Alliance for a Living Ocean • American Littoral Society • Catskill Citizens for Safe Energy • Catskill Mountainkeeper • Clean Air Council • Clean Water Action • Clean Ocean Action • Coastal Research and Education Society of Long Island • Communication Workers of America Local #1075 • Environmental Action • Environment New Jersey • Food and Water Watch • Natural Resources Protective Association • New Jersey Sierra Club • NY/NJ Baykeeper • Sane Energy Project • Surfers Environmental Alliance • Surfrider Foundation NYC Chapter • United for Action •WATERSPIRIT

July 8, 2015

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Ms. Yvette M. Fields, Director
Maritime Administration
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RE: Docket Number USCG-2012-0061
Comments on the United States Coast Guard's Notice of Proposed Rulemaking to Deepwater Port Regulations (Published at 80 Fed. Reg. 19118)

SUBMITTED VIA WWW.REGULATIONS.GOV

Dear Mr. Bachman and Ms. Fields;

On behalf of the undersigned organizations, Clean Ocean Action (COA), a regional, broad-based coalition of 125 conservation, environmental, fishing, boating, diving, student, surfing, women's, business, civic and community groups with a mission to improve the degraded water quality of the marine waters off the New Jersey/New York coast, submits the following comments in response to the U.S. Coast Guard's (USCG) proposed rulemaking to the Deepwater Port regulations found at 33 CFR Parts 148, 149, and 150 (Docket #USCG-2012–0061).[1] These comments are to be considered in addition to those already submitted by COA in relation to the Deepwater Ports License Application Process for Offshore Export Facilities (Published at 79 Fed. Reg. 62242).

[1] Notice of Intent, 80 F.R. 19118 (Thursday, April 9, 2015) (hereafter "Proposed Rules").

I. The Negative Consequences of Exporting Oil and Natural Gas

COA reiterates its opposition to the exportation of domestically produced natural gas. Widespread drilling and hydraulic fracturing, or fracking, already causes significant air, water and climate pollution as well as landscape changes. Exports will only exacerbate such negative consequences. Large investments in infrastructure to export oil and natural gas lock in future drilling and fracking with broad environmental and economic implications. The implications of climate change ensure that any investment made in fossil fuels today is a wasted investment, and more, a step backwards in the ability of our country, and those countries that import our natural gas, to transition to a clean energy future. Therefore, COA opposes any rule changes that facilitate the permitting of Deepwater Port LNG facilities to export domestically produced natural gas.

II. The Industrialization of Coastal Waters

COA strongly believes that the continued development and industrialization of marine and coastal waters will result in significant environmental and economic impacts. While our coastal waters have always been a multi-use area with multiple stakeholders, deepwater port LNG terminals are large scale industrial facilities that cannot coexist with the many other beneficial uses of coastal waters.

III. Natural Gas Exports and Job Creation

The proposed rule revisions state "[i]n light of the recent surge in US natural gas production, and now that the Deepwater Port Application (DWPA) permits Deepwater ports to export oil and natural gas, our proposed rule may also facilitate the development or conversion of existing Deepwater ports to export…Therefore it may contribute to the job creation and economic benefits that are goals of Executive Order (E.O.) 13605." COA rejects this assertion and requests that USCG remove it from the proposed rules. Because the infrastructure will already be present, modification of an LNG facility from import to export will have minimal impact on the creation of new jobs. Therefore any as potential new jobs created by increased production of domestic natural gas will occur outside of the deepwater port industry. With many countries' shift toward renewable energy technology, and the continued development of foreign sources of fossil fuels, the "recent surge" of domestic gas production will have no bearing on the number of jobs associated with the LNG deepwater port industry.

IV. Energy Effects

According to the proposed rules, USCG has analyzed the effects of these revisions on the nation's Energy Supply, Distribution, or Use as E.O. 13211 requires. To that end, USCG found that these revisions would not constitute a "significant energy action." COA disagrees. Firstly, this determination is unsupported in the rule making, as there is no real analysis of how a significant increase in export capacity would affect the availability and pricing structure domestically. Secondly, as the purpose of these proposed rules states, the clarification and

streamlining of an already expedited process will potentially allow for the approval of numerous other LNG deepwater port facilities, which would have grave impacts on the nation's energy supply and environment. By increasing the number of potential applicants and approved applications, and, coupled with the increased demand for natural gas both domestically and abroad, as well as the potential impacts of the TTIP and TPP trade agreements (should they gain approval), these revisions could substantially alter the energy outlook in the United States and should be analyzed as a "significant energy action". COA requests USCG to remove this section from the proposed rules, and further, reanalyze the effects of a streamlined permitting process on the timeframe and success rates for deepwater port facility applicants before making this determination.

V. Inclusion of Decommissioning Estimate in Application

COA believes that section 148.105(g)(2)(iii) should explicitly include remediation of any environmental damage as a component of the decommissioning costs estimate and therefore, a component of the bond, guarantee, or other financial instrument necessary to cover the complete cost of decommissioning. This would ensure that any remediation to repair damage to the environment is explicitly covered in the decommissioning costs estimate and included in the financial instrument provided by the applicant. Including remediation in this cost could potentially save millions of dollars and time in the future.

VI. The Inclusion of Detailed Information for Coastal Zone Management Act Compliance

Congress enacted the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451 et seq.) to protect the coastal environment from growing demands associated with residential, recreational, commercial, and industrial uses (e.g., State and Federal offshore oil and gas development). The CZMA provisions help States develop coastal management programs (Programs) to manage and balance competing uses of the coastal zone. Federal Agencies must follow the Federal Consistency provisions as delineated in 15 CFR part 930. The CZMA requires that Federal actions that are reasonably likely to affect any land or water use or natural resource of the coastal zone be consistent with enforceable policies of a State's federally-approved coastal management program.

COA supports the inclusion of language in section 105(j) that makes clear that a Coastal Zone Management Act (CZMA) consistency certification is required *prior* to submitting an application. This is essential both in ensuring that a Coastal State's interests are given priority while also allowing for an efficient use of resources for an applicant to fulfill their duties under the CZMA while also preparing any supporting environmental analyses, as the effects analysis of the CZMA has similarities and broad application to the preparation of the environmental analyses required by NEPA and the DWPA.

VII. Allowance of older hydrographic data

COA opposes the revision to section 148.105(m)(2) and 148.105(n) which would allow applicants to utilize older hydrographic and geological survey data in their application. Due to

the dynamic nature of the marine environment, applicants should be required to utilize only recently obtained hydrographic and geological survey data. Accurate and current data is the basis upon which engineering analyses and environmental impacts are considered. Allowing applicants to use outdated data in order to save money and time is fundamentally flawed and could potentially undermine the permitting process. Furthermore, pursuant to Section 102 (C) of the National Environmental Policy Act (NEPA), describing the impacts of an action requires an understanding of the current conditions of affected resources; this is often referred to as the "baseline" conditions. This stipulation warrants the use of the most up to date data possible.

If an exception is made to the 5-year limit on the age of hydrographic data, COA requests that the rules be explicitly clear in what considerations and analysis the USCG would undertake before making a determination to allow 5+ year old data. Furthermore, the USCG's decision to allow 5+ year old data should be subject to a notice and comment period, in order to ensure that inaccurate or outdated data are not utilized during the application process. COA seeks to ensure that only the most accurate and up to date information is used when analyzing potential impacts.

VIII. Clarification of Geological Survey Requirements

COA supports the revision to section 148.105(n) which would clarify that full geological information, not just soil data, is essential for analyzing a proposed deepwater port's environmental impact and should be required in the initial application.

IX. Inclusion of Regasification Method in Initial Application

COA supports the revision to section 148.105(s)(6)(iv) to ensure that applicants provide regasification data in the initial application, in order to properly analyze a proposed deepwater port's environmental impact. The regasification process can be significantly harmful to fish eggs, larvae, and water quality, depending on what methods are used. Requiring applicants to identify the method of regasification gives regulators and the public critical information for ensuring a meaningful regulatory process. Once again, the more information that an applicant is required to provide in the application, the more efficient, and effective the permitting process will be.

X. Applicants Are "Encouraged" to Consult with PHMSA

The Pipeline and Hazardous Materials Safety Administration (PHMSA) is the expert federal agency tasked with regulation and oversight regarding design and safety standards for pipelines. Under section 148.105(t), applicants are merely encouraged to consult with the PHMSA prior to the submission of an application. COA believes that the USCG should require this consultation process, and furthermore, allow PHMSA the ability to either approve or deny the applicant's design, construction, operation and maintenance requirements prior to the submission of an application. This would ensure that the design, construction, and operation of the proposed facility would be held to the highest standards possible, as well as continue to streamline the process by allowing PHMSA to ensure the pipeline specifications are sound prior to submission of the application.

XI. MARPOL Requirements

COA supports the inclusion of section 148.105(ff) which would require applicants to include an application for a Certificate of Adequacy in compliance with MARPOL 73/78, however, allowing the use of a written waiver in this section to bypass the need for a Certificate of Adequacy undermines the purpose and intent of MARPOL 73/78 and the culture of compliance that strict of enforcement of MARPOL 73/78 seeks to nurture.

XII. Clock Stoppage Provisions 148.107(c)-(e)

COA supports the efforts of the USCG to clarify the timeline and process for submitting an application under the Deepwater Port Act, however, in order to ensure that only completed applications are submitted, the "clock stopping" provision should be further clarified and reduced. Allowing an applicant to submit incomplete information wastes federal resources, and allows the permitting process to start, which effectively permits the review of an incomplete application and the start of procedures that are time consuming, expensive and difficult to stop once allowed to commence.

Section 148.107(d) states that the Administrator's review of an application "is extended for a period of time equal to the total number of days of all suspensions made…" This contravenes the compressed timeline of the Deepwater Port Act and its purpose to quickly review projects in a short timeframe in order to make a determination.

Furthermore, section 148.107(e) should explicitly lay out a definition for "reasonable progress," as both the public's and State and Federal Government's interests in conserving resources should not be applied to a project that is in a state of suspension and might never become active.

Taken together, section 148.107 and its proposed revisions continue to allow, and even encourage, the submittal of incomplete applications, fails to take into account the ever shifting and evolving world energy economy, and allows for the potential "zombie project" where the clock for the approval process has been paused for an indefinite amount of time so that it can be reviewed by MARAD for a subsequent undetermined timeframe, allowing an outdated and unneeded proposed project to continue to exist. This section should outline explicit limitations for regulating clock stoppage procedures as well as explicit limitations on the number of clock stoppages allowed.

XIII. Amended Applications and Reopening of the Scoping Process or Additional Public Comment

COA takes exception with the revision to Section 148.211(b) which would give broad discretion to the Commandant in consultation with MARAD to determine if a change or edit to an application is of such a nature to require reopening of the scoping process or otherwise warrant the opportunity for additional public comment on the proposed action. COA reminds the USCG that the public comment period is the only avenue for public stakeholders to provide input on a project that has the potential to seriously affect their economic and environmental interests. Therefore, COA requests that at the very least, the USCG make clear that any substantive changes to the design or operation of the facility immediately trigger a public comment period.

This would include any structural changes to the design of the facility such as: changes to the connecting pipeline, docking structure, regasification technology, the presence of a new corporate entity on the license application through transfer of the license or addition on the application, and the application for an export license. Additionally, USCG should explicitly define the parameters that would have to be met in order for a change to an existing application to require a new scoping process or additional public comment.

XIV. Transferring a License

COA believes that the ability of a license holder to transfer its' license to another corporation or entity should be structured in a way that gives the public a meaningful opportunity to review the credentials and character of the transferee. Section 148.315 of the DWPA states that MARAD may transfer a license if it finds that the transfer is consistent with the requirements of the act. COA requests USCG and MARAD to explicitly include a public review component to any potential license transfer. This would be consistent with the changes to section 148.211(b), as the transfer of a license from one operator to another would likely constitute a significant change to the original application.

XV. Process for Designating Adjacent Coastal States

While the construction of deepwater ports occurs in federal waters, the potential environmental and economic consequences will certainly impact those citizens unlucky enough to reside in coastal areas near the facilities. Therefore, the ability for States that may be affected by a proposed project to influence the scoping and permitting process cannot be understated. To that end, COA takes issue with section 148.217, which caps the time period within which a State may submit a request to be designated as an Adjacent Coastal State to only 14 days after publication of the notice of application in the Federal Register. While the deepwater port permitting process is designed to be a fast moving and efficient process, the "clock stopping" provisions of section 148.107 afforded to applicants illustrate that the USCG seeks to build in a measure of flexibility into the process. To that end, the analysis and decision by a State seeking to be designated as an Adjacent Coastal State is an important decision, and a 14 day time period to make the necessary analysis is entirely too short.

Furthermore, the revision to change the authority to which the State submits this request and the lead agency who makes an Adjacent Coastal State determination is puzzling. The USCG, as the preeminent expert agency in domestic maritime affairs, as well as the agency tasked with compliance and review of NEPA documents under section 148.3 of the Deepwater Port Act, should continue to act in the capacity of Lead Agency with respect to the Adjacent Coastal State determination. As the lead agency responsible for environmental permitting, USCG, and not MARAD, would be the more knowledgeable and well versed agency on potential environmental impacts. Therefore, USCG would be in a much better position to determine which states may be "affected" and therefore qualify as an Adjacent Coastal State. COA requests that this revision be dropped from the regulations, and the regulations should continue to allow USCG to make the final determination for Adjacent Coastal State designations.

XVI. Timeline for ACS Governor to approve or disapprove a proposed Deepwater Port Application 148.277(d)

In so far as the proposed regulation would prohibit the Governor of an Adjacent Coastal State from disapproving of a deepwater port application prior to the last public hearing on the application, the proposed regulation is contrary to the authorizing statute and therefore would be invalid. The Deepwater Port Act ("DWPA"), 33 U.S.C. §§ 1501 et seq., does not contain any provision that limits the exercise of a veto authority prior to or during the course of public hearings. The only provision in the DWPA regarding the timing of a veto provides, in full, as follows:

> Not later than 10 days after the designation of adjacent coastal States pursuant to this Act, the Secretary shall transmit a complete copy of the application to the Governor of each adjacent coastal State. The Secretary shall not issue a license without the approval of the Governor of each adjacent coastal State. If the Governor fails to transmit his approval or disapproval to the Secretary not later than 45 days after the last public hearing on applications for a particular application area, such approval shall be conclusively presumed.

The plain language of this section signifies that the 45th day benchmark is only the trigger for "conclusively presum[ing]" that approval is given. As used in the above-cited provision, the phrase "45 days" is used to describe a hard deadline by which action must occur before approval will be conclusively presumed, not a limited period during which action must occur. The statute clearly states that if a veto is transmitted after the deadline it is too late; there is no language establishing "before the last public hearing" as being too early. Accordingly, the proposed regulation is contrary to the DWPA and would therefore be invalid.

The 45th-day hard deadline serves two apparent purposes. First, it serves to avert delay in processing the application by constraining the amount of time a governor has to provide a response (including a veto) to the federal reviewing agencies. Second, it ensures that the federal agencies have the opportunity to incorporate that response into a Record of Decision that formally concludes the application review process, prior to a governor's thorough review and subsequent response. The transmission of a veto prior to the commencement of public hearings does nothing to upset these interests; vetoes transmitted earlier than the last-minute ensure timely application of the DWPA, and in fact leads to the conservation of significant agency and applicant resources. These benefits of early vetoes fit within the DWPA's goal of strict 365-day application timelines; under the act a premium is placed on expedited review – so to prevent Governors from making their review conclusions known at the earliest possible stage of the process runs counter to this legislative intent.

Requiring the Governor of an Adjacent Coastal State to wait until after the final public hearing on an application, as this proposed regulation would, is counterproductive as well. As the actions of Governor Christie made clear with respect to the proposed Liberty LNG projects off the coast of New Jersey and the Port Ambrose LNG project off the coast of NY and NJ, the ability of a State Governor to disapprove of an application as early in the permitting process as possible can provide more immediate and more timely clarification to an applicant and to the

public that a proposed project will not be allowed to go forward in a given location, and thereby afford the applicant the opportunity to expedite the search for alternate site locations, and save federal agencies, applicants, and the public precious time and resources.

Accordingly, the proposed revision to 33 CFR 148.277(d) is unlawful, unnecessary and ill-advised.

XVII. Requests to Adjust Limit of Liability

Section 148.605(d)(1) and (2) state what should be covered by an applicant seeking to adjust the limit of liability under section 148.605 and the Oil Pollution Act of 1990 (OPA 90, found at 33 CFR 138.230(b)) in the required risk and economic analysis studies. 148.605(d)(1) should explicitly include an oil spill study not just of that specific port at issue, but of all similar port facilities to ensure that the risk analysis is as comprehensive and accurate as possible. Furthermore, section 148.605(d)(2) should explicitly include an analysis of the potential costs of natural resource damages, punitive damages, and the costs associated with a long term mitigation and recovery plan.

XVIII. Inclusion of Criteria for Environmental Evaluation

COA requests that the USCG include the effects of the proposed project on Climate Change mitigation and adaptation strategies as explicitly defined criteria that must be included in an Environmental Evaluation under section 148.715. The carbon and methane emissions associated with the transportation and combustion of natural gas, as well as, the continued investment in fossil fuel based infrastructure to the detriment of renewable energy technology should be analyzed and incorporated into any environmental evaluation on a proposed facility. Moreover, the current environmental document does not include an analysis of potential renewable energy projects, like windfarms, under the No Action Alternative.

XIX. Allowance of the Use of Third Party Certifying Entities During the Application Process 149.58

A “Certifying Entity” is contracted by the licensee but performs its duties under the direction and in place of the USCG and MARAD. Prior to the proposed revision to section 149.58, applicants were allowed to utilize CEs to assist with post-licensing technical matters. This proposed revision would allow license applicants to use CEs during the application process as well. Responsibilities would include drafting a recommendation to the USCG on the sufficiency of the port’s design basis and selected plans, and drawings, analysis of procedures, approval or disapproval of proposed changes in design, interim reports and recommendations, maintenance and inspection, system safety, pipeline design and installation, and on-site inspections and oversights; in short, the role of a CE is that of a private industry stand in for a federal regulatory entity.

While COA realizes that there are some benefits to the utilization of CEs such as efficiency and cost savings, these programs have the potential to undermine regulatory goals and impose high

costs. Third party programs can undermine the fulfillment of public purposes and commitments. The conflict of interests inherent in a relationship of this nature cannot be overstated. Furthermore, auditing organizations may develop "checklists" to standardize their practices and appear impartial, however this practice can lead to a "ticking of the boxes" mentality where critical risks may go unnoticed.[2] Therefore, COA opposes the use of CEs throughout the permitting process, as this is a critical time when project parameters are set, analyses conducted, and the role of federal regulators is at its most essential.

If CEs must be allowed during the permitting process, USCG must develop comprehensive conflict of interest standards and regulations to oversee third party Certifying Entities, specifically crafted for the use of CEs during the permitting process. Furthermore, the competence, independence, extent of government control and oversight, and management and coverage of third party program costs must be explicitly identified and enumerated in this section and made available to the public.

XX. Operations Manual Review

Under section 150.10(e), a deepwater port operator must re-submit the operations manual to the Commandant to be re-reviewed and re-approved every 5 years in conjunction with the EIS for the facility. COA believes that this 5 year timeframe is significantly longer than necessary and suggests that the operations manual be reviewed no less than once every 2 years. Furthermore, the operations manual should be held to the same public review standards as the EIS, and both documents should be open for public review and comment during this timeframe. Regardless of the time interval required for operations manual review, COA requests that the USCG clarifies this section in order to make explicit the relationship between the operations manual and the EIS, and how the public will be notified and given opportunity to weigh in on the operations manual.

XXI. Prevention, Monitoring, and Mitigation Program (PMMP)

Under section 150.15(bb), the operations manual must include a PMMP component designed to prevent, minimize, or mitigate adverse environmental effects resulting from the construction, operation, and decommissioning of the deepwater port. COA requests that the USCG explicitly include repairs, upgrades, and modifications to this section to ensure that PMMP is comprehensive and encompasses all potential environmental impacts that could result from repair or medication activities.

Section 150.15(bb)(2) states that review of this PMMP should occur every 5 years *unless a longer timeframe is approved by the Commandant.* COA believes that a 5 year timeframe for review of the PMMP is unacceptable, as environmental impacts could potentially occur in a 5 year timeframe that would continue unabated until the PMMP is reviewed. This is unacceptable and renders the purpose of a PMMP useless. Therefore, COA requests that the USCG require a review of the PMMP no less than once every 2 years. Logically following this change, COA

[2] See Report and Recommendations authored by Administrative Conference of the US, an independent federal agency that provides recommendations for improvement of federal agency regulations. Found at https://www.acus.gov/recommendation/agency-use-third-party-programs-assess-regulatory-compliance

requests that the USCG remove the ability for an applicant to request a review interval of more than 5 years, as a 2 year review period is the maximum timeframe allowed to ensure that the PMMP is effective.

Finally, COA believes that this PMMP should be open to public review and comment during the same timeframe that the Commandant and MARAD review said procedures. This would ensure that the PMMP is comprehensive and thoroughly reviewed prior to re-approval.

XXII. PHMSA Regulations Are Explicitly Required for Pipeline Standards.

Under section 150.15(cc) USCG has made explicitly clear that the Procedural Manual for operations, maintenance, and emergencies of the deepwater port pipelines must meet the requirements of PHMSA regulations 49 CFR 192.605 and other applicable parts of 49 CFR 190 through 199. COA supports this revision and encourages USCG to include PHMSA approval where applicable throughout the permitting process for deepwater ports, especially as COA suggested for section 148.105(t).

XXIII. How May an Adjacent Coastal State request an amendment to a Deepwater Port's Operations Manual?

Section 150.35 states that only adjacent coastal states connected by pipeline to the deepwater port may petition the Sector Commander to amend or change parts of the operations manual**.** COA opposes this revision, as the Adjacent Coastal State designation can be approved for States that are not physically connected to a facility by pipeline. This section, as written, would affect a potentially large number of Adjacent Coastal States that may not be connected by pipeline to a deepwater port, yet because of their proximity to the facility, are subject to potential impacts from the operations of a deepwater port facility. COA requests USCG to remove the language "connected by pipeline to the deepwater port," so that all Adjacent Coastal States have the ability to petition for a change in the operations manual of a facility. Only then will the purpose of the Adjacent Coastal State designation be fully realized.

XXIV. Miscellaneous

With reference to the proposed revisions to 33 CFR 148.5, COA supports the integration of the MARAD policy published at 78 CFR 25349 concerning nautical miles.

With reference to footnote 16, COA supports the integration of the MARAD policy published at 80 CFR 26321 concerning export licensing, however, COA believes that this policy must be explicitly integrated into these revised regulations. This would ensure that it is exceedingly clear that a facility applying for an export license would be required to go through the same inclusive process described in the import license, specifically at § 148.105 of environmental and safety reviews, as well as the necessary public notice and comment periods. Furthermore, as the consideration of an export license has the potential to significantly affect the quality of the environment both on site, in drilling locations throughout the country, as well as the chemistry

and equilibrium of our delicate climactic drivers on a global level, a full Environmental Impact Statement should be made a requirement of any export permit review.

Furthermore, COA requests that USCG and MARAD clarify when an applicant should specify that the deepwater port license will be used to export natural gas. COA believes that any application for a new facility should include whether the operator plans to export. This would ensure that the environmental review of the facility contemplates all potential impacts, and furthermore, would reduce the potential delay in having an export license approved separately from the facility license. While the conversion of an existing facility would be required to apply for an export license, all new applications should be required to apply for an export license with the facility license application.

XXV. Conclusion

In general, COA believes that these revised regulations are a step in the right direction. Clarification of the standards and requirements for an application ensures that the potential environmental impacts can be analyzed, and avoided, as early in the process as possible. While clarification and incorporation of other relevant law is beneficial, USCG and MARAD have also revised these regulations with an eye to the applicant's interests in speed of processing and ease of use; and not with the goals of setting the most stringent, environmentally and safety oriented standards possible. Our comments reflect these instances, and suggest edits that would ensure an efficient, clearly understood, yet environmentally sensitive permitting process.

Sincerely,

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