

example, consistent with customary international law, 33 U.S.C. 1226 provides the Coast Guard with authority to carry out or require measures, including the establishment of safety and security zones, to prevent or respond to an act of terrorism against a vessel or public or commercial structure that is located within the marine environment. 33 U.S.C. 1222 defines "marine environment" broadly to include the waters and fishery resources of any area over which the U.S. asserts exclusive fishery management authority. The U.S. asserts exclusive fishery management authority in the EEZ.

Ten commenters were concerned that the control and compliance measures section did not address the liability implications of implementing the provisions required by these regulations and complying with the directives associated with the MARSEC Levels established by the Coast Guard. Two commenters were concerned with the liability for oil spills resulting from a transportation security incident. Two commenters recommended that the strict liability scheme under OPA 90 not be used for such circumstances. Two commenters believed there is a need to address liability for undue delay during application of control measures. One commenter believed there is a need to address Coast Guard liability in the context of owners or operators acting as government agents when conducting screenings. One commenter questioned whether the ship agent, whose bond is often used for Customs clearance for a vessel, would be liable if a vessel violates control and compliance issues.

An approved security plan under these security regulations satisfies the requirements of 46 U.S.C 70103(c)(3)(D). The fact that a transportation security incident is not deterred does not alone constitute a failure to comply with these security regulations. Failure to follow the approved plan, however, is a violation of these regulations. While we appreciate the points raised concerning potential liability for terrorist acts and when owners or operators are conducting screenings, the issue of liability is beyond the scope of this final rule. No provision of the MTSA addressed liability, either to expressly limit liability or to address immunity from liability. Additionally, the MTSA did not address liability within the context of undue delay. Among other things, determinations of liability require a fact-laden inquiry on a case-by-case basis and typically require complex analyses regarding matters such as choice of law, contracts, and international conventions. Undue delay is a term used in international

conventions and likewise requires fact-laden analysis that we leave for the courts. We note that OPA 90 provides three defenses to its liability regime (act of God, act of war, or act or omission of a third party, as set forth 33 U.S.C. 2703). Whether one of these defenses will apply to a transportation security incident will depend on the facts of each case. Concerning the comment regarding compensation for undue delay of vessels, we note that this is a principle commonly found in IMO instruments, including other parts of SOLAS and the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). Therefore, we anticipate that claims for undue delay under SOLAS Chapter XI-2, regulation 9, will be resolved similar to the resolution found in these other instruments.

One commenter said that penalties should be applied equally to both U.S. flag vessels and foreign flag vessels.

We believe that the commenter misunderstood the nature of authorities granted to port and flag states. The assertion that penalties are applied unequally to U.S. and foreign flag vessels is incorrect. Civil penalties authorized by 46 U.S.C. 70117 apply equally to both U.S. and foreign vessels that do not meet the requirements of the regulations. Because we can revoke, at any point, ISSCs for Vessel Security Plans that we approve, we have full discretion in enforcing the rules on those vessels. For foreign flag vessels whose ISSCs are issued by its flag administration, we can enforce the regulations by not allowing the vessel to call at our ports, or we can work with the country issuing the vessel's ISSC to revoke it. We will enforce the regulations equally; however, the comment brought to light the need to clarify § 101.410(b)(8) to include the right of the U.S. to revoke any security plan we approve, and we have amended the section to clarify this requirement.

After reviewing § 101.420, we amended paragraph (b) to clarify that appeals of certain decisions and actions of the District Commander should be made to the Commandant (G-MOC).

#### *Subpart E—Other Provisions*

This subpart concerns Declarations of Security, security assessment tools, and credentials for personal identification.

Three commenters stated that the Coast Guard should delegate its authority for reviewing and approving security plans to an RSO, stating that if the Coast Guard reviews and approves

all plans, this will interfere with other critical Coast Guard missions.

We believe that it is imperative to maritime homeland security to ensure consistent application of the requirements of parts 101 through 106 and will conduct the reviews and approvals of certain security plans. We do not intend to delegate authority to an RSO at this time. Reconsideration and further delegation of plan approvals may be provided once a stable nationwide foundation for maritime security has been established. Although the Coast Guard is not delegating plan approval authority, we have ensured plan review resources will be sufficient for implementing these regulations while not negatively affecting Coast Guard missions.

Three commenters asked when the Coast Guard would communicate standards for U.S. flag vessels and facilities as to the timing and format of a Declaration of Security. One commenter requested information about how Declaration of Security requirements will be communicated to and coordinated with vessels that do not regularly call U.S. ports and specific facilities.

As specified in § 101.505, the format of a Declaration of Security is described in SOLAS Chapter XI-2, Regulation 10, and the ISPS Code. The timing requirements for the Declaration of Security are specified in §§ 104.255 and 105.245. The format for a Declaration of Security can be found as an appendix to the ISPS Code. We agree that the format requirement was not clearly included in § 101.505(a) when we called out the incorporation by reference. Therefore, we have explicitly included a reference to the format in § 101.505(b).

One commenter asked whether the Declaration of Security requirement applies to vessel-to-vessel or vessel-to-facility interfaces beyond the 12-mile limit but still in the U.S. EEZ.

Vessel-to-vessel activity in the EEZ is not included in these regulations, except if one of the vessels is intending to enter a U.S. port. The regulations do apply to vessels interfacing with OCS facilities.

We received 15 comments regarding security assessment tools. Eleven commenters would like the Coast Guard to formally approve a separate security assessment methodology as one that may be used by a refiner or petrochemical manufacturer, and also to incorporate it by reference. The commenters believe that it is a sophisticated and effective methodology for conducting Facility Security Assessments. One commenter asked whether an owner or operator who has