



DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2013-0915]

RIN 1625-ZA31

Carriage of Conditionally Permitted Shale Gas Extraction Waste Water in Bulk

AGENCY: Coast Guard, DHS.

ACTION: Notice of withdrawal.

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**SUMMARY:** The Coast Guard announces that it has withdrawn the October 30, 2013, proposed policy letter concerning the carriage of shale gas extraction waste water (SGEWW) in bulk via barge. The policy letter proposed a new standardized process and specified conditions under which a barge owner could request and be granted a Certificate of Inspection endorsement or letter allowing the barge to transport SGEWW in bulk. That proposed policy is withdrawn and no new policy is proposed at this time. Barge owners may continue to request case-by-case approval to transport SGEWW under current regulations by providing recent detailed chemical composition, environmental analyses, and other information for each individual tank barge load. The Coast Guard will consider instituting a standardized process for transporting SGEWW in bulk after it has assessed whether current regulations are inadequate to handle requests for transport of SGEWW in bulk and environmental impacts that may be associated with SGEWW transport by barge.

**DATES:** The proposed policy letter was withdrawn [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call or email Dr. Cynthia A. Znati, Office of Design and Engineering Standards, Hazardous Materials Division, U.S. Coast Guard; telephone 202-372-1412, email *HazmatStandards@uscg.mil*.

**SUPPLEMENTARY INFORMATION:**

**General Discussion**

This notice is issued under the authority of 5 U.S.C. 552(a). On October 30, 2013, the Coast Guard published a proposed policy letter and requested comments on a new standardized process including the specific carriage conditions for the transport of shale gas extraction waste water (SGEWW) in bulk via barge (78 FR 64905). The proposed policy would have set out a process for performing chemical analyses of each load of SGEWW, a radiation survey of each barge before any personnel entered the barge and before changing from SGEWW to another cargo, and tank venting to prevent accumulation of radon. It also would have described limits on radioactivity concentration and consignment activity (effectively, limits on emission of radiation) for SGEWW cargoes.

We proposed the policy letter in response to the rapid development in recent years of horizontal drilling and hydraulic fracturing (commonly known as “fracking”) that produce large volumes of shale gas and oil in the northern Appalachian Mountains. This fracking produces large amounts of SGEWW, some of which may contain hazardous materials including radioactive isotopes. Transport of SGEWW by vessel falls under the

Coast Guard's existing regulations for bulk liquid hazardous material and requires specific, case-by-case permission. We explain these regulations in more detail, below.

In 2011 a tank barge owner asked the Coast Guard for permission to transport SGEWW by tank barge. Anticipating that this would be the first of many requests, the Coast Guard proposed a standardized national policy to replace the case-by-case process which might have led to delays in processing those requests. (We have not received significant interest from industry, however, which is one of the reasons we are withdrawing the proposed policy.) The notice announcing the policy letter provided a 30-day public comment period. We received 70,115 comments in response to the notice and proposed policy letter. These comments are generally described below, with our responses, in the section titled "Comments Received."

We are now withdrawing the proposed policy. This notice officially withdrawing the proposed policy letter is intended to resolve any questions about the status of the proposed policy letter or the existing regulatory process. No new policy is proposed at this time. The Coast Guard will continue to consider requests for permission to transport SGEWW in bulk under our existing regulatory authority described in the next section. We will use experience with individual approvals of SGEWW barge transport to inform any future rulemaking or guidance on this subject.

### **Carriage of SGEWW under Existing Regulations**

The Coast Guard regulates the carriage of bulk liquid hazardous material by listing, in the Code of Federal Regulations (CFR), permitted cargoes and the safety requirements that vessel owners must meet in order to carry those cargoes; see, for example, the list at Table 1 in 46 CFR part 153. Unlisted cargoes may not be carried without specific

permission from the Coast Guard. The regulations provide that vessel owners may request and receive the necessary permission by providing information about each cargo so that the Coast Guard can prescribe necessary safety measures; see, for example, the requirements in 46 CFR 153.900. SGEWW is an unlisted cargo. In order to carry SGEWW on a tank barge, the vessel owner must request permission from the Coast Guard, provide the information about each individual cargo that the Coast Guard needs in order to analyze potential impacts and develop carriage requirements, and then comply with the requirements specified. Although the proposed policy letter would have standardized that information and request process for SGEWW, withdrawal of the policy letter does not change the Coast Guard's authority to consider approving unlisted cargoes on a case-by-case basis under the existing regulations.

### **Comments Received**

*Form letters.* Of the 70,115 comments the Coast Guard received, 68,747 comments were brief statements in similar format and wording that expressed disapproval of the proposed policy letter and expressed opposition to hydraulic fracturing. Commenters stated concerns that a spill or accident would release toxic chemicals into our rivers and could put our drinking water at risk. The Coast Guard notes the general concerns expressed in these comments, but also notes these comments expressed the writers' general opposition to the proposed policy letter without offering input regarding the substance of transporting SGEWW in bulk as described in the policy. The Coast Guard has no legal authority to permit, prohibit, or place conditions on the practice of fracking itself. The Coast Guard's only authority in this matter is the authority to evaluate the safety of SGEWW as a cargo and set conditions on its carriage by vessel.

*Other comments.* We also received approximately 1,368 comments that did not employ a form template and are discussed here and below. One submission<sup>1</sup> was signed by representatives of 140 organizations and other entities from various States. This (and comments submitted by others) stated that the Coast Guard should expect wide interest in SGEWW barging and that a rulemaking, rather than a policy letter, is the appropriate approach to this issue. Commenters indicated a rulemaking would more clearly prescribe rules, how to achieve compliance, a consistent and transparent implementation process, an effective means of enforcement, and improved opportunities for public participation. The Coast Guard does not agree that a rulemaking would have provided more transparency or opportunities for public participation than were provided in the public comment period on the proposed policy letter. Detailed information on how to achieve compliance is often better suited to guidance documents such as the withdrawn policy letter. Effective enforcement is already provided via existing regulations prohibiting the carriage of unlisted cargoes without specific permission from the Coast Guard.

The comment also noted that the proposed chemical analysis protocol allows shippers to propose alternatives but those alternatives would not be transparent to the general public. Many Coast Guard regulations provide the opportunity to propose alternatives or equivalent methods of compliance for the Coast Guard's approval; for examples see 46 CFR 62.15-1, 114.540, and 110.20-1, among others. Allowing alternatives provides the flexibility to use new technology, including improved safety and pollution prevention equipment. In addition, the Coast Guard consistently explains in its policy letters and other guidance that it will consider alternate methods of compliance with

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<sup>1</sup> Docketed as USCG-2013-0915-0932.

the binding statutory and regulatory requirements. Coast Guard determinations on alternate or equivalent methods of compliance generally are not publicly available because they do not create rights or obligations for anyone other than the requester, and they could contain proprietary information about the alternative requested or approved.

The same group of 140 organizations and entities submitted another comment,<sup>2</sup> stating that the proposed policy letter would result in uncertain or unknown effects or risks to various aspects of the environment and public health. The commenters also thought the proposed policy would result in negative impacts to areas that have unique historical, cultural, and ecological characteristics. The Coast Guard notes the concerns raised in these comments and will carefully consider the environmental impacts of each request to ship SGEWW by barge on a case-by-case basis under existing regulations.

Another submission<sup>3</sup> was made on behalf of 46 organizations in Ohio, Pennsylvania, Michigan, Kentucky, Illinois, New York, and West Virginia. This comment (and comments submitted by others) has similarly stated that the Coast Guard should require chemical analyses of SGEWW barge loads to be submitted to the agency, not merely held by industry. Under the proposed policy, vessel owners would have retained records of the chemical analyses and surveys, but the Coast Guard would have examined those records prior to allowing workers or Coast Guard personnel to enter a barge's tank. Also, by cumulating data from the chemical analyses records we could determine whether hazardous materials had built up within the barge's tank.

Various commenters, including some commenters employing a form template, also said that the Coast Guard's use of a categorical exclusion to preclude more thorough

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<sup>2</sup> Docketed as USCG-2013-0915-1036.

<sup>3</sup> Docketed as USCG-2013-0915-0855.

environmental analysis of the proposed policy letter's impact was improper under the National Environmental Policy Act of 1969<sup>4</sup> (NEPA), and that more environmental analysis of the effects of the proposed policy letter is necessary to assess the likelihood of a spill. The Coast Guard intends to evaluate the environmental impacts under NEPA for each request to ship SGEWW by barge, on a case-by-case basis under existing regulations. This information may be used, as appropriate, to inform any future rulemaking or guidance on this issue.

Finally, the commenters believe the Coast Guard gave inadequate consideration to worker safety hazards and mitigation measures. As described above, however, the Coast Guard would have used the analyses and surveys described in the proposed policy to evaluate the safety of the barge tanks before allowing personnel to enter. In addition, once the chemical components of each individual load of SGEWW were identified, the Coast Guard could have used the regulatory process for unlisted cargoes to prescribe other protocols to mitigate safety risks to workers.

The Coast Guard also received many comments from individuals raising additional varied concerns. Some comments requested an extension of the public comment period, which is unnecessary in light of this withdrawal. Other comments stated that the proposed policy letter unfairly transfers industry costs and risks to society in general; we disagree that Coast Guard decisions on safe transport of SGEWW in bulk by water necessarily transfer costs and risks away from industry, especially as the proposed policy does not affect the creation or disposal of SGEWW, or its transport by truck or rail. We also received comments saying that the Coast Guard provided inadequate information about

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<sup>4</sup> Codified as 42 U.S.C. 4321 *et seq.*

SGEWW's ultimate destination and the methods for its ultimate disposal; the ultimate destination and disposal of SGEWW was outside the scope of our proposed policy on safely transporting SGEWW. Also, commenters thought that the Coast Guard provided inadequate information about cleanup plans in the event of an SGEWW spill, but environmental liability and cleanup requirements were outside the scope and purpose of the proposed policy. The Coast Guard intends to evaluate requests to ship SGEWW by barge on a case-by-case basis under existing regulations. Any other statutes or regulations found to be applicable under this case-by-case review would be included when developing carriage requirements.

Of the comments received, 21 comments thought the proposed policy letter should be finalized. These commenters suggested that the risk of transporting SGEWW by vessel was lower relative to transport by rail or truck, or that SGEWW is less hazardous than other vessel-borne cargoes such as oil and gasoline. The Coast Guard notes these comments in support of the proposed policy letter.

The Coast Guard appreciates all the comments received. It will continue to study this issue in light of the comments received before taking any further action on this matter. In particular, the Coast Guard will assess whether current regulations are adequate to handle requests for transport of SGEWW in bulk and environmental impacts that may be associated with SGEWW transport by barge.

Dated: February 17, 2016

J. G. LANTZ  
Director of Commercial Regulations and Standards  
U. S. Coast Guard

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