

ASSOCIATION OF CANADIAN PORT AUTHORITIES

**Submission to Transport Canada
On Proposed Marine Transportation Security Regulations**

**Ottawa, CANADA
January 23, 2004**

Executive Summary

The Association of Canadian Port Authorities (ACPA) welcomes the federal government's commitment to enhancing marine security in Canada. Canada Port Authorities (CPA) are the 'first point of entry' for goods and people valued at over \$100 billion annually in Canada. Canada's National Ports System is a significant contributor to the nation's economy and everything must be done to ensure that the competitiveness of Canada's major ports are not impeded due to security concerns. Canada Port Authorities have already taken measures to ensure that security is a high priority and many have invested millions of dollars in pursuit of better security.

The International Maritime Organization (IMO) established new standards for marine security and expects that all countries will comply with these new standards by the deadline of July 2004. The deadline is fast approaching for the implementation of new IMO standards for maritime security, now commonly known as the International Ship and Port-facility Security (ISPS) Code. In late 2002, Canadian federal government officials represented Canada at the IMO in London, England and ratified amendments to SOLAS at the conference of Contracting Governments to the SOLAS convention, creating the ISPS Code. As the contracting government, Transport Canada signed the agreement for new, national security standards and since then have initiated a process to ensure that the requirements of the Code are implemented by the imposed deadline.

To this end, marine facility operators and CPAs came together in working groups and had direct input into drafting security regulations to implement Canada's commitment under the IMO. These regulations were made public at the end of November 2003 and cross-country consultations on the proposed regulations concluded in Ottawa on January 16, 2004. The goal now is to publish the new regulations in the *Canada Gazette* some time in the spring of 2004. While this process is unfolding 'marine facility operators' have been busily conducting 'threat assessments' and developing 'marine facility security plans' that must be submitted to Transport Canada who will then issue a 'certificate of security compliance' based on those plans.

The ISPS Code designated ‘marine facility operators’ as the entities that must comply with the new regulations and these ‘operators’ would be the recipients of the ‘certificates of security compliance.’ Port administrations have not been identified in the ISPS Code, thus placing ‘port administrations’ – as they are identified in the proposed regulations - in a unique position in the ongoing development and eventual implementation of the ISPS Code for ‘marine facility operators’ in Canada.

As a result, the Chair of the ACPA Board wrote the Minister of Transport on September 28, 2003, requesting clarification on certain key issues related to security respecting CPAs. The key issues raised with the Minister of Transport at that time continue to apply today and are as follows:

- 1) need for a clear definition of responsibility for overall port security on CPA managed property, including federal lands;
- 2) need for a clearly defined enforcement regime related to the implementation of the ISPS code;
- 3) need for a clear definition of liability related to the implementation of proposed Transport Canada security regulations;
- 4) need for a clear definition of responsibility for waterside security; and
- 5) need for direct funding for the effective implementation of the ‘contracting government’s’ commitment to the IMO, similar to the funding provided by our neighbouring ‘contracting government’ for similar security enhancements in the United States.

While much good work has been done - and CPAs continue to work with marine facility operators to ensure that the new ISPS standards are fully met - **these issues require further clarification in the proposed regulations.**

We understand that the implementation of the ISPS code is being done under the auspices of the Marine Transportation Safety Act (MTSA) and for the purposes of security this Act overrides all other Acts with respect to marine security regulations. We also understand that national marine security goes beyond the requirements of the Canada Marine Act (CMA) with respect to safety.

The Association is pleased that Transport Canada has made every effort to harmonize Canadian marine security regulations with that of the United States. We look forward to reviewing the outcome of the ongoing bilateral discussions to formalize this harmonization effort. We are hopeful that there will also be harmonization with respect to federal funding related to seaport security.

Please accept this submission as the Association's general observations with respect to the implementation of the ISPS Code under the proposed regulations. It must be noted that individual Canada Port Authorities provided specific concerns to Transport Canada in the cross-country consultations and in individual written submissions.

Contrast Between Marine Facilities and Port Administrations

The ISPS Code refers to marine facilities, but not ports. Hence, Transport Canada, as the contracting government, has included a role for CPAs in the proposed regulations to help effectively implement the ISPS Code. This is a fundamental issue for CPAs given that CPAs, by and large, are not 'marine facility operators'. CPAs have a landlord-tenant relationship with marine facility operators operating on port lands. However, the Port Authority has a vested interest in ensuring that proper procedures and practices are in place for the benefit of all port business.

It is also extremely important that the contracting government, Transport Canada, define what is expected of 'marine facility operators' with respect to the ISPS Code implementation and what is expected of Canada Port Authorities. The Code demands that all 'marine facility operators' submit security assessments and security plans which will require the formal approval of the Minister of Transport, leading to the granting of a 'certificate of security compliance'. There is no requirement in the regulations for marine security operators to provide copies of their respective assessments and plans to the 'port administration' or CPAs. Given this situation it would appear that Transport Canada assumes full liability related to marine facility security based on the respective security assessments and plans submitted to the contracting government for approval.

The proposed regulations require marine facility operators to submit security assessments and plans to Transport Canada for approval. The proposed regulations indicate that CPAs are also accountable for the ‘same’ assessments and plans even though CPAs have no direct input in the completion of those assessments and plans noted in Sections 304 and 356 of the regulations and referred to in other sections throughout.

It is proposed that the marine facility security officer is supposed to develop the marine facility security plans ‘in cooperation with the port security officer’ and only participate in the port security committee ‘where applicable’ (Section 304). This would appear to be a double layering of responsibility which holds both the ‘marine facility operator’ and the ‘port administration’ accountable for the same plan. This must be clarified in the proposed regulations. Of course, the CPA will take full ownership and responsibility for its own specific security assessment and security plan which is separate and apart from those of the marine facility operators.

Structure of Port Committees

It is proposed that a port committee structure be adopted to coordinate marine security within ports. This has become a *de facto* situation at most Port Authorities given that it was determined to be the most effective way to ensure that information is disseminated in a timely manner to marine facility operators. This is important in terms of both understanding the requirement as well as consideration of the means required to meet the new security regulations. We are pleased to see that the security committee has now been formalized in the draft regulations given that both marine facility operators and CPAs have a vested interest in maintaining security at Canada’s ports. This is a positive feature in the regulations. It must be noted, however, that composition of the security committee is left to the sole discretion of the ‘port administration’ or CPA.

Security Assessments and Security Plans

Transport Canada has urged early, voluntary implementation of elements of the ISPS Code by conducting security assessments and security plans. While this is a laudable effort, there may be some adjustment required based on the current proposed regulations now being considered. The Association asks

that all Canada Port Authorities be informed of any and all such adjustments prior to publication in the Canada Gazette.

As stated at the outset, the Association has raised the concern with respect to liability. As 'marine facility operators' and CPAs engage in detailed security assessments and security plans, insurance providers may be given cause to re-evaluate the level of risks ensured. If so, this could lead to increased insurance premiums for CPAs. After the events of September 11, 2001, all CPAs experienced an exponential increase in insurance costs, some experienced as much as triple the rates pre-9/11. We respectfully request that Transport Canada clarify the obligations with respect to liability and assure Canada Port Authorities that they will not experience similar increases once the final security regulations are promulgated. If there is a consequential impact on the legal liability of CPAs that Transport Canada indemnify 'port administrations' under the Marine Liability Act or some similar legislation.

Enforcement Regime

We appreciate that the full enforcement regime with respect to the proposed regulations has yet to be completed. The Association hopes that the enforcement regime will be shared with CPAs prior to being published in the Canada Gazette. It would appear that the enforcement regime envisioned by the regulations is for the most part voluntary with the ultimate authority for the enforcement regime resting with Transport Canada. Before the draft regulations are published in the Canada Gazette it will be necessary to more clearly define the penalties for non-compliance, whether it will be as drastic as the withdrawal of certificates of compliance or the use of such things as administrative monetary penalties.

This issue is of critical importance for CPAs because an act of non-compliance by a 'marine facility operator' will result in the 'black listing' of that facility with the IMO. This will be seen around the world as the non-compliance of one marine facility could adversely impact the operations of all marine facilities at that port. The Association supports having an appeal process under the auspices of the Transportation Appeal Tribunal of Canada with respect to acts of non-compliance under the Act.

Waterside Security

Some have suggested that waterborne security is one of the highest risk areas related to maritime security. Yet there is no provision made for waterside security standards and related responsibilities in the proposed regulations. Transport Canada has suggested that the responsibility for waterside security rests with the jurisdiction of the local policing authorities, whether it be city police or the RCMP. In cases where CPA management and staff have inquired, they were told by local policing authorities that they have little or no capacity to police the harbours.

It must also be noted that Canada Port Authorities do not have the necessary resources to provide adequate policing related to potential waterside threats. Waterborne security requirements must rest within the domain of government authorities that are better equipped to address such a threat. This must be addressed in any meaningful marine security initiative such as those envisioned in the proposed regulations.

Marine Security Clearance Program

It Section 5, it is proposed that persons who require access to restricted and sensitive areas of marine facilities, or those who occupy specific security sensitive positions, would be required to obtain a Transportation Security Clearance. While this would appear to be a worthwhile initiative, CPAs have some concerns with respect to the way in which such a program will be implemented. Among some of these concerns is the area which will be designated for restricted access; will these areas include common use areas; who will be screened for access to the restricted areas; what are the costs associated with such an ambitious program; and the timing of implementation. Surely the oversight and related costs of such sensitive information and issuance of security clearances goes beyond the jurisdiction of Canada Port Authorities as they are currently configured. The Association looks forward to having these issues addressed more definitively in the next draft of the regulations.

Process and Timing

Transport Canada has suggested that the regulations could be amended once they receive final approval given that it is being done under current legislation, and not by the creation of a new Act. We would also like to know when the new 'legislation' related to the proposed marine security regulations will be completed. It would be helpful if we had some indication of the timing of the legislative development process related to the proposed security regulations and the related opportunities for direct input into this process as it unfolds after the July 2004 deadline. That may also be something of interest to our major trading partners.

Transport Canada has indicated that once the security plans are submitted and approved, marine facility operators will have five years to implement these security plans. Is this the practice in other countries and will our most important trading partner, the United States, agree to such a process? These will be important considerations for CPAs as they continue to advocate for a level playing field with that of competing ports in the United States.

Conclusion

Enhanced marine security is now a way of life for Canada Port Authorities. Many CPAs have invested heavily in new equipment and practices to bolster seaport security. Competing ports and marine facility operators in the United States continue to receive direct grants from the federal government to help implement their government's commitment to the IMO for enhanced marine security. This has not been the case in Canada and more needs to be done to assist Canada's major ports to help the 'contracting government' meet its obligation to the IMO as it relates to implementation of the ISPS Code.

Canada Port Authorities will continue to cooperate with the 'contracting government' for the implementation of new, enhanced security standards. However, the key policy issues noted above must be fully addressed before regulations can be published in the Canada Gazette. If not, this could jeopardize the strength of the regulations as originally conceived as well as possibly place a number of Canada Port Authorities, or 'port administrations' in a vulnerable position with respect to related liability.

