

Dated: August 8, 2011.

**Judith Enck,**

*Regional Administrator, Region 2.*

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 46 CFR Part 28

[Docket No. USCG-2010-0625]

RIN 1625-AB50

#### Waiver of Citizenship Requirements for Crewmembers on Commercial Fishing Vessels

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to add to its regulations a description of the procedures for requesting and processing waivers of citizenship requirements on commercial fishing vessels. The Coast Guard aims to improve its efforts to inform the commercial fishing industry of this opportunity by publishing the application procedure policy into the Code of Federal Regulations (CFR).

**DATES:** Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before November 16, 2011 or reach the Docket Management Facility by that date. Comments sent to the Office of Management and Budget (OMB) on the collection of information must reach OMB on or before November 16, 2011.

**ADDRESSES:** You may submit comments identified by docket number USCG-2010-0625 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**Collection of Information Comments:** If you have comments on the collection of information discussed in section V.D of this NPRM, you must also send comments to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget. To ensure that your comments to OIRA are received on time, the preferred methods are by e-mail to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov) (include the docket number and "Attention: Desk Officer for Coast Guard, DHS" in the subject line of the e-mail) or fax at 202-395-6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Mr. David Belliveau, Office of Vessel Activities (CG-5433), Coast Guard; telephone 202-372-1247, e-mail [David.J.Belliveau@uscg.mil](mailto:David.J.Belliveau@uscg.mil). If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### SUPPLEMENTARY INFORMATION:

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##### I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.

##### A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2010-0625), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and type "USCG-2010-0625" in the "Enter Keyword or ID" box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

##### B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, click on the "read comments" box, which will then become highlighted in blue. In the "Enter Keyword or ID" box, insert "USCG-2010-0625" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

##### C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

#### D. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the docket using one of the methods specified under **ADDRESSES**. In your request, explain why you believe a public meeting would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

#### II. Abbreviations

CFR Code of Federal Regulations.

COMDTINST Commandant

Instruction.

DHS Department of Homeland Security.

DOL Department of Labor.

FR **Federal Register**.

INA Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

§ Section symbol.

U.S.C. United States Code.

#### III. Background

Under title 46 United States Code (U.S.C.) 8103(i)(1), each unlicensed seaman on a fishing, fish processing, or fish tender vessel that is engaged in the fisheries in the navigable waters of the United States or the exclusive economic zone must be—

1. A citizen of the United States;
2. An alien lawfully admitted to the United States for permanent residence; or
3. Any other alien allowed to be employed under the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (INA).

Furthermore, 46 U.S.C. 8103(i)(2) states that no more than 25 percent of the unlicensed seamen on these vessels may be non-permanent resident aliens authorized for employment in the United States under the Immigration and Nationality Act (INA), category 3 above.

Relief from these citizenship and permanent resident status requirements is provided in 46 U.S.C. 8103(b)(3)(C). If the Secretary of Homeland Security determines, after an investigation, that qualified seamen who are citizens of the United States are not available, the Secretary may waive these citizenship requirements.

Congress did not specify a procedure for requesting the waiver allowed under section 8103(b)(3). To fill the need for a procedure, the Coast Guard published a policy letter in June 2001 titled “Procedures for Waiver of Requirements for Citizenship Aboard Commercial Fishing Vessels” (2001 policy letter). This policy letter is available at <http://homeport.uscg.mil/mycg/portal/ep/>

[programView.do?channelId=17679&programId=12861](http://www.fishsafe.info/programView.do?channelId=17679&programId=12861). This policy letter explains the steps involved in the request for a waiver process. The Coast Guard intended the letter to be the means of informing the fishing industry of the waiver opportunity and the application procedure.

In past years, the Coast Guard received between 125 and 200 waiver requests annually. In 2008, that volume slowed appreciably.<sup>1</sup> Through experience gained during the ten years since the publication of the policy letter and feedback received from the Commercial Fishing Industry Vessel Safety Advisory Committee, the Coast Guard believes that not all fishing vessel owners, operators, and employers are aware they can request a waiver from citizenship requirements. As a result, these vessels often either sail short-handed, creating potential safety issues, or choose to exceed the 25 percent limit for non-permanent resident aliens authorized for employment in the United States under the INA without an approved waiver. This proposed rule mirrors the requirements that exist in the 2001 policy letter with the exception of the mandatory dockside examination.

Despite the benefits of the waiver option for owners, operators, and employers, the Coast Guard is concerned that the continued practice of granting requests for waivers under this program gives rise to potential safety and emergency preparedness problems on fishing vessels for U.S. citizen and alien crewmembers. It is incumbent on owners, operators, and employers to ensure the vessel is in full compliance with all safety, survival equipment, and systems requirements.

Therefore, in this proposed rule, the Coast Guard proposes to make satisfactory completion of a dockside safety examination under the Coast Guard’s Commercial Fishing Industry Vessel Safety program a condition for receiving a waiver from the citizenship requirements. (For more information on this program, see <http://www.fishsafe.info/>) Section 604 of the Coast Guard Authorization Act of 2010 (Pub. L. 111–281) mandates dockside examinations for commercial fishing vessels operating beyond 3 nautical miles from shore. For vessels operating inside of 3 nautical miles from shore, examinations would remain voluntary. Under these proposed rules, any commercial fishing vessel requesting a waiver would be required to show satisfactory completion of a dockside

<sup>1</sup> In 2008, the Coast Guard received a total of six waiver requests.

safety examination, regardless of its area of operation.

#### IV. Discussion of Proposed Rule

Through this rulemaking, the Coast Guard would amend 46 CFR part 28, Requirements for Commercial Fishing Industry Vessels, by adding a new subpart to specifically address the citizenship waiver program. This subpart would formally incorporate the 2001 policy letter into the CFR and would also require that any vessel citizenship waiver request and approval be conditioned on the successful completion of a required dockside exam.

In the proposed new subpart, the Coast Guard would explain that owners, operators, and employers must send to the Coast Guard a written citizenship waiver request, which would include the number of alien seamen to be employed who are not lawfully admitted for permanent residence but are otherwise authorized for employment in the United States under the INA, along with certification that the vessel(s) would comply with all other applicable citizenship requirements regarding the Master or other officers in charge of deck or engineering watches on a documented vessel. The owner, operator, or employer would also be required to provide a U.S. Citizenship and Immigration Services (USCIS) or other DHS-issued authorization for employment in the U.S. under the INA for each alien seaman it intends to employ who is not lawfully admitted for permanent residence, as well as information, as discussed below, demonstrating that there are no qualified U.S. seamen available for the position.

If, within 30 days of receipt of a request for a waiver, the Coast Guard does not make a determination, or informs the employer that the Coast Guard needs more time for review, the waiver request would be provisionally approved for 90 days from the end of the original 30 days. If the Coast Guard grants a waiver, the term of the approval would be for the same period as specified by the USCIS or other DHS-issued authorization for employment in the U.S. under the INA.

Additionally, to help ensure the safe condition of the vessel, the Coast Guard would require the employer to submit documentation of a satisfactory dockside safety examination conducted by the Coast Guard.

The written request for a waiver must contain the following:

1. *Vessel owner, operator, or employer’s contact information.* This information is required to cross-

reference with the Marine Information for Safety and Law Enforcement database to verify vessel ownership; to facilitate contact with the owner, operator, or employer if any questions arise after reviewing the request for a waiver package; and to mail a waiver letter back to the owner, operator, or employer in an expeditious manner.

2. *List of fishing vessels and information on those vessels that the owner, operator, or employer wishes to exempt.* The owner, operator, or employer would be asked to provide, for each vessel that he/she wants a waiver, the following: the fishing vessel's name, official number, length (in feet), gross tonnage, and the types of fisheries the vessel will fish. This information would be used to verify the documentation of the vessel, to check the vessel's safety history, and to ensure that the vessel belongs to the person who is making the request for citizenship waiver.

3. *A list of persons working on the vessel(s).* The list would include: The total number of crewmembers; the number of seamen who are neither U.S. citizens nor lawful permanent residents; the name, nationality, birth place, position to be held, and basis for employment authorization in the U.S. under the INA of each seaman who is neither a U.S. citizen nor a lawful permanent resident; and the number of alien seamen who are neither U.S. citizens nor lawful permanent residents for whom the waiver is being requested. This requested information would allow the Coast Guard to ascertain what percentage of a vessel's crew would be non-permanent resident aliens to ensure that non-U.S. citizens would only be used as seamen and not Watch Officers or Masters, and to ensure that the persons named on a waiver request would be non-permanent resident aliens who are authorized for employment in the United States under the INA.

4. *Identification of the time period over which the 25 percent limit would be exceeded:* This information would include the start date (MM/DD/YYYY) and expiration date (MM/DD/YYYY) of the requested waiver. This information would be required to ensure the owner, operator, or employer is asking for an exemption that falls within the period of the named individuals' authorization for employment in the U.S. under the INA.

5. *Demonstration that the vessel(s) is/are in full compliance with all applicable safety and other regulatory requirements set forth in 46 CFR part 28.* In order to document compliance, the owner, operator, or employer would be required to submit documentation that shows that: a dockside safety examination was conducted; the

examination was successfully passed; the vessel(s) received a safety examination decal (and include the serial number of the decal; the decal is displayed on the vessel; and that the decal will not expire during the entire time period of the requested waiver. Since commercial fishing vessels operating within 3 nautical miles from shore are generally not required to be examined, compliance with 46 CFR part 28 requirements would usually be determined by a random boarding or by the vessel owner, operator, or employer requesting a dockside safety examination. Thus absent these rules, it is conceivable that a vessel could go to sea and fish for months, or even years, without being checked for its compliance with regulations. Through these examinations, we intend to identify and correct safety issues, eliminate preventable hazards, and minimize any problems that might exist prior to the Coast Guard approving a request for a waiver. Satisfactory completion of a dockside safety examination for all commercial fishing vessels requesting a waiver under this proposed rule would ensure all applicable vessels provide all emergency equipment and instruction for all crewmembers and otherwise comply with applicable laws and regulations.

6. *Owner, operator, or employer's statement certifying that the vessel(s) would operate in compliance with all other applicable citizenship requirements regarding the Master or other Officers in Charge of deck or engineering watches on U.S. documented vessels.*

7. *Documentation demonstrating satisfactory evidence of authorization for employment as a seaman with the owner, operator, or employer under the INA for aliens who are not lawful permanent residents but are otherwise authorized for employment in the United States under the INA; and that qualified seamen who are United States citizens are not available.*

The H-2B visa has proven to be the primary avenue for demonstrating compliance with these statutory requirements. The 2001 policy letter thus required a temporary labor certification from the Department of Labor (DOL) for the position in question in addition to DHS authorization for the alien's employment with the owner, operator, or employer as an H-2B nonimmigrant. Together, the documents from DHS and DOL demonstrate that these prerequisites are met. In this proposed rulemaking, we plan on removing the requirement in the 2001 policy letter that an alien authorized for

employment with the owner, operator, or employer as a seaman pursuant to admission as H-2B nonimmigrant provide evidence of a DOL temporary labor certification; the owner, operator, or employer need only provide evidence of the alien's authorization from DHS to work with the employer as a crewman in H-2B nonimmigrant status. The requirement to provide evidence of the DOL temporary labor certification is being removed because USCIS approval of an H-2B nonimmigrant visa petition is premised on DOL certification that there are no qualified and available U.S. workers (a term which includes U.S. citizens) to perform the respective temporary services or labor as a seaman. See 8 CFR 214.2(h)(6)(iii)(A); 20 CFR 655.4 (defining "United States Worker" for H-2B purposes).

Additionally, we seek comment on alternative documentation that may be submitted for our review and evaluation if an alien is not authorized for employment with the owner, operator, or employer as an H-2B nonimmigrant. H-2B nonimmigrant status is but one means by which a non-permanent resident alien might be authorized for employment in the U.S. under the INA. If an alien who is neither a lawful permanent resident nor an H-2B nonimmigrant is authorized for employment, the owner, operator, or employer must nevertheless establish that qualified seamen who are citizens of the United States are not available in order to qualify for a waiver. In this instance, the burden is upon the requestor of the waiver to provide satisfactory evidence (1) Of authorization for employment with the owner, operator, or employer as a seaman under the INA, as required by 46 U.S.C. 8103(i)(1)(C), and (2) that qualified U.S. citizen seamen are not available as required by 46 U.S.C. 8103(b)(3)(C). We seek comments on the type of documents that could possibly be submitted to establish compliance with the statutory requirements when an alien's authorization for employment in the U.S. with the owner, operator, or employer is not derived from his or her classification as an H-2B nonimmigrant.

## VI. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below, we summarize our analyses based on 13 of these statutes or executive orders.

### A. Executive Order 12866 and Executive Order 13563

This proposed rule is not a significant regulatory action under section 3(f) of

Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that

Order. The Office of Management and Budget has not reviewed it under that Order.

The following table summarizes the costs and benefits of this rule. We

estimated annual and 10-year costs of the rule. And, based on data availability, we identified qualitative benefits of the proposed rule.

TABLE 1—SUMMARY OF COSTS AND BENEFITS

Category	Estimate
<b>Costs</b>	
Annual Cost to Apply for Waiver ....	\$42,365.
Cost of Dockside Examination * .....	\$9,160.
Ten Year Monetized Costs .....	\$330,812.
(rounded values, 7% discount rate)	
<b>Benefits</b>	
Qualitative Benefits .....	This proposed rule would provide industry with greater visibility to the waiver application procedures. The inclusion of the dockside examination would ensure that all vessels granted waivers are in compliance with existing safety regulations.

\* The cost to apply for a waiver is an annual cost. The cost of the dockside exam occurs every two years.

This proposed rule would create a regulatory burden for those owners and operators of commercial fishing vessels electing to request a waiver. From 2005 to 2009, there was an average of 91 requests for waivers sent to the Coast Guard per year. Note that applications for waivers have declined from a high of 203 in 2005 to 20 in 2009. The number of applications for waivers will vary from year to year based on many factors, such as national and regional economic conditions and management programs for specific fisheries. We use a 5-year average to reflect the range of conditions that may occur over the 10-year period of analysis. In addition, during the period of 2005 to 2009, Coast Guard issued an average of 108 violations of 46 U.S.C. 8103, which would include violations related to the citizenship requirements for the crew of fishing vessels and the citizenship requirements for the Master and Officer in charge of deck or engineering watches. During 2009, 75 of these violations were issued. Based on the continuing level of violations of citizenship requirements for fishing vessels, the average over 5 years of requests for waivers, rather than the low number of recent requests, is more indicative of the future use of waivers once their use is established in the regulations.

We estimate that it takes an owner or operator approximately 9.25 hours<sup>2</sup> to compile and submit the appropriate documentation to the Coast Guard per the 2001 policy letter. The Bureau of Labor Statistics provides a wage of \$34.01 for captains, mates, and pilots of

water vessels.<sup>3</sup> We apply a load factor of 1.48 to this wage to account for benefits, which makes the hourly wage for a captain, mate, or pilot approximately \$50.33.<sup>4</sup> At a cost of \$50.33 per hour to the civilian sector, the cost is \$465.55 per request for a waiver (\$50.33 per hour × 9.25 hours). The total annual burden would be approximately 842 labor hours (9.25 hours per request × 91 requests per year) for a cost to industry of \$42,377 (\$50.33 × 842 hours) to submit the request for a waiver. This cost is only borne if a vessel owner, operator, or employer chooses to seek relief of the citizenship requirement. The proposed rule would require that all vessels requesting a waiver undergo a dockside examination.

As noted, the Coast Guard Authorization Act of 2010 added a requirement for mandatory dockside safety examinations once every 2 years for vessels that operate beyond 3 nautical miles from the shoreline. Some of the vessels requesting citizenship waivers may be required to undergo the dockside examinations due to the Authorization Act. Since this proposal would make the dockside safety examination a requirement for obtaining a waiver, the total cost of these examinations is attributable to this proposed rule.

According to Coast Guard Fishing Vessel Safety Division subject matter experts, the dockside safety examination takes, on average, 2 hours to complete, which would represent an opportunity cost to the vessel owner, operator, or

employer equal to the time lost multiplied by the wage for a captain, mate or pilot. This opportunity cost would equal approximately \$9,160 (2 hours × \$50.33 × 91 examinations).

The dockside examination would serve as a check to ensure that the vessel is in full compliance with all applicable safety and other regulatory requirements set forth in 46 CFR part 28. Vessels may have to take corrective actions as a result of the dockside examinations. As the examinations focus on compliance with existing regulations, the costs of any corrective actions would not be attributable to this rulemaking, but instead is attributable to compliance with existing regulations.

The total annual cost to industry associated with this proposal would be approximately \$51,537. This includes the \$42,365 cost for applying for a waiver per the 2001 policy letter and the \$9,160 opportunity cost associated with the addition of the dockside examination to the current request for a waiver process.

Reviewing a waiver application currently takes a Coast Guard employee approximately 3 hours, on average. We assume a wage rate equal to that of a GS-13 for the reviewer. Based on Commandant Instruction (COMDTINST) 7310.1L, Coast Guard Reimbursable Standard Rates, (available at [http://uscg.mil/directives/ci/7000-7999/CI\\_7310\\_1L.PDF](http://uscg.mil/directives/ci/7000-7999/CI_7310_1L.PDF)), the hourly wage for the reviewer would be \$67 per hour. The total annual projected cost to the Coast Guard to review applications would be \$18,291 (3 hours × \$67 × 91 requests). The dockside examination portion of this proposal would also create additional government costs to perform the examinations. Civilian

<sup>2</sup> Time estimates provided by Coast Guard Fishing Vessel Safety Division subject matter experts.

<sup>3</sup> <http://www.bls.gov/oes/2009/may/oes535021.htm>. This wage information is from May 2009 and is the most recent figure from BLS.

<sup>4</sup> The load factor is determined by dividing BLS total compensation by BLS wages.

examiners are usually GS-11 or GS-12 positions while Coast Guard uniformed examiners are usually E-5 or E-6 grades, which, according to COMDTINST 7310.1L, would lead to an average wage for examiners of \$49.<sup>5</sup> According to Coast Guard subject matter experts, a dockside examination, including travel time and administrative time, would take an examiner 4 hours to complete. The total cost to the government from this requirement would be \$17,836 (4 hours per examination × \$49 × 91 examinations). As with the costs to industry, government costs would only be incurred if owners or operators opt to apply for a waiver.

By incorporating the current policy into regulation, the Coast Guard would promote greater awareness of the policy, and provide commercial fishermen with one location for all rules governing their operations. Greater visibility of the application procedures may help reduce the number of crew requirement violations. Also, the inclusion of the dockside examination would ensure that all vessels granted waivers are in compliance with existing safety regulations that apply to commercial fishing vessels.

#### B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

Based on 2007 data, we identified 79,058 entities owning fishing vessels. Of these, a small number (13) were owned by government entities or non-profits, all of which exceed the threshold for being classified as a small entity. The remaining owners are classified as businesses. Based on available revenue data, approximately 99.8 percent (78,901) of the commercial fishing businesses fall below the Small Business Administration threshold for a small business based on their primary North American Industry Classification System designation.

Based on historical data, we expect an average of 91 requests for a waiver per year. If we assume that all of these requests are from small commercial fishing businesses, we can assess the

potential impacts of this proposal on the industry. Coast Guard records show that the majority of vessels requesting waivers in the period from 2006–2009 are between 50 and 70 feet in length. By comparing the \$566 cost per vessel of the proposal to the revenues for commercial fishing vessels in the 50–70 ft. size range, we estimate that only 3 percent of all commercial fishing vessels would have a revenue impact greater than 3 percent from this proposal. Table 2 shows the percent of vessels by revenue impact.

TABLE 2—REVENUE IMPACTS OF PROPOSED RULE

Revenue impact	Percent of vessels
0% < Impact ≤ 1% .....	62
1% < Impact ≤ 3% .....	35
3% < Impact ≤ 5% .....	1
5% < Impact ≤ 10% .....	2
Above 10% .....	0

The primary purpose of this proposed rule is to codify existing policy into regulation, although, there would be one new cost element introduced. We estimate 91 of approximately 80,000 commercial fishing vessels apply for a waiver annually, which is not a substantial number. Furthermore, because the waiver process is voluntary, in that vessel owners, operators, or employers would only apply for a waiver if the benefits of doing so outweigh the costs, we can assume that if the approximate \$566 per vessel cost of this rulemaking is prohibitive, vessel owners would choose to not pursue a waiver. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain why you think it qualifies and how and to what degree this rule would economically affect it.

#### C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or

governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult with the Coast Guard personnel listed under **FOR FURTHER INFORMATION CONTACT** section of this proposed rule. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### D. Collection of Information

This proposed rule would call for a revision to an existing collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). This revision is explained below under ESTIMATE OF TOTAL ANNUAL BURDEN. As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

*Title:* Commercial Fishing Industry Vessel Safety Regulations.

*OMB Control Number:* 1625–0061.

*Summary of the Collection of Information:* This information collection is intended to improve safety on board vessels in the commercial fishing industry. The requirements apply to those vessels and to seamen on them.

*Need for Information:* The Coast Guard needs to collect this information for all vessels requesting a waiver for relief of the citizenship requirements on a commercial fishing vessel.

*Proposed Use of Information:* The Coast Guard would use this information solely to determine whether or not a vessel should be granted relief of the citizenship requirements on a commercial fishing vessel.

*Description of the Respondents:* The respondents are vessel owners, operators, and employers of U.S. commercial fishing vessels who opt to seek relief of the citizenship requirements on a commercial fishing vessel.

*Number of Respondents:* The existing OMB-approved number of respondents, as adjusted in May 2008, is 5,103. The proposed rule would not change that total.

*Frequency of Response:* 91 respondents, based on a five-year average.

<sup>5</sup> COMDTINST 7310.1L lists reimbursable rates for government workers.

*Burden of Response:* Those vessels that voluntarily choose to request a waiver bear the burden of this collection. We estimate that a request for a waiver would take about 9.25 hours per response.

*Estimate of Total Annual Burden:* The existing OMB-approved total annual burden, as adjusted in May 2008, is 5,917 hours. The annual increase from the proposed rule would be approximately 842 hours to the public, assuming 91 waiver requests are submitted per year.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we will submit a copy of this proposed rule to the Office of Management and Budget (OMB) for its review of the collection of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining the burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date under **DATES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the Coast Guard could enforce the collection of information requirements in this proposed rule, OMB would need to approve the Coast Guard's request to collect this information.

#### *E. Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them.

We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism because states may not regulate citizenship requirements onboard fishing, fish processing, or fish tender vessels engaged in the fisheries in the navigable waters of the United States or the exclusive economic zone.

#### *F. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires

Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### *G. Taking of Private Property*

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### *H. Civil Justice Reform*

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### *I. Protection of Children*

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

#### *J. Indian Tribal Governments*

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### *K. Energy Effects*

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *L. Technical Standards*

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### *M. Environment*

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under the “Public Participation and Request for Comments” section of this preamble. This rule involves the qualifying of maritime personnel and the manning of vessels and falls under § 2.B.2, figure 2–1, paragraphs (c) and (d) of the Instruction. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### **List of Subjects in 46 CFR Part 28**

Alaska, Fire prevention, Fishing vessels, Marine safety, Occupational safety and health, Reporting and recordkeeping requirements, Seamen.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR Part 28 as follows:

#### **PART 28—REQUIREMENTS FOR COMMERCIAL FISHING INDUSTRY VESSELS**

1. The authority citation for part 28 is revised to read as follows:

**Authority:** 46 U.S.C. 4502, 4505, 4506, 8103; Department of Homeland Security Delegation No. 0170.1.

#### Subpart H—[Reserved]

2. Amend part 28 by reserving subpart H.
3. Amend part 28 by adding new subpart I to read as follows:

#### Subpart I—Citizenship Waiver Procedures

Sec.

- 28.1100 General  
 28.1105 Request for a waiver  
 28.1110 Waiver approval  
 28.1115 Waiver request and approval records

#### Subpart I—Citizenship Waiver Procedures

##### § 28.1100 General.

As set forth in 46 U.S.C. 8103, a citizenship requirement, other than a requirement that applies to the master of a documented vessel, on commercial fishing vessels may be waived for unlicensed seamen when qualified seamen who are citizens of the United States are not available. Under the provisions of this subpart, the Coast Guard approves or denies requests for a waiver of the citizenship requirement from owners, operators, or employers seeking to exceed the 25 percent limit applicable to unlicensed seamen aboard fishing industry vessels who are non-permanent resident aliens authorized for employment in the United States under the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et. seq.*).

##### § 28.1105 Request for a waiver.

(a) Vessel owners, operators, or employers who desire a waiver of citizenship requirements from the Coast Guard must submit a written request to the Commandant (CG-5433), United States Coast Guard, 2100 Second St., SW., Stop 7581, Washington, DC 20593-7581.

(b) The written request required under paragraph (a) of this section must contain—

- (1) The vessel owner, operator, or employer's contact information—
  - (i) The vessel owner, operator, or employer's full name (last, first, middle initial);
  - (ii) Address;
  - (iii) Work phone number;
  - (iv) Fax number (if applicable); and
  - (v) E-mail address (if applicable);
- (2) Information on fishing vessel(s) for which the owner, operator, or employer requests a citizenship waiver. For each listed vessel, the owner, operator, or employer must include—
  - (i) Fishing vessel name;

- (ii) Fishing vessel official number;
- (iii) Fishing vessel length (in feet);
- (iv) Fishing vessel gross tonnage; and
- (v) Type(s) of fishery(ies) in which the vessel is engaged;

(3) Information on persons who will work on the vessel(s). For each listed vessel, the owner, operator, or employer must include—

- (i) The total number of unlicensed crew normally employed;
- (ii) The name, nationality, birth place, position to be held, and basis for employment authorization in the United States of each alien who is not lawfully admitted for permanent residence but is otherwise authorized for employment in the United States under the INA; and
- (iii) The number of alien seamen who are not lawfully admitted for permanent residence but are otherwise authorized for employment in the United States under the INA for which the waiver is requested; and

(4) The time period over which the 25 percent limit will be exceeded—

- (i) Start date (MM/DD/YYYY); and
- (ii) Expiration date (MM/DD/YYYY).

(c) The vessel owner, operator, or employer submitting a request for a waiver under paragraph (a) of this section is required to demonstrate that the vessel(s) is/are in full compliance with all applicable safety and other regulatory requirements set forth in 46 CFR part 28. To that end, the owner, operator, or employer must submit documentation that shows—

- (1) A dockside safety examination was conducted;
- (2) The examination was successfully passed and a safety decal was issued and affixed to the vessel;
- (3) The serial number of the decal issued; and
- (4) The period of validity of the safety decal issued.

(d) The owner, operator, or employer submitting a request for a waiver under paragraph (a) of this section must include a statement certifying that the vessel(s) will operate in compliance with all other applicable citizenship requirements regarding the Master or other Officers in Charge of deck or engineering watches on U.S. documented vessels.

(e) The owner, operator, or employer submitting a request for a waiver under paragraph (a) of this section must provide evidence that aliens who are not lawfully admitted for permanent residence are authorized for employment with the owner, operator, or employer under the INA and evidence that qualified seamen who are U.S. citizens are not available for employment. The following documentation is satisfactory evidence

both of authorization for employment with the owner, operator, or employer under the INA and that qualified seamen who are U.S. citizens are not available:

Documentation for H-2B nonimmigrants.

(1) U.S. Citizenship and Immigration Services (USCIS) Form I-797, "Notice of Action: Approval Notice" classifying the alien as an H-2B nonimmigrant for purposes of employment with the owner, operator, or employer submitting a request for a waiver under paragraph (a) of this section; and

(2) USCIS Form I-94 indicating that the alien has been lawfully admitted to the United States (or has been lawfully granted a change of nonimmigrant status or extension of nonimmigrant stay in H-2B classification) for the dates covered by the proposed employment.

(f) Upon receipt of a request submitted under paragraph (a) of this section and required information submitted in accordance with paragraphs (b)–(e) of this section, the Coast Guard (CG-5433) will evaluate the information and may investigate further, as necessary, to determine the validity of the information provided.

##### § 28.1110 Waiver approval.

(a)(1) If, within 30 days of receipt of a properly submitted request for a waiver, the Coast Guard does not make a determination whether to approve the request or does not advise the owner, operator, or employer that additional time is needed for consideration, the request will be considered provisionally approved for 90 days from the end of that 30-day period.

(2) If the Coast Guard does not make a determination whether to approve a properly submitted request for a waiver in writing within 30 days of receipt, the owner, operator, or employer must have a copy of the request and supporting documentation available onboard the vessel as proof of submission of a request for waiver of the citizenship requirement for unlicensed seamen for that vessel.

(b)(1) If the Coast Guard determines, based on the waiver request, supporting documentation, and any other relevant information, that no qualified U.S. citizen seamen are available, the Coast Guard (CG-5433) will grant the waiver to exceed the 25 percent limit for employment of non-permanent resident alien seaman for the period of employment authorized for each alien under the INA. The Coast Guard will issue a letter of approval to the owner, operator, or employer for the applicable vessel(s).

(2) The owner, operator or employer must have a copy of the waiver approval letter available onboard the vessel as proof of waiver of the citizenship requirement for unlicensed seamen for that vessel.

**§ 28.1115 Waiver request and approval records.**

The Coast Guard will maintain a record of citizenship waiver requests and approvals. Approvals will be documented for the applicable vessel(s) in the Coast Guard's vessel information database.

Dated: August 9, 2011.

**James A. Watson,**

*Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.*

[FR Doc. 2011-21024 Filed 8-17-11; 8:45 am]

**BILLING CODE 9110-04-P**

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 171, 172, 173, 174, 179, and 180**

[Docket No. PHMSA-2010-0018 (HM-216B)]

RIN 2137-AE55

**Hazardous Materials: Incorporating Rail Special Permits Into the Hazardous Materials Regulations**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Pipeline and Hazardous Materials Safety Administration is proposing to amend the Hazardous Materials Regulations to incorporate provisions contained in certain widely used or longstanding special permits that have general applicability and established safety records. Special permits allow a company or individual to package or ship a hazardous material in a manner that varies from the regulations provided that an equivalent level of safety is maintained. The revisions in this proposed rule are intended to provide wider access to the regulatory flexibility offered in special permits and eliminate the need for numerous renewal requests, thus reducing paperwork burdens and facilitating commerce while maintaining an appropriate level of safety. This rulemaking also proposes to respond to two petitions for rulemaking, P-1497 concerning the use of electronic shipping papers, and P-1567

concerning the removal of the Association of American Railroad's (AAR's) AAR-600 portable tank program for previously adopted standards that meet or exceed the AAR-600 requirements.

**DATES:** Written comments should be submitted on or before October 17, 2011.

**ADDRESSES:** You may submit comments identified by the docket number (PHMSA-2010-0018 (HM-216B)) by any of the following methods:

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

*Fax:* 1-202-493-2251.

*Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue, SE., Washington, DC 20590.

*Hand Delivery:* To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name and docket number for this notice at the beginning of the comment. All comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information.

*Docket:* For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT's Docket Operations Office (*see ADDRESSES*).

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

**FOR FURTHER INFORMATION CONTACT:** Eileen Edmonson or Steven Andrews, Standards and Rulemaking Division, Office of Hazardous Materials Safety, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration (PHMSA), or Karl Alexy, Office of Safety Assurance and Compliance, (202) 493-6247, Federal Railroad Administration (FRA), 1200 New Jersey Avenue, SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

I. Background

II. Overview of Proposed Amendments  
III. Regulatory Analyses and Notices

**I. Background**

*Special Permits*

The Pipeline and Hazardous Materials Safety Administration (PHMSA) is proposing to amend the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) to incorporate certain requirements based on existing special permits for transportation by railroad issued by PHMSA under 49 CFR part 107, subpart B (§§ 107.101 to 107.127). A special permit sets forth alternative requirements (variances) to the requirements in the HMR by means that achieve a safety level that at a minimum corresponds to the safety level required under the regulations and is consistent with the public interest. Congress expressly authorized DOT to issue these variances in the Hazardous Materials Transportation Act of 1975.

The HMR generally are performance-oriented regulations that provide the regulated community a certain amount of flexibility in meeting safety requirements. Even so, not every transportation situation can be anticipated and built into the regulations. Innovation is a strength of our economy, and the hazardous materials community is particularly strong at developing new materials and technologies as well as innovative ways of transporting materials. Special permits enable the hazardous materials industry to quickly, effectively, and safely integrate new products and technologies into the production and transportation streams. Thus, special permits provide a mechanism for testing new technologies, promoting increased transportation efficiency and productivity, and ensuring global competitiveness.

A special permit must achieve at least an equivalent level of safety to that specified in the HMR. Implementation of new technologies and operational techniques can enhance safety because the authorized operations or activities may achieve a greater level of safety than currently required under the regulations. Special permits also reduce the volume and complexity of the HMR by addressing unique or infrequent transportation situations that would be difficult to accommodate in regulations intended for use by a wide range of shippers and carriers.

PHMSA conducts ongoing reviews of special permits to identify widely used and longstanding special permits having general applicability with established safety records for adoption into regulations for broader applicability. To