



DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2011-0727]

RIN 1625-AA11

Regulated Navigation Area; Arthur Kill, NY and NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule with request for comments.

SUMMARY: The Coast Guard is amending the Regulated Navigation Area (RNA) in the navigable waters of the Arthur Kill in New York and New Jersey. The amendment allows the Coast Guard to suspend enforcement of some RNA requirements when they are found to be impracticable and unnecessary for the maintenance of safety.

DATES: This rule is effective in the CFR on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** until 5 p.m. on April 1, 2014. This rule is effective with actual notice for purposes of enforcement from December 16, 2011, until 5 p.m. on April 1, 2014. Public comments will be accepted and reviewed by the Coast Guard through April 1, 2014.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2011-0727

and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0727 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Jeff Yunker, U.S. Coast Guard Sector New York Waterways Management Division, Coast Guard; telephone 718-354-4195, e-mail Jeff.M.Yunker@uscg.mil, or Lieutenant Junior Grade Isaac Slavitt, Coast Guard First District Waterways Management Branch, telephone 617-223-8385, e-mail Isaac.M.Slavitt@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to

<http://www.regulations.gov> and will include any personal information you have provided.

The Coast Guard will evaluate and revise this rule as necessary to address significant public comments. Alternatively, if the dredging project necessitating the interim rule is completed before April 1, 2014, and we receive no public comments that indicate a substantive need to revise the rule, we may allow it to expire on that date without further regulatory action.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2011-0727), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via <http://www.regulations.gov>) or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via www.regulations.gov, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address,

or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG-2011-0727" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will consider those comments before issuing a final rule.

Viewing comments and documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG-2011-0727" and click "Search."

Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the Federal Register (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 553. But you may submit a request for one using one of the four methods specified under ADDRESSES. Please explain why you believe such a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in

the Federal Register. The Coast Guard has held or participated in 17 locally announced informal waterway user meetings where waterway closures and restrictions were discussed. We anticipate holding additional informal meetings, with opportunity for public questions or comments, during this project. We will provide written summaries of any such meetings in the docket.

Regulatory Information

This temporary interim rule (TIR) is the second to address the RNA in the Arthur Kill. An earlier TIR added the basic RNA regulation for that waterway: 33 CFR 165.T01-0727 (76 FR 52569; Aug. 23, 2011).

We are issuing this second TIR without prior notice and opportunity to comment, under the authority of the Administrative Procedure Act (APA), 5 U.S.C. 553(b), and giving effect to it immediately (with actual notice) under the authority of the APA, 5 U.S.C. 553(d)(1). This second TIR adds 33 CFR 165.T01-0727(b)(9), which allows us to suspend the enforcement of specific RNA requirements. We find good cause for adding paragraph (b)(9) without prior notice and comment, and without the normal 30-day APA waiting period, because doing so relieves a regulatory restriction that would require strict observation of the RNA's requirements under all conditions, and because we

know of conditions under which it would be unnecessary and contrary to the public interest for us to enforce those requirements: at three informal meetings held with stakeholders between July and September 2011, we learned that the RNA's requirement to maintain a distance of at least 150 feet from drilling and blasting equipment is not feasible for large commercial ships with tugs alongside. Moreover, the distance requirement is not necessary for the protection of safety, when all drilling and blasting equipment is located in an enclosed portion of the navigable channel away from the normal flow of marine traffic. We can foresee other possible circumstances in which it would be contrary to the public interest and unnecessary for safety to enforce the RNA's requirements. It would be impracticable and contrary to the public interest to continue enforcing those requirements solely to allow time for publication of a notice of proposed rulemaking and for taking public comments on such a notice.

Basis and Purpose

Under the Ports and Waterways Safety Act, the Coast Guard has the authority to establish RNAs in defined water areas that are determined to have hazardous conditions and in which vessel traffic can be regulated in the interest of safety. See 33 U.S.C. 1231 and Department of Homeland

Security Delegation No. 0170.1.

The purpose of this rule is to ensure the safe transit of vessels in the area and to protect all persons, vessels, and the marine environment during the ongoing channel deepening project.

Background

The RNA encompasses all waters of the North of Shooters Island Reach, Elizabethport Reach, and Gulfport Reach in the Arthur Kill. Consult the first TIR for further background information on the RNA. Drilling and blasting operations began in the Arthur Kill on Tuesday, August 2, 2011. We expect those operations to conclude within the lifespan of this second TIR, which like the first expires on April 1, 2014.

Discussion of Comments and Changes

We received comments from the harbor pilots during the locally announced informal waterway user meetings held between July and September 2011. They noted that the requirement for all vessels to remain at least 150 feet from drilling and blasting equipment is not feasible for large commercial ships with tugs alongside, and unnecessary for the protection of safety when all drilling and blasting equipment is located in an enclosed portion of the navigable channel away from the normal flow of marine

traffic. We agree and are adding paragraph (b) (9) to the regulatory text for our RNA, allowing us to suspend enforcement of specific requirements under circumstances such as these, upon a mariner giving appropriate notice of a vessel transit in the regulated area.

Regulatory Analyses

We developed both the first TIR and this second TIR after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. For a discussion of the RNA's overall economic impact, see our first TIR. The economic impact of this second TIR's addition of 33 CFR 165.T01-0727(b)(9) will be favorable because it allows us to suspend enforcement of provisions against the regulated public.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-

612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. In the first TIR, we certified under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, and we supported that certification. We repeat that certification for this second TIR, which will have a favorable though insignificant impact on small entities by allowing us to suspend enforcement of provisions against them.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we continue to offer to assist small entities in understanding the RNA and its impact on them.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not

retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Miscellaneous

The amendment made by this second TIR allows us to suspend enforcement of the RNA's requirements. As such, the amendment has no further impact on the analyses included in the first TIR of collection of information (Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520); Federalism (Executive Order 13132), the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the taking of private property (Executive Order 12630), civil justice reform (Executive Order 12988), protection of children (Executive Order 13045), Indian tribal governments (Executive Order 13175), energy (Executive Order 13211), technical standards (the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note), or the environment. This rule is categorically excluded, under figure 2-1, paragraph (34) (g), of Commandant Instruction M16475.1D. This rule involves the establishment of a RNA. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. In 33 CFR 165.T01-0727, add paragraph (b) (9) to read as follows:

§ 165.T01-0727 Regulated Navigation Area; Arthur Kill, NY and NJ.

* * * * *

(b) * * *

(9) Suspension of enforcement: the Captain of the Port (COTP) New York will cause notice of enforcement, suspension of enforcement, or closure of the waterway to be made by all appropriate means to achieve the widest

distribution among the affected segments of the public. Such means of notification may include, but are not limited to, Broadcast Notice to Mariners, Local Notice to Mariners and Vessel Traffic Service New York (VTSNY). Such notification will include the date and time that enforcement is suspended as well as the date and time that enforcement will resume.

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Dated: December 16, 2011.

D. A. Neptun
Rear Admiral, U.S. Coast Guard
Commander, First Coast Guard District

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