IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

INTERNATIONAL LIQUID TERMINALS ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-467 (LMB/IDD)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION IN PART TO PLAINTIFFS' MOTION FOR A STAY OR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY

In this case, a group of trade associations challenge a final 2016 Coast Guard regulation ("2016 Final Regulation") implementing Congress's mandate that certain secure maritime facilities must conduct electronic Transportation Worker Identification Credential ("TWIC") inspection to reduce the risk of unauthorized access leading to terrorism at the nation's most sensitive and vulnerable ports. The 2016 Final Regulation determined that the identification cards—known as "TWICs"—must be scanned by electronic readers for unescorted access to facilities that carried the highest risk: those that receive vessels carrying large volumes of passengers and also those facilities that "handle" certain dangerous cargoes ("CDCs"), such as butane. Pursuant to the 2016 Final Regulation, this electronic inspection requirement goes into effect starting August 23, 2018.

For purposes of this litigation, the types of facilities covered by the 2016 Final Regulation can be broken into three groups: (1) facilities that handle CDCs in bulk but do not transfer them to or from a vessel ("Non-Transfer Facilities"); (2) facilities that handle CDCs in

bulk and transfer them to or from a vessel ("Transfer Facilities"); and (3) facilities that receive vessels certified to carry 1,000 or more passengers ("Large Passenger Facilities"). Plaintiffs challenge the first group, arguing that there was no notice-and-comment period provided before the Non-Transfer Facilities were "added" to the 2016 Final Regulation's definition of facilities requiring electronic TWICs, and that no risk analysis was performed for these facilities. Plaintiffs do *not* challenge, however, the propriety of including the second or third groups, as Plaintiffs concede that Transfer Facilities and Passenger Facilities were always expressly and correctly covered by the proposed rulemaking and 2016 Final Regulation itself. Despite this, Plaintiffs have now asked this Court to either stay or enjoin the 2016 Final Regulation's effective date for *all* groups for an indeterminate length of time.

During the pendency of this case, the Coast Guard has issued a new notice of proposed rulemaking ("NPRM") that would stay the effective date of the 2016 Final Regulation for Non-Transfer Facilities for an additional three years, to August 23, 2021, while the Coast Guard conducts additional review as to whether those facilities should be subject to the electronic TWIC reader requirements. This development effectively moots Plaintiffs' claims of imminent harm in having to comply with the Non-Transfer Facilities portion of the 2016 Final Regulation. Indeed, Plaintiffs' motion suggests that they will not suffer imminent harm "if the Coast Guard voluntarily acts to limit the [2016 Final Regulation's] scope through another rulemaking." Dkt. 25 at 7. Although the NPRM is not yet final, Defendants anticipate that it will become final within several months. Accordingly, to avoid needless litigation and to maintain the status quo, Defendants do not oppose the Court issuing a temporary stay, pursuant to the Administrative Procedure Act, 5 U.S.C. § 705, of the 2016 Final Regulation's effective date for Non-Transfer Facilities, until the pending NPRM becomes final. *See* Part I, below.

The Court, however, should reject Plaintiffs' request that the Court stay or enjoin the *entire* 2016 Final Regulation, including Transfer Facilities and Large Passenger Facilities. Plaintiffs have not raised any challenge to the inclusion of those groups, which Plaintiffs admit were properly within the scope of the 2016 Final Regulation. This alone dooms Plaintiffs' request for injunctive relief as to those facilities, as Plaintiffs cannot make a clear showing of success on a challenge they have not actually raised. *See* Part II.A, below.

Plaintiffs' only argument for why they should not have to follow the clear and admittedly valid regulations for these other facilities is that in Fall 2017, an Admiral in the Coast Guard allegedly told several trade representatives during a meeting that the entire regulation may be stayed. Plaintiffs cannot make a clear showing that the Admiral actually said this, and ultimately it does not matter whether he did: the Supreme Court and Fourth Circuit have repeatedly held that parties cannot claim detrimental reliance on oral statements made by government agents about the effect or scope of a law. For this additional reason, Plaintiffs have no chance of success on the merits of their request to stay or enjoin the entire 2016 Final Regulation. *See* Part II.A, below.

In addition to these failings, Plaintiffs cannot show imminent, irreparable harm from allowing the Transfer Facilities and Large Passenger Facilities provisions to go into effect, because Plaintiffs could seek exemption from these provisions, use approved alternatives to TWIC readers, or seek to alter their facilities' layouts to avoid application of the regulation. But Plaintiffs have not averred that they attempted any of these options, even though the Supreme Court has held that parties seeking a preliminary injunction must be diligent. *See* Part II.B, below. Finally, given the important national security issues at stake, the public interest and balancing of equities counsel against staying the entire 2016 Final Regulation. *See* Part II.C,

below. Accordingly, Plaintiffs cannot meet the requirements for a stay or injunction against Transfer Facilities or Large Passenger Facilities.

For these reasons, Defendants do not oppose the Court issuing a temporary stay of the 2016 Final Regulation's applicability to Non-Transfer Facilities, but the Court should deny all other relief to Plaintiffs.

FACTUAL AND REGULATORY BACKGROUND

A. Maritime Transport Security Act Of 2002.

The Maritime Transportation Security Act ("MTSA") of 2002 created a security program for all the nation's ports to better identify and deter threats. *See* 46 U.S.C. § 70101 *et seq.* The MTSA required the DHS Secretary—who oversees the Coast Guard—to set physical and personnel security standards at ports and related facilities. *Id.*, §§ 70102, 70103. Congress also required the DHS Secretary to issue a "biometric transportation security card," later termed TWIC, and also issue a regulation regarding the use of TWICs at facilities that "pose a high risk of being involved in a transportation security incident." *Id.*, §§ 70105(b) 70105(k).

The DHS Secretary has delegated responsibility for MTSA obligations to the Commandant of the Coast Guard. 33 C.F.R. § 1.05-1(b); DHS Delegation No. 0170. In July 2003, the Coast Guard exercised its authority to promulgate a set of interim rules that outline maritime facility security requirements. Among these interim rules was a special set of requirements for "CDC facilities" involved in the transfer of CDCs to or from vessels. 68 Fed. Reg. 39315, 39330 (July 1, 2003). Under the interim rule, such facilities had to take special precautions, including escorting any visitors, providing alternate or independent power sources for security and communications systems, and, most significantly, searching unmanned or unmonitored waterfront areas for dangerous substances and devices prior to a vessel's arrival at

the facility. *Id.* Although the interim rule did not define "CDC facilities," the Coast Guard, in the preamble to the later-issued final rule, defined "CDC facilities" as those that "handle[] certain dangerous cargo (CDC)." 68 Fed. Reg. 60515, 60530 (Oct. 22, 2003), codified at 33 C.F.R. § 105.295.[1] In 2004, the Coast Guard also issued a Policy Advisory Council document clarifying that, for the purposes of this 2003 maritime-transfer regulation, facilities "handle" CDCs—and therefore fall under the regulation—when "a vessel-to-facility interface . . . occur[s], or [is] capable of occurring, and involve[s] the transfer of CDC's in bulk." Dkt. 25-1 ("PAC 20-04"). A second Coast Guard document issued around the same time—a Navigation and Vessel Inspection Circular—clarified that the maritime-transfer CDC facility regulations did not apply unless the facility processed CDC transfers involving vessels. Dkt. 12 at 47 ("NVIC 03-03").

B. SAFE Port Act Of 2006.

Three years later, Congress enacted the SAFE Port Act of 2006. The SAFE Port Act requires that the Coast Guard promulgate final regulations that require the deployment of electronically readable TWICs. *See* 46 U.S.C. § 70105(k)(3). Although MTSA-regulated facilities had long used TWICs, facilities previously required only visual card inspection, not electronic TWIC inspection. Congress dictated that an electronic reader requirement would "improve maritime and cargo security through enhanced layered defenses." Pub. Law 109-347 (Oct. 13, 2006).

Electronic TWIC inspection consists of three steps. First, the TWIC is "authenticated" by having the reader confirm the unique electronic identifier associated with the particular

[1] The term "Certain Dangerous Cargo" is defined in 33 C.F.R. § 101.105 by reference to 33 C.F.R. § 160.202, which lists all covered substances.

TWIC. AR2919-20.[2] Second, the TWIC is "validated" by checking the TWIC against a list of cancelled cards, which detects if the credential has been revoked, has expired, or has been reported lost or stolen. *Id.* Third, the TWIC-holder undergoes biometric identification by comparing a fingerprint sample with a template stored on the TWIC card. *Id.* These three aspects of electronic TWIC inspection are improvements over visual TWIC inspection because they ensure the TWIC is not easily counterfeited and that individuals holding invalidated TWICs do not gain access. *Id.*

To implement this Congressional mandate in an effective manner, the Coast Guard undertook a series of regulatory actions culminating in a requirement to implement electronic TWIC inspection at certain high-risk vessels and facilities regulated under MTSA.

C. 2009 And 2013 Notices Of Proposed Rulemaking.

On March 27, 2009, the Coast Guard published an advanced notice of proposed rulemaking on the topic of TWIC reader requirements. 74 Fed. Reg. 13360 (Mar. 27, 2009); AR1-11. The advanced notice discussed dividing vessels and facilities into three "risk groups"—Risk Group A for the high-risk vessels and facilities, Risk Group B for medium-risk vessels and facilities, and Risk Group C for low-risk vessels and facilities. The advanced notice also considered different electronic inspection requirements for Risk Groups A and B, with no electronic inspection requirements for Risk Group C. 74 Fed. Reg. at 13365; AR6.

On March 22, 2013, the Coast Guard published a notice of proposed rulemaking that retained the three risk groups (A, B, and C), but limited the proposed electronic TWIC inspection requirements to Risk Group A vessels and facilities only. 78 Fed. Reg. 17782, 17786 (March 22,

[2] Citations to "AR" are to the certified administrative record filed by Defendants on June 25, 2018. Dkts. 16-21.

2013); AR380.1-432. In both the advanced notice and the notice itself, Risk Group A expressly included "facilities that handle CDC in bulk," although neither notice defined this term. 74 Fed. Reg at 13367; AR8; 78 Fed. Reg. at 17786; AR385. Neither notice referred to the PAC 20-04 or NVIC 03-03 documents issued years earlier to clarify the scope of the 2003 maritime-transfer regulation.

D. 2016 Final Regulation.

On August 23, 2016, the Coast Guard published a final rule entitled "Transportation Worker Identification Credential (TWIC) – Reader Requirements," the regulation challenged in this suit. 81 Fed. Reg. 57652 (Aug. 23, 2016); AR2745-2807. The 2016 Final Regulation eliminated the three-risk-group structure but required that the high-risk vessels and facilities (still referred to as "Risk Group A") conduct electronic TWIC inspection for all personnel seeking unescorted access to secure areas of the vessel or facility. 81 Fed. Reg. at 57653; AR2747. Like the prior notices of proposed rulemaking before it, the 2016 Final Regulation once again expressly included within Risk Group A all "facilities that handle CDC in bulk." 81 Fed. Reg. at 57681; AR2775. Although neither of the prior proposed rulemaking notices had elaborated on this description, the preamble to the 2016 Final Regulation explained that "any facility that *handles or receives* vessels carrying CDC in bulk will be classified as Risk Group A." 81 Fed. Reg. at 57681 (emphasis added); AR2775. The preamble explained that Risk Group A entities included facilities that allowed bulk CDC on the premises, regardless of whether any transfer to or from a ship occurred. 81 Fed. Reg. at 57681; AR2775.

In reaching this conclusion, the Coast Guard relied on the Maritime Security Risk Analysis Model ("MSRAM"), which is a risk-analysis tool used to analyze vulnerabilities and risk-mitigation measures in a wide variety of scenarios. *See* 81 Fed. Reg. at 57659, 57701;

AR2753, 2795. MSRAM identified three hypothetical scenarios in which a TWIC reader could be useful in preventing or mitigating terrorist attacks: (1) a truck bomb; (2) a terrorist assault team; and (3) an explosive attack carried out by a passenger or passerby (with the specific stipulation that the terrorist is not an "insider"). *See* 81 Fed. Reg. at 57659, 57701; AR2753, 2795. MSRAM also identified risk factors that made a facility or vessel particularly susceptible to these types of attacks and thus warranted the inclusion of that facility or vessel in Risk Group A. *See also* AR2925.

The Coast Guard found that three discrete classes of facilities could experience security benefits that are significant enough to warrant the requirement for electronic TWIC inspection. These included: (1) facilities that handle CDC in bulk; (2) facilities that receive vessels carrying CDC in bulk; and (3) facilities that receive vessels certificated to carry more than 1,000 passengers. 81 Fed. Reg. at 57679; AR2773. Each of these types of facilities contain targets—either bulk CDC or groups of more than 1,000 passengers—that could be attacked using a method identified above, with a result potentially catastrophic enough to be classified as a Transportation Security Incident ("TSI"). 81 Fed. Reg. at 57681; AR2775.[3] As such, the Coast Guard determined that these facilities should require electronic TWIC verification pursuant to Congress's mandate in the SAFE Port Act. 46 U.S.C. § 70105(k)(3).

The final rule stated that it would become effective and enforceable on August 23, 2018—thereby giving the industry two years to comply and either purchase TWIC readers for

[3] A TSI is a "transportation security incident is a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. 70101. The term 'economic disruption' does not include a work stoppage or other employee-related action not related to terrorism and resulting from an employer-employee dispute." 49 C.F.R. § 1572.103.

the Risk Group A facilities, or retrofit other systems to become compliant—an option the 2016 Final Regulation expressly allowed and explained. *See* 81 Fed. Reg. at 57662.

E. Post-Final-Regulation.

On May 15, 2017, Plaintiff International Liquid Terminals Association and other industry groups submitted a petition for rulemaking. AR2882-2904. The petition requested that the Coast Guard (1) revise the scope of the 2016 Final Regulation to impose electronic TWIC inspection requirements on only those vessels and facilities that engage in the maritime transfer of certain dangerous cargoes and (2) extend the compliance date of the 2016 Final Regulation so that vessels and facilities would not incur costs while the Coast Guard reviewed the scope of the 2016 Final Regulation. AR2903.

In June 2017, representatives from several industries affected by the 2016 Final Regulation attended a meeting hosted by Louisiana Congressman Garret Graves and attended by Admiral Paul Thomas of the Coast Guard. AR2906-10. At this meeting, industry representatives asked Admiral Thomas for a three-year delay in the effective date. Attendees disagree as to whether and to what extent Admiral Thomas promised the Coast Guard would grant any relief to the affected entities. A letter from Congressman Graves stated that Admiral Thomas "conveyed to me that the USCG would look into a host of options, one of which being an extension of the effective date of the rule." AR2909. Plaintiffs have submitted several declarations outside of the administrative record. One declarant, who does not expressly state he was even at the meeting, says that Admiral Thomas stated the Coast Guard would "reconsider" the rule. Dkt. 25-12 at 3. Another declarant who was actually present states that Admiral Thomas did not specifically "make any distinction between facilities that would have been covered under the proposed version of the rule and facilities that were only covered under the

expanded scope of the rule," but it was the declarant's "impression" that the rule "would extend the compliance date for all facilities." Dkt. 25-7 at 3.

F. 2018 Notice Of Proposed Rulemaking.

On June 22, 2018, the Coast Guard and DHS published in the Federal Register a notice of proposed rulemaking to delay the effective date of the 2016 Final Regulation for two categories of facilities: (1) facilities that handle bulk CDC but do not transfer it to or from a vessel; and (2) facilities that receive vessels that carry bulk CDC but, during that vessel-to-facility interface, do not transfer bulk CDC to or from the vessel (collectively, "Non-Transfer Facilities"). 83 Fed. Reg. 29067 (June 22, 2018); AR2911-56. For these Non-Transfer Facilities, the NPRM proposed a new effective date of August 23, 2021. 83 Fed. Reg. at 29073; AR2955-56. However, the Transfer Facilities (*i.e.*, facilities with port-to-vessel or vessel-to-port bulk CDC transfers) and Large Passenger Facilities would remain bound by the August 23, 2018, effective date. 83 Fed. Reg. at 29073; AR2955.

The Coast Guard proposed the delay to give the agency time to consider industry input about the allegedly overbroad scope of the 2016 Final Regulation and to re-evaluate the underlying methodology used to determine the facilities subject to the electronic TWIC inspection requirements. 83 Fed. Reg. at 29072-73; AR2930-34. The NPRM stated that "there is a need to develop a more comprehensive analysis of the risk factors of facilities that handle CDC on an individualized basis, and the results of that analysis could inform either a revision of the TWIC reader rule applicability or, alternatively, to develop a consistent methodology for applying waivers. Further analysis could allow the Coast Guard to provide broad relief from security requirements for a wide variety of facilities currently characterized as Risk Group A due to the asset categorization methodology." 83 Fed. Reg. at 29072; AR2928. "Because it is our

goal to impose a requirement only where there is clear evidence that the benefits will justify the costs, we believe that these issues warrant additional study." 83 Fed. Reg. at 29072; AR2930.

The comment period for the NPRM closes on July 23, 2018. 83 Fed. Reg. at 29067; AR2911-12.

On July 10, 2018, the Coast Guard issued a formal response to the 2017 petition filed by several of Plaintiffs, seeking a new rulemaking. The response denied the petition's requests but noted that the pending NPRM addressed many of the same issues raised by the petition.

G. Judicial Proceedings.

On April 18, 2018, Plaintiffs brought the current suit, and they filed an amended complaint on May 23, 2018, alleging that—by including the facilities comprising Non-Transfer Facilities—the 2016 Final Regulation's definition of Risk Group A facilities had drastically expanded beyond what the preceding notices of proposed rulemaking had covered. Dkt. 12. Plaintiffs argued that while Transfer and Large Passenger Facilities were always understood to have been within the scope of the regulation, the same was not true for Non-Transfer Facilities, even though the notices of proposed rulemaking had stated that any facility that "handles" CDCs in bulk would require electronically readable TWICs. Dkt. 12, ¶ A.

Plaintiffs argued that the 2016 Final Regulation was therefore procedurally invalid, and also arbitrary and capricious because the Coast Guard had allegedly not run any risk analysis on the "expanded" list of covered facilities. *Id.*, ¶¶ 73-81. Plaintiffs also claimed that they had never received a response to their 2017 petition seeking a new rulemaking. *Id.*, ¶¶ 82-86. Plaintiffs asked the Court to "postpone the effective date" of the 2016 Final Regulation by several years and to order a new rulemaking. *Id.*, ¶ 90. Plaintiffs never directly challenged the

2016 Final Regulation's inclusion of Transfer Facilities or Large Passenger Facilities as requiring electronic TWIC readers.

On June 25, 2018, Plaintiffs filed a memorandum in support of their motion for a preliminary injunction, arguing that they will suffer imminent, irreparable harm if they are required to comply with the 2016 Final Regulation. Dkt. 25. Although the motion never directly challenges the inclusion of Transfer Facilities or Large Passenger Facilities, Plaintiffs nonetheless ask this Court to "stay the Final Rule" for "*all covered facilities*." Dkt. 25 at 8, 36 (emphasis in original).[4]

STANDARD OF REVIEW

A. Preliminary Injunction.

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Such a request "involv[es] the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001). In order to be eligible for a preliminary injunction, Plaintiffs must demonstrate each of the following factors by a "clear showing": (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities between the parties tips in favor of the party seeking such relief; and, (4) the public interest favors equitable relief. *Winter*, 555 U.S. at 20, 22. The requirement for showing a clear likelihood of success on the merits "is far stricter than … [a] requirement that the plaintiff demonstrate only a grave or serious *question* for

[4] Page citations to Plaintiffs' memorandum in support of their motion for a preliminary injunction are to the docket-stamped page numbers at the top of the filing.

litigation." *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010) (emphasis in original).

B. Administrative Procedure Act.

When reviewing final agency action, this Court employs the well-established and extensively deferential standards established by the Administrative Procedure Act ("APA"). This Court's review is circumscribed, *see Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as the APA provides that this Court may "set aside" an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is extraordinarily "narrow," and does not authorize a district court "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Accordingly, review is "highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Entvl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). Indeed, the Court "must defer to the agency if its action has a rational basis." *American Meat Inst. v. U.S. Dep't of Agric.*, 646 F.2d 125, 127 (4th Cir. 1981). The APA requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). "The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

The APA has its own provision expressly allowing a Court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of [administrative] review proceedings." 5 U.S.C. § 705. The

standard for issuing such a stay is the same as for issuing a preliminary injunction. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012).

ARGUMENT

I. Defendants Do Not Oppose The Court Issuing A Limited Stay Of The 2016 Final Regulation For Non-Transfer Facilities Until The Pending NPRM Becomes Final.

In their Amended Complaint and in their motion for a preliminary injunction, Plaintiffs mount a legal challenge only to the alleged expansion of the 2016 Final Regulation to cover Non-Transfer Facilities. *See, e.g.*, Dkt. 12, ¶ A; Dkt. 25 at 12, 26. As discussed above, on June 22, 2018, the Coast Guard issued an NPRM proposing to delay by three years the effective date of the TWIC reader requirements for Non-Transfer Facilities. 83 Fed. Reg. at 29072-73; AR2930-34. The comment period for the NPRM ends on July 23, 2018. 83 Fed. Reg. at 29067; AR2911-12.

If finalized, this NPRM would vitiate Plaintiffs' claim of imminent harm in having to comply with the 2016 Final Regulation for Non-Transfer Facilities. Under the pending NPRM, Non-Transfer Facilities would not have to comply with the electronic reader requirement of the 2016 Final Regulation until August 2021 at the earliest—and, depending on what the Coast Guard ultimately determines during its analysis, those facilities may never have to comply. Given this, Plaintiffs would face no legally cognizable *imminent* harm, and thus their request for a preliminary injunction would necessarily fail. *See* Dkt. 25 at 7 (Plaintiffs acknowledging that they will not suffer irreparable harm "if the Coast Guard voluntarily acts to limit the Final Rule's scope through another rulemaking").[5]

[5] Plaintiffs' Amended Complaint also raised a claim of delayed agency action, alleging that their 2017 petition—in which they asked the Coast Guard to revise the 2016 Final Regulation to require electronic TWIC readers only for Transfer Facilities—had not received an agency

Because the NPRM will not likely become final before August 23, 2018 (*i.e.*, the effective date stated in the 2016 Final Regulation), however, Defendants do not oppose the Court issuing a temporary stay, pursuant to 5 U.S.C. § 705, of the effective date of the 2016 TWIC rule as applied to Non-Transfer Facilities, until the NPRM becomes final. Section 705 permits the Court to "preserve status … pending conclusion of [administrative] review proceedings." 5 U.S.C. § 705; *see Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974); *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) ("Section 705 of the APA authorizes courts to stay agency rules pending judicial review without any time limit on the duration of the stay.") (emphasis omitted). The stay would expire when the pending NPRM becomes final, which Defendants anticipate will take several months, and at which point the NPRM itself would maintain the status quo vis-à-vis Non-Transfer Facilities while the Coast Guard reevaluates the scope of Risk Group A.

Although Plaintiffs do *not* challenge the 2016 Final Regulation's coverage of Transfer Facilities or Large Passenger Facilities, Plaintiffs nonetheless have asked the Court to stay or enjoin those portions of the rule, as well. Dkt. 25 at 36 (asking the Court to stay the final rule as to "all covered facilities"). The Court should reject this request for the reasons discussed next.

II. Plaintiffs Are Not Entitled To Any Other Preliminary Relief.

Plaintiffs request that the Court "stay the Final Rule" for "*all covered facilities*." Dkt. 25 at 8, 36 (emphasis in original). This relief should be flatly rejected because Plaintiffs fail to make the necessary clear showings to obtain extraordinary preliminary relief against the entire 2016 Final Regulation.

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response. Dkt. 12, ¶¶ 83-86. Plaintiffs do not raise this claim in their motion for a stay or injunction.

A. Plaintiffs Have Not Shown A Clear Likelihood Of Success On The Merits For Transfer Or Large Passenger Facilities.

As a preliminary matter, Plaintiffs have not challenged the 2016 Final Regulation's inclusion of Transfer Facilities, which they concede they knew all along would be part of the final regulation and for which an appropriate risk analysis was performed. Dkt. 12, ¶ A; Dkt. 25 at 12 (Plaintiffs noting that it was "universally understood" that any "facility where the transfer to or from a vessel of CDC in bulk occurred" would be covered); Dkt. 25 at 26 (the prior notices of proposed rulemaking "conduct[ed] an exhaustive risk analysis … and had that analysis peer reviewed"). Nor have Plaintiffs raised any challenge to the inclusion of Large Passenger Facilities. These omissions are significant. Plaintiffs cannot show a likelihood of success on the merits of claims that have not actually been made. This failure alone is a sufficient ground on which to deny their request for a preliminary injunction for *any* part of the 2016 Final Regulation except Non-Transfer Facilities covered by the pending NPRM. *See, e.g., Berry v. Bean*, 796 F.2d 713, 716 (4th Cir. 1986) ("A plaintiff with little or no chance of success on the merits should not receive an injunction ….").[6]

Plaintiffs nonetheless argue that they should receive an injunction against the entire 2016 Final Regulation because at a 2017 meeting with Congressman Graves and several industry members, Coast Guard Admiral Thomas allegedly said that the 2016 regulation could be stayed. Dkt. 25 at 33. This argument does not provide Plaintiffs any chance of success on the merits.

First, Plaintiffs cannot make a clear showing that Admiral Thomas actually said the entire 2016 Final Regulation would definitely be delayed, or for how long. The statements were

[6] Plaintiffs also lack standing to challenge the 2016 Final Regulation's inclusion of Large Passenger Facilities, given that none of them assert that they actually own or operate any such facilities. This provides yet another ground to deny Plaintiffs' request to stay the entire 2016 Final Regulation. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

made orally, and Congressman Graves's summary stated only that Admiral Thomas "conveyed to [Congressman Graves] that the USCG would look into a host of options, one of which being an extension of the effective date of the rule." AR2909. Another attendee's recollection was that while the "plan" was to "delay the effective date of the rule," the rulemaking process "could wind up in one of a series of potential outcomes." AR2907. Plaintiffs have submitted additional declarations that should not be considered because they are outside the administrative record[7]—but in any event they provide no support to Plaintiffs. A declaration from Carl Holley (who does not state whether he was actually present at the meeting) says that Admiral Thomas stated the Coast Guard would "reconsider" the rule, among "other ambiguous statements" Dkt. 25-12 at 3. Scott Whelchel (who was at least present at the meeting, AR2907) states that Admiral Thomas did not specifically "make any distinction between facilities that would have been covered under the proposed version of the rule and facilities that were only covered under the expanded scope of the rule," but it was Mr. Whelchel's personal "impression" that the rule "would extend the compliance date for all facilities." Dkt. 25-7 at 3. Given these vague and inconsistent recollections, the most Plaintiffs can show is that Admiral Thomas's statements were equivocal. This is far short of the "clear showing" required to obtain a preliminary injunction or stay.

Second, regardless of what Admiral Thomas actually said, the Supreme Court and Fourth Circuit have both held that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984); *Holly Hill Farm Corp. v. United*

[7] *See, e.g., Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 444 (7th Cir. 1990) (in the context of seeking emergency relief, "only if there is no record and no feasible method of requiring the agency to compile one in time to protect the objector's rights—in short, only (to repeat) if there is an emergency—should an objector be allowed to present evidence in court showing why the agency acted unlawfully. And this was not such a case.").

States, 447 F.3d 258, 264 (4th Cir. 2006). Thus, parties may not claim any form of detrimental reliance or estoppel against the federal government when it tries to enforce the law. "Federal law is clear that estoppel is rarely, if ever, a valid defense against the Government absent proof of some affirmative misconduct by a Government agent, and *estoppel against the Government cannot be premised on oral representations.*" *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994) (emphasis added); *accord Heckler*, 467 U.S. at 65. Plaintiffs have not alleged (nor could they) any "affirmative misconduct" by Admiral Thomas.[8] Indeed, in a separate case, the Fourth Circuit has expressly rejected the notion that "the Coast Guard should be estopped from applying [a] new rule" based on the Coast Guard's own prior representations about the effect of a certain law, because "affirmative misconduct by the government was not even alleged" in that case. *Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1484 & n.24 (4th Cir. 1992) (rejecting Second Circuit decision holding to the contrary). In any event, Plaintiffs certainly cannot avoid the blackletter rule that "estoppel against the Government cannot be premised on oral representations," *Vanhorn*, 20 F.3d at 112 n.19, which is precisely what Plaintiffs rely on here.

Rejecting Plaintiffs' detrimental reliance argument is especially apt given that Plaintiffs surely knew that Admiral Thomas did not have authority to orally and unilaterally change the deadline for a final, significant regulatory action under Executive Order 12866—a process that would actually require approval by the Department of Homeland Security and the Office of

[8] "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct." *Bd. of Cty. Commissioners of Cnty. of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994); *Greenbelt Ventures, LLC v. Washington Metro. Area Transit Auth.*, 481 F. App'x 833, 838 (4th Cir. 2012) ("If estoppel is ever allowed against a government agency, it is only available where a government agent engages in 'affirmative and egregious misconduct' that goes beyond mere 'unprofessional and misleading conduct.'").

Management and Budget, as well as a new rulemaking signed by the Commandant of the Coast Guard, as demonstrated by the process followed for the NPRM issued on June 22, 2018. *See Conn. Gen. Life Ins. Co. v. C.I.R.*, 177 F.3d 136, 145 (3d Cir. 1999) ("[R]eliance upon remembered details from officials who lacked the ultimate authority to issue any proposed regulation has little support in the law.").

For these reasons, Plaintiffs are unlikely to make any showing, let alone a clear showing, of likelihood of success on their request that the Court stay or enjoin the *entire* 2016 Final Regulation. This failure alone mandates denial of Plaintiffs' request for such relief.

B. Plaintiffs Cannot Make A Clear Showing Of Actual And Immediate Irreparable Harm.

Plaintiffs' request for a stay of the entire 2016 Final Regulation fails for another reason: they have not made a "clear showing" that, without the requested injunction, they will suffer irreparable harm that is "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991); *see also Winter*, 555 U.S. at 20, 22. As a preliminary matter, Plaintiffs have not alleged that they operate Large Passenger Facilities, and accordingly there can be no harm at all in enforcing that portion of the 2016 Final Regulation. Even for Transfer Facilities, Plaintiffs have failed to make a clear showing of imminent, irreparable harm in having to follow the 2016 Final Regulation, as discussed next.

1. Plaintiffs Have Not Attempted To Obtain Regulatory Waivers.

Facilities have long been able to seek waivers of any requirement imposed by the Coast Guard under the MTSA: "Any facility owner or operator may apply for a waiver of any requirement of this part that the facility owner or operator considers unnecessary in light of the nature or operating conditions of the facility, prior to operating." 33 C.F.R. § 105.130. Any request must be in writing to the Commandant of the Coast Guard. *Id.* In essence, this provision

permits parties like Plaintiffs to provide practical explanations justifying why they should not have to comply with certain regulations.

Despite this clear regulatory waiver process and the Coast Guard's willingness to consider any such requests for the 2016 Final Regulation, Plaintiffs have not even attempted to seek such waivers for any facilities. *See* Dkt. 25-13, ¶ 12 (indicating that waivers were not sought because the declarant believes it "would only further complicate the process"). This is fatal to their claim of irreparable harm. As the Supreme Court has made clear, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. ___, No. 17-333, 2018 WL 3013808, at *2 (U.S. June 18, 2018). Plaintiffs' decision not to even *seek* waivers shows a lack of diligence on their part and only highlights that any harm they might suffer is due solely to their own dilatory actions. Thus, any allegedly imminent harm "largely arose from a circumstance within plaintiffs' control." *Id.* Plaintiffs' failure to seek waivers regarding Transfer Facilities is especially inexplicable given that Plaintiffs themselves repeatedly note that Transfer Facilities comprise only a "narrow category of facilities" with a "narrow scope," Dkt. 12, ¶¶ A, 50; Dkt. 25 at 17, and that only "some" of their members would be unable to meet the August 23 deadline for such facilities, Dkt. 25 at 33. Given this, it would make eminent sense for this subset of facilities to seek waivers for the "narrow" portion of the 2016 Final Regulation that will still apply to Plaintiffs after the NPRM becomes final. Yet they have chosen not to do so.

Given this readily available means for seeking exemption from the 2016 Final Regulation, Plaintiffs have not shown a cognizable imminent harm, nor have they shown the diligence required to obtain a preliminary injunction.

2. Plaintiffs Have Not Made A Clear Showing For Why They Cannot Use PACS As An Alternative To TWIC Readers.

Plaintiffs also claim that they cannot comply with the 2016 Final Regulation because TWIC readers have a long delivery time. Dkt. 25 at 33. Again, any delay on this front is due to Plaintiffs' own decision not to comply with the portions of the 2016 Final Regulation—those applicable to Transfer Facilities—that they agree were covered and for which the industry was given a two-year lead time. This lack of diligence is grounds for denying preliminary relief. *See Benisek*, 585 U.S. ___, 2018 WL 3013808, at *2. But, in any event, the 2016 Final Regulation repeatedly explained that many facilities would not have to purchase TWIC readers because they instead could retrofit their pre-existing physical access control systems ("PACS") to comply with the 2016 Final Regulation. Plaintiffs' motion for a preliminary injunction never once addresses this alternative means of compliance.

In the 2016 Final Regulation, the Coast Guard noted that it was expressly "allow[ing] electronic TWIC inspection to be conducted by either a TWIC reader or a PACS at vessels and facilities," where the PACS could perform the same biometric and security confirmation requirements of a TWIC reader. 81 Fed. Reg. at 57662; AR2756. Thus, facilities could satisfy the TWIC regulation by making "use of an existing PACS, with the inclusion of biometrics, with a facility-specific access card that uses the TWIC as the baseline credential," rather than having to buy TWIC readers at all. 81 Fed. Reg. at 57664; AR2758. Using PACS is a practical alternative, as shown, for example, by the fact that the Coast Guard said it was "reasonably certain that the largest passenger facilities are much more likely to implement the electronic TWIC inspection requirement by adding a biometric input method into their PACS, rather than by developing an entirely parallel TWIC reader system." 81 Fed. Reg. at 57689; AR2783.

The Coast Guard again discussed PACS when it addressed concerns about the "costs of

TWIC inspection equipment." 81 Fed. Reg. at 57,688; AR2782. One public comment stated that "it would not be necessary to purchase an entirely new PACS software system, and that one could simply add an electronic reader to the existing PACS that supports the perimeter access points for some entities," rather than buy TWIC readers. 81 Fed. Reg. at 57688; AR2782. The Coast Guard "agree[d]" and stated, once again, that facilities could "integrate biometric input functions into an existing PACS, rather than install a separate integrated TWIC reader," and this "discretionary option can reduce electronic TWIC inspection costs substantially, depending on the business operations of the facility using such a system." 81 Fed. Reg. at 57688; AR2782.

In their motion for a preliminary injunction, however, Plaintiffs never once mention PACS, nor provide any explanation for why they have not pursued PACS adjustments rather than purchase TWIC readers. Plaintiffs may believe that it is simpler to seek a Court order staying the entire regulation, rather than trying reasonable routes for compliance, but, again, "a party requesting a preliminary injunction must generally show reasonable diligence," and Plaintiffs have not demonstrated that they have done so. *Benisek*, 585 U.S. ___, 2018 WL 3013808, at *2.

Further, for those entities concerned by the costs of security infrastructure, DHS was authorized by Congress to "establish a grant program for making a fair and equitable allocation among port authorities, facility operators, and State and local agencies required to provide security services of funds to implement Area Maritime Transportation Security Plan and facility security plans." 46 U.S.C. § 70107(a); *see also* FEMA, *Port Security Grant Program*, https://www.fema.gov/port-security-grant-program.[9]

[9] Moreover, the MTSA states that Captains of the Port may grant permission for a facility to continue operations when it must temporarily deviate from the maritime security requirements. *See* 33 C.F.R. § 105.125. Plaintiffs ignore their ability to petition for such relief in the event that

For these additional reasons, Plaintiffs have failed to make a clear showing of a cognizable imminent and irreparable harm.

3. Plaintiffs Could Seek To Designate Certain Portions Of Their Facilities As Not Requiring Electronic TWIC Access.

Plaintiffs also suggest that they face irreparable harm by having to comply twice with the 2016 Final Regulation—once now for Transfer Facilities, and possibly again later for Non-Transfer Facilities. Dkt. 25 at 31.

This claim fails at the outset because such monetary expenditures are rarely considered to present irreparable harm. *See, e.g., Am. Hosp. Assoc. v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."); *Tafas v. Dudas*, 511 F. Supp. 2d 652, 669 (E.D. Va. 2007) (Cacheris, J.) (same). Plaintiffs' claim also fails because it depends on the hypothetical and certainly non-imminent possibility that Plaintiffs will have to comply for Non-Transfer Facilities at some point in the future. Finally, Plaintiffs will not have to comply "twice"—rather, they would comply once for each type of covered facility.

Even setting aside those basic flaws, Plaintiffs' claim fails because they could limit any alleged "double compliance" by immediately seeking to shrink the portions of their facilities requiring electronic TWIC reader access. The 2016 Final Regulation provides several means by which facilities could, on a case-by-case basis, seek to relax or exempt portions of their facilities

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delays in ordering and installing TWIC readers would necessitate temporary deviation from the Final Rule.

from the electronic TWIC reader rule. Plaintiffs have not attempted to utilize these alternatives, however. For example, the Coast Guard agreed with comments that "suggested that where the presence of, and access to, CDC in bulk can be isolated from areas not containing these products within a large MTSA footprint, the facility should be allowed to limit elevated security measures to the higher-risk area only." 81 Fed. Reg. at 57682; AR2776. "If bulk CDC is contained in a discrete area of the facility, it may be possible to isolate that area from other areas of the facility," and "the owner or operator would be permitted to delineate in the [facility security plan ("FSP")] a portion of the facility as not subject to the electronic TWIC inspection requirements." 81 Fed. Reg. at 57682; AR2776.

Rather than make changes to a facility's CDC handling area, Plaintiffs could seek to revise the "MTSA footprint" of the facility—*i.e.*, exclude an area from MTSA coverage (and thus the 2016 Final Regulation) altogether. In the 2016 Final Regulation, the Coast Guard noted that a facility where bulk CDC is stored and handled away from the maritime nexus would still be a Risk Group A facility, but that "where the bulk CDC is not a part of the maritime transportation activities, it may be that a facility could define its MTSA footprint in such a way as to exclude that area… [with the result that] the TWIC reader requirements… would not apply in that area." 81 Fed. Reg. at 57681; AR2775. Plaintiffs claim that this possibility "may not be practicable," Dkt. 25 at 34, although they provide little evidence of even attempting this course. In fact, their own documentation undercuts the claim. Carl Holley's declaration describes a facility near Houston where the owner "fenced" just the portion of the facility where there is "movement of CDCs" across docks. Dkt. 25-12, ¶ 6. This shows that facilities often can install security features and adjust the layout of their facilities in ways that shrink the geographic area where electronic TWIC inspection is required under MTSA, thereby reducing the number of

TWIC readers needed to access that area and reducing the chances of somehow having to comply "twice" by installing additional readers at some future point.[10]

The extraordinary remedy of a preliminary injunction cannot issue without an adequate and clear showing of irreparable harm that will likely occur without such relief. Plaintiffs have not made this showing.

C. The Balance Of The Equities And Public Interest Both Favor The Government.

The final requirements for obtaining a preliminary injunctive relief require a plaintiff to demonstrate that the balance of equities tips in his or her favor, and that a preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20, 23; *Dewhurst v. Century Aluminum Co*., 649 F. 3d 287, 290 (4th Cir. 2011). Again, these factors favor Defendants.

In terms of equities, Plaintiffs essentially ask this Court to issue a preliminary injunction because Plaintiffs decided to roll the dice and hope that the entire 2016 Final Regulation would be stayed, to the point that Plaintiffs decided not to take any steps towards complying with the rule—even the portions to which they have raised no legal challenge. The Court should not encourage parties to disregard clear, binding regulations, based only on (at most) ambiguous oral statements by a government agent whom Plaintiffs knew had no authority to unilaterally stay an entire regulation.

Balanced against this self-interested behavior is the "Government's interest in combating terrorism [which] is an urgent objective of the highest order." *Holder v. Humanitarian Law*

[10] Moreover, if separation is not feasible and CDC presence truly is pervasive, then the security interests at stake require electronic TWIC inspection. Stated another way, if a facility operator chooses to define the MTSA footprint of a facility to cover areas without a maritime nexus, or if CDC presence is truly so pervasive that the footprint cannot be limited in any way, logic dictates that Coast Guard jurisdiction under MTSA would extend to those areas and that electronic TWIC inspection must be used.

Project, 561 U.S. 1, 28 (2010). And the 2016 Final Regulation goes directly to those critical concerns. The rule found that "Risk Group A" Transfer Facilities and Large Passenger Facilities present a serious enough risk of terroristic threats that electronic TWICs should be required. Plaintiffs contend there would be no harm from enjoining or staying the entire Final Regulation because facilities would still require "visual verification of TWICs." Dkt. 25 at 34. The fallacy of this argument is that Congress itself has already mandated that visual inspection is insufficient for high-risk facilities and that electronic verification should therefore be required because of its security benefits. 46 U.S.C. § 70105(k)(3). If the Court stayed or enjoined the 2016 Final Regulation for *all* facilities, they would no longer be subject to the benefits of electronic readers articulated by Congress in the SAFE Port Act.

Finally, Plaintiffs' "estoppel" argument, based on Admiral Thomas's alleged remarks in 2017, implicates the public interest because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler*, 467 U.S. at 60. If Plaintiffs could prevent the government from enforcing provisions of a lawful regulation, based on nothing but ambiguous oral statements at a meeting, then the public interest in the rule of law would be significantly harmed.

Accordingly, neither the balance of the equities nor the public interest favor Plaintiffs' request for an injunction against or a stay of the 2016 Final Regulation for Transfer Facilities or Large Passenger Facilities.

CONCLUSION

Defendants do not oppose the Court issuing, pursuant to the APA, a temporary stay of the 2016 Final Regulation as applied only to Non-Transfer Facilities (*i.e.*, those covered by the

pending NPRM), with the stay expiring when the pending NPRM becomes final. The Court should deny Plaintiffs' requests for any other relief.

DATE: July 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the foregoing electronically using the Court's CM/ECF system, which will trigger a notice of electronic filing to the following:

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