement by the Contractor or if sufficient MSP funding is not appropriated for any fiscal year by the 60th day of that fiscal year. Section 296.30(h) requires the owner and operator of any tank vessel to formally apply to MARAD pursuant to section 9 of the Shipping Act, 1916 to transfer and register the vessel under a foreign registry.

*Response:* MARAD agrees that the requirement for formally applying under section 9 of the Shipping Act, 1916, to flag out tankers applies only to tankers built under the NDTVCP. Appropriate changes have been made to sections 296.30(h)(2) and 296.30(h)(3).

*Comment:* One commenter argued that the transfer of MSP Operating Agreements should be allowed only to a person with the same or more restrictive U.S. citizenship priority. The commenter also urged that MARAD should render decisions on MSP transfer requests within 90 days—not with a minimum of 90 days without an upper limit to process such transfer requests.

*Response:* MARAD agrees that transfers of MSP Operating Agreements will be to persons of the same or more restrictive U.S. citizenship priority. However, the statute provides for both DOD and MARAD approval of transfers, and does not set a time limit for review. Therefore, MARAD will not limit MSP transfer requests to 90 days or less. MARAD does not believe any changes are necessary to the rule with regard to the commenter’s suggestions.

*Comment:* One commenter believes that a transfer from a holder of an MSP Operating Agreement under the Third citizenship category be required to transfer that MSP Operating Agreement to another person that qualifies under the Third citizenship category. In connection, the commenter requests that section 296.30(f)(2)(B) be reworded to

“Owned by a person that is a Documentation Citizen and operated by a person that is a Section 2 Citizen.”

*Response:* MARAD agrees to this language and has revised the regulation accordingly.

#### 10. MSP Assistance Conditions; Section 296.31

*Comment:* One commenter requested that MARAD amend the proposed regulations to allow U.S. Merchant Marine Academy (USMMA) cadets to be carried either on the MSP vessel or on non-MSP U.S.-flag vessels in the Contractor’s fleet.

*Response:* MARAD does not agree to this change. One of the requirements for receiving an MSP Operating Agreement is that MSP vessels carry USMMA cadets. Section 296.31 has been amended for clarity.

#### 11. Payment procedures; Section 296.41

*Comment:* One commenter claims that MARAD has exceeded its authority in section 296.41(c)(1)(v) by limiting the number of days that a vessel may be drydocked, surveyed, inspected, or repaired without MARAD approval to 30 days, and requests removal of this section or, alternatively, an increase in the number of days to 45.

*Response:* MARAD believes thirty days is a reasonable limit. If a Contractor anticipates that the number of repair days will exceed this amount, a request for MARAD approval may be submitted by the Contractor.

*Comment:* One commenter believes that MARAD must set a limit per voyage on carriage of preference cargo of 7,500 tons bagged and/or bulk, or alternatively, MARAD should adopt rules requiring that full shipment lot bids submitted to agricultural agencies on behalf of MSP vessels be augmented with the per ton value of the daily government assistance from MSP.

*Response:* Section 296.41(c)(i) states that no payments will be made “[f]or any day that an MSP Agreement Vessel is engaged in transporting more than 7,500 tons\* \* \* of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b of the Act provided that it is bulk cargo.” Section 296.41(c)(i) comports with the language in 46 U.S.C. 53106 which does not allow for “7,500 bagged” preference cargo or a reduction based on a per ton value of the daily government MSP assistance. Therefore, MARAD is not changing section 296.41(c)(i).

MARAD has replaced the words “of up to” preceding \$2,600,000 in the first paragraph in section 296.41 with “equal to” to comport with the governing statute, 46 U.S.C. 53106(a).

#### 12. Administrative Determinations; Section 296.50

Section 296.50(a) has been amended to clarify and to indicate that appeals to the Administrator under this paragraph are a prerequisite to exhausting administrative remedies. Section 296.50(b) has been amended for purposes of clarity.

#### 13. Miscellaneous Editorial and Clarifying Changes Adopted

The commenters submitted several editorial and clarifying comments which MARAD is incorporating in this final rule. In section 296.11(a)(2), the reference to foreign commerce of the United States, and in sections 296.31(d)(2) and 296.41, the descriptions of “foreign trade” are being replaced by the words “foreign commerce” because the reference and the descriptions closely mirror the definition of “foreign commerce” in section 296.2.

MARAD has amended Section 296.31(b) to clarify funding levels and vessel selection under a continuing resolution, and section 296.31(d)(3) to clarify the meaning of the term “participates”.

MARAD has added the phrase “or if not current year data, a Schedule 310 of the MA-172” to section 296.32(b) to clarify MARAD’s expectations if current year data is not available.

#### 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 and 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 equal 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. Under Executive Order 12866, MARAD is required to provide an analysis of information developed as part of its decision making 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 (DOD) 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 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 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, 40 MSP vessels were employed in support of military operations. Four additional MSP ships have been utilized for reconstruction of Iraq. 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 fleets. The MSP also supports the training of merchant mariners by including United States Merchant Marine Academy cadets on voyages of MSP vessels.

#### 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 1997–2005) to 60 (authorized for FYs 2006–2015). Similarly, the payments per vessel are 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.

#### *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 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 was required prior to issuance of this 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 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. In addition, because this final rule implements a financial assistance program, it does not impose an economic burden on small entities.

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

This 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.

#### *Environmental Assessment*

We have analyzed this 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 final rule does not change the environmental effects of the current MSP, which has been operational since FY 1997. This final rule implements a financial assistance program which results in a negligible, if any cumulative effect on the environment. 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*

The Office of Management and Budget extended its approval of an information collection under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*) for three years on January 31, 2005. The title of the information collection is Application and Reporting Elements for Participation in the Maritime Security Program, OMB Control No. 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.

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

Assistance payments, Maritime carriers, Reporting and recordkeeping requirements.

■ Accordingly, the interim final rule adding part 296 to title 46, Code of Federal Regulations, which was published at 69 FR 43328 on July 20, 2004, is revised and adopted as a final rule 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.
- 296.23 Discretion within priority.
- 296.24 Subsequent awards of MSP Operating Agreements.

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

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



**Subpart E—Billing and Payment 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. The term, “applicant” excludes a trust.

*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.

*Coastwise Trade* means trade between points in the United States.

*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 § 53103 of the MSA 2003. The term, “Contractor” excludes a trust.

*Defense Contractor* means a person that operates or manages United States documented vessels for the Secretary of Defense or charters vessels to the Secretary of Defense and has entered into a special security agreement with the Secretary of Defense.

*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 points in the United States.

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

*Emergency Preparedness Agreement* means an agreement, required by § 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.

*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 any 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, includes trading between ports in the United States and foreign ports or 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.

*MSA 2003* means the Maritime Security Act of 2003.

*MSP Fleet* means the fleet of vessels established under section 53102(a) of the MSA 2003 and operated under MSP Operating Agreements.

*MSP Operating Agreement* means the assistance agreement between a Contractor and MARAD that provides for MSP payments, but is not a “procurement contract.”

*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 and operates that vessel directly 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. For purposes of holding an MSP Operating Agreement, the term "person" excludes a trust.

*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.

*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.

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

*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) of this definition, a trust that is qualified under this definition.

(2) A trust is qualified only if:

(i) Each of the trustees is a Section 2 Citizen; 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 Section 2 Citizen, or involving any other person that is not a Section 2 Citizen, 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 Section 2 Citizen 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 Section 2 Citizens 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 Section 2 Citizen 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 were due by October 15, 2004 to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Any applications received before October 15, 2004 were deemed to have been submitted on October 15, 2004. Within 90 days after receipt of a completed application, the Secretary was obligated to 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 took place reasonably soon after approval of the application. Contractors of MSP Operating Agreements were required to submit ownership information and signed charters to MARAD for approval by July 1, 2005.

(b) *Action by the Applicant.* Each applicant for an MSP Operating Agreement was required to submit an application under OMB control number 2133-0525 to the Secretary, Maritime Administration in the manner prescribed on that form. Application forms were made available from MARAD's Office of Sealift Support, or the application form could be downloaded from the MARAD Web site, <http://www.marad.dot.gov>, Information required included:

(1) An *Affidavit of Section 2 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 is required. If the applicant is a vessel operator and proposes to employ a vessel manager, then the applicant must supply an affidavit for the vessel manager that meets the same citizenship requirements applicable to the applicant;

(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:* Provide 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 any 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(ies) 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). The vessel replacement plan shall include the vessel's characteristics, a letter of intent or other document indicating agreement for purchase of vessel, and a forecast of operations for five years for the replacement vessel. 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 entire period of an MSP 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 Section 2 Citizens.

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

(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 subject 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 MSP Operating Agreement at the time of application for an MSP Operating 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 and operated by a defense contractor or a related person to include affiliated or related companies within the same corporate group 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 MSP 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;

(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 MSP 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 MSP 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

(A) 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:

(1) 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;

(2) 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

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

(B) [Reserved]

(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.

(c) *Telecommunications and Other Electronic Equipment.* The telecommunications and other electronic equipment on an existing vessel that is redocumented under the laws of the United States for operation under an MSP Operating Agreement shall be deemed to satisfy all Federal Communications Commission equipment certification requirements, if

(1) Such equipment complies with all applicable international agreements and associated guidelines as determined by the country in which the vessel was documented immediately before becoming documented under the laws of the United States;

(2) That country has not been identified by the Secretary as inadequately enforcing international regulations as to that vessel; and

(3) At the end of its useful life, such equipment will be replaced with equipment that meets Federal Communications Commission equipment certification standards (*see* 49 CFR Chapter I).

**§ 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: (i) That the Contractor agrees to execute a binding agreement approved by the Secretary for a

replacement vessel to be operated under the MSP Operating Agreement and to be built in the United States not later than nine months after the first date appropriated funds are available for construction and operating assistance for a minimum of three tank vessels;

(ii) A tank vessel under this section is eligible to be included in the MSP under § 296.11(a); and

(iii) A tank vessel under this section is owned and operated during the period of the MSP Operating Agreement by one or more persons that are Section 2 Citizens;

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

(i) Four years following the date this MSP Operating Agreement is effective, except if amounts are available for construction of a minimum of three tank vessels under the National Defense Tank Vessel Construction Assistance Program (NDTVCP) by October 1, 2007, then no payments shall be made for the existing “tank vessel” after four years following the date such amounts are available; or

(ii) The date of delivery of the replacement tank vessel constructed in the United States after October 1, 2004.

(3) The Secretary will not enter into more than five MSP Operating Agreements for tank vessels under this priority. If the five tank vessel MSP 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 nevertheless be awarded to existing tank vessels or the slots may be awarded permanently to any eligible 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 any eligible vessel of another Contractor until a new tank vessel's construction is completed in the United States. Such temporary MSP Operating Agreements may be terminated 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 MSP Operating Agreements.*—MARAD will not enter into more than 47 MSP Operating Agreements for Participating Fleet Vessels.

(c) *Reduction of Participating Fleet Vessel MSP Operating Agreements.*—The number of MSP 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 MSP 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 MSP Operating Agreement. Applicants must certify that they have the requisite authority as of October 1, 2005 and for the full period of the MSP Operating Agreement thereafter 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 that remains in effect until September 30, 2015.

(2) The full term of the MSP 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 MSP 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 MSP 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. For companies requesting an age waiver, the Applicant must submit an appropriate replacement vessel at least 120 days prior to the date of expiration of age eligibility.

(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 MSP 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).

(f) In the event that a Participating Fleet Vessel will be unavailable to participate in the MSP on October 1, 2005, due to an unforeseen casualty to the vessel, a Contractor may offer an eligible replacement vessel. The replacement vessel must subsequently be approved by MARAD and DOD. The replacement vessel must operate under an MSP Operating Agreement in sufficient time to meet the 180 minimum operation days required during the fiscal year to avoid being in default of the MSP Operating Agreement.

#### § 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 MSP Operating Agreement, will be:

(1) Owned and operated by one or more persons that are Section 2 Citizens; 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 Section 2 Citizen.

(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).

#### § 296.23 Discretion within priority.

The Secretary—

(a) Subject to paragraph (b) of this section, may award MSP Operating Agreements within each priority as the Secretary considers appropriate; and

(b) Shall award MSP Operating Agreements within a priority—

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

(2) In the cases of the Priorities III and IV, according to the applicants' records of owning and operating vessels; and

(3) Subject to the approval of the SecDef.

(c) The Secretary does not have discretion to override the priority requirements with respect to the initial award of MSP Operating Agreements.

#### § 296.24 Subsequent awards of MSP Operating Agreements.

(a) Until October 1, 2005, if, for any reason, after the award of an MSP Operating Agreement, the Applicant is unwilling or unable to commence operations pursuant to the terms of the MSP Operating Agreement, MARAD may, pursuant to the priority criteria, award that MSP Operating Agreement to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement.

(b) After October 1, 2005, MARAD intends to ensure that all available MSP Operating Agreements are fully utilized at all times, in order to maximize the benefit of the MSP. Accordingly, when an MSP Operating Agreement becomes available through termination by the Secretary, expiration of a temporary MSP Operating Agreement or early termination by the MSP contractor, and no transfer under 46 U.S.C. 53105(e) is involved, MARAD will reissue the MSP Operating Agreement pursuant to the following criteria.

(1) The proposed vessel must meet the requirements for vessel eligibility in 46 U.S.C. 53102(b);

(2) The applicant must meet the vessel ownership and operating requirements for priority in 46 U.S.C. 53103(c); and

(3) Priority will be assigned in accordance with operational requirements specified by the SecDef.

(c) MARAD will use the following procedures in reissuing an MSP Operating Agreement. MARAD and USTRANSCOM will determine if the applications received on October 15, 2004 form an adequate pool for award of a reissued MSP Operating Agreement. If so, MARAD will award a reissued MSP Operating Agreement from that pool of qualified applicants in its discretion, subject to approval of the SecDef. MARAD and USTRANSCOM may decide to open a new round of applications. Applicants for reissued MSP Operating Agreements must meet the citizenship requirements of Priority III. Inasmuch as MSP furthers a public purpose and MARAD does not acquire goods or services through MSP, the selection process for award of MSP Operating Agreements does not constitute an acquisition process subject to any procurement law or the Federal Acquisition Regulations.

#### 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 announced an initial award of 60 MSP Operating Agreements on January 12, 2005. In addition, the Secretary advised 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 established 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 were 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 Agreement (EPA) provided by § 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 the MSP.

(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 MSP Operating Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments, and by its EPA 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 MSP Operating 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 Section 2 Citizens; or

(B) Owned by a person that is a Documentation Citizen and operated by a person that is a Section 2 Citizen.

(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 will 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 MSP Operating Agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former MSP 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 or a tank vessel not built under the NDTVCP 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 built under the NDTVCP 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 MSP Operating Agreements.* A Contractor subject to an MSP Operating Agreement may transfer that MSP Operating Agreement (including all rights and obligations under that MSP Operating Agreement) to any person eligible to enter into an MSP Operating Agreement under § 296.10 and of the same or more restrictive U.S. citizen priority, provided that prior approval to transfer the MSP Operating 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 10 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 under a CR at sufficient levels for any portion of a fiscal year, the Secretary will select the vessels to retain within the funding level of the previous fiscal year, in consultation with the SecDef, based on the Secretaries' determination of the most militarily useful and commercially viable vessels. 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 MSP Operating 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 MSP Operating 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 foreign commerce, 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, *i.e.*, directly or indirectly owns, charters, or operates, a vessel engaged in noncontiguous domestic trade unless the Contractor is a Section 2 Citizen.

(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 on the MSP vessel 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 EPA, or if not current year data, a Schedule 310 of the MA-172.

(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 MSP Operating 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 MSP Operating Agreement is in effect,

for each Agreement Vessel, an annual payment equal 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 foreign commerce, 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 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 Section 2 Citizen;

(iii) While under charter to the United States Government other than a charter pursuant to an EPA under § 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 Maritime Administration or the Contracting Officer with respect to the administration of this part or any other dispute or complaint concerning MSP Operating Agreements 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 Operating Agreement Appeals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590. Such an appeal is a prerequisite to exhausting administrative remedies.

(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 make 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. 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.

By order of the Maritime Administrator.

Dated: September 15, 2005.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

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