

environment from a transportation security perspective. The commenters requested that we exempt facilities that handle only certain non-hazardous fertilizers from the requirements of part 105, stating that these facilities are not likely to be involved in a transportation security incident.

Our risk assessment determined that facilities that receive vessels on international voyages, including those that carry non-hazardous fertilizers, may be involved in a transportation security incident. We are not, therefore, amending the applicability for facilities in part 105 to exempt these facilities. The facility owner or operator may apply to the Commandant (G-MP) for a waiver as specified in § 105.130. Because a Facility Security Plan is based on the results of the Facility Security Assessment, the security measures implemented will be tailored to the operations of the facility. Those security measures will be appropriate for that facility, but will differ from the measures implemented at a facility that handles dangerous goods or hazardous substances.

One commenter stated that we needed to clarify how the regulations apply to facilities in "caretaker status."

Facilities operating with "caretaker status" as defined in 33 CFR 154.105, that are not engaged in any of the activities regulated under part 105, will be covered under parts 101 through 103. Facilities in "caretaker status" engaging in or intending to engage in any of the activities regulated under § 105.105 must comply with part 105 by conducting a Facility Security Assessment and, 60 days prior to beginning operations, submitting a Facility Security Plan to the local COTP for approval. In such situations, the "caretaker" is the "owner or operator" as that term is defined in the regulations.

Six commenters stated that part 105 should not apply to marinas that receive a small number of passenger vessels certificated to carry more than 150 passengers or to "mixed-use or special-use facilities which might accept or provide dock space to a single vessel" because the impact on local business in the facility could be substantial. Two commenters stated that private and public riverbanks should not be required to comply with part 105 because "there is no one to complete a Declaration of Security with, and no way to secure the area, before the vessel arrives." Two commenters stated that facilities that are "100 percent public access" should not be required to comply with part 105 because these types of facilities are "vitally important

to the local economy, as well as to the host municipalities." This commenter also stated that vessels certificated to carry more than 150 passengers frequently embark guests at private, residential docks and small private marinas for special events such as weddings and anniversaries and may visit such a dock only once.

We agree that the applicability of part 105 to facilities that have minimal infrastructure, but are capable of receiving passenger vessels, is unclear. Therefore, in the final rule for part 101, we added a definition for a "public access facility" to mean a facility approved by the cognizant COTP with public access that is primarily used for purposes such as recreation or entertainment and not for receiving vessels subject to part 104. By definition, a public access facility has minimal infrastructure for servicing vessels subject to part 104 but may receive ferries and passenger vessels other than cruise ships, ferries certificated to carry vehicles, or passenger vessels subject to SOLAS. Minimal infrastructure would include, for example, bollards, docks, and ticket booths, but would not include, for example, permanent structures that contain passenger waiting areas or concessions. We have not allowed public access facilities to be designated if they receive vessels such as cargo vessels because such cargo-handling operations require additional security measures that public access facilities would not have. We amended part 105 to exclude these public access facilities, subject to COTP approval, from the requirements of part 105. We believe this construct does not reduce security because the facility owner or operator or entity with operational control over these types of public access facilities still has obligations for security that will be detailed in the AMS Plan, based on the AMS Assessment. Additionally, Vessel Security Plans must address security measures for using the public access facility. This exemption does not affect existing COTP authority to require the implementation of additional security measures to deal with specific security concerns. We have also amended § 103.505, to add public access facilities to the list of elements that must be addressed within the AMS Plan.

We received 26 comments dealing with the definition of "facility." One commenter asked whether a facility that is inside a port that handles cargo or containers, but does not have direct water access, is covered under the definition of facility. Another commenter recommended that the

definition specify that facilities without water access and that do not receive vessels be exempt from the requirements. One commenter asked whether small facilities located inland on a river would be subject to part 105 if they receive vessels greater than 100 gross registered tons on international voyages. One commenter asked whether a company that receives refined products via pipeline from a dock facility that the company does not own qualifies as a regulated facility. One commenter asked whether part 105 applies to facilities at which vessels do not originate or terminate voyages. Two commenters stated that the word "adjacent" in the definition should be changed to read "immediately adjacent" to the "navigable waters." One commenter suggested that, in the definition, the word "adjacent" be defined in terms of a physical distance from the shore and the terms "on, in, or under" and "waters subject to the jurisdiction of the U.S." be clarified. Two commenters understand the definition of "facility" to possibly include overhead power cables, underwater pipe crossings, conveyors, communications conduits crossing under or over the water, or a riverbank. One commenter asked for a blanket exemption for electric and gas utilities. One commenter suggested rewriting the applicability of "facilities" in plain language or, alternatively, providing an accompanying guidance document to help owner and operators determine whether their facilities are subject to these regulations. One commenter asked us to clarify which facilities might "qualify" for future regulation and asked us to undertake a comprehensive review of security program gaps and overlaps, in coordination with DHS. One commenter stated that a facility that receives only vessels in "lay up" or for repairs should not be required to comply with part 105.

We recognize that the definition of "facility" in § 101.105 is broad, and we purposefully used this definition to be consistent with existing U.S. statutes regarding maritime security. A facility within an area that is a marine transportation-related terminal or that receives vessels over 100 gross tons on international voyages is regulated under § 105.105. All other facilities in an area not directly regulated under § 105.105, such as some adjacent facilities and utility companies, are covered under parts 101 through 103. If the COTP determines that a facility with no direct water access may pose a risk to the area, the facility owner or operator may be required to implement security