IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CANOE CRUISERS ASSOCIATION of GREATER WASHINGTON, D.C. Plaintiff, v. KARL L. SCHULTZ, in his official capacity as Commandant of the United States Coast Guard, *et. al.*, Defendants	Case No. 8:18-cv-2914-PJM

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants hereby submit this Memorandum in support of their Motion for Summary Judgment, and in support thereof, state as follows:

INTRODUCTION

This case concerns the United States Coast Guard's obligation to protect the nation from threats delivered by water. To carry out this critical responsibility, the U.S. Coast Guard stands vigilant watch to ensure the safest usage of the nation's waterways. In accordance with its longstanding role in providing maritime security, on June 22, 2017, the U.S. Coast Guard established a security zone encompassing certain waters of the Potomac River. The purpose of this security zone is "to prevent waterside threats and incidents immediately before, during and after events held at the Trump National Golf Club ("Trump National") at Potomac Falls, Virginia." *See* 82 Fed. Reg. 31719. President Trump frequently visits Trump National with high-ranking United States officials. The U.S. Coast Guard established this security zone "to protect high-ranking United States officials and the public, mitigate potential terrorist attacks, and enhance

public and U.S. navigable waterway safety and security." *See id.* The interim rule establishing the security zone (hereinafter the "Security Zone Rule") was published in the Federal Register on July 10, 2017. *See* 33 C.F.R. § 165.557.

The U.S. Coast Guard (hereinafter the "Agency") implemented the Security Zone Rule immediately and without the typical notice-and-comment period. Its rationale for doing so is simple, yet vitally important: to prevent "vulnerability to U.S. navigable waterway safety and the security of high-ranking United States officials, as well as that of the general public." *See* 82 Fed. Reg. 31720. Notwithstanding this significant public interest rationale, Plaintiff, Canoe Cruisers Association of Greater Washington D.C., seeks to have the Security Zone Rule removed or replaced so that users of the Potomac River can exercise their public right to access the waterway. In doing so, Plaintiff erroneously alleges that the U.S. Coast Guard violated the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. As explained below, the Agency had a sound basis for implementing the security zone in the manner that it did. The U.S. Coast Guard is responsible for the safety and security of the navigable waters of the United States. This Court should accord deference to the Agency's actions in carrying out this significant responsibility.

FACTUAL BACKGROUND

I. The U.S. Coast Guard's Enactment of the Temporary Security Zone

The U.S. Coast Guard enacted the Security Zone Rule in response to five separate occasions within three months in which the U.S. Coast Guard Sector Maryland – NCR Captain of the Port ("COTP") was required to establish a temporary security zone in the Potomac River, adjacent to Trump National. *See* 82 Fed. Reg. 31719. The creation of these temporary security zones were made at the request of the United States Secret Service ("USSS") for the protection of the President and other government officials who may be co-located at Trump National. *Id.* The

USSS requested these zones in order meet its mission of protecting the President and government officials. *Id*.

In response to several of President's Trump's trips to Trump National in the spring and early summer of 2017 that were only disclosed to the U.S. Coast Guard by USSS on relatively short notice, the U.S. Coast Guard took measures to implement a permanent temporary security zone that could be "turned on" when the president or other high-ranking government officials were present at Trump National. *See* 82 Fed. Reg. 31719, 31720. On June 22, 2017 the temporary security zone was placed in effect and actual notice of the restriction was given to users on the Potomac River. On July 10, 2017, the Security Zone Rule was published in the federal register announcing the restrictions on the use of that particular section of the Potomac River abutting Trump National, giving constructive notice to the public at large. *See* 33 C.F.R. § 165.557.

To date, the U.S. Coast Guard has not issued a "final rule" relating to the temporary security zone, although one is expected in the near future. As explained in the attached Declaration of Captain Joseph Loring, the U.S. Coast Guard is actively working on creating a Second Interim Final Rule for publication in the Federal Register. *See* Declaration of Captain Loring, attached hereto as **Exhibit 1**, at ¶ 3. This Second Interim Final Rule will analyze and respond to comments received by the public following publication of the first rule. *See id.*

II. Plaintiff's Administrative Procedure Act ("APA") Challenge to the Security Zone Rule Complaint

Plaintiff filed the instant action alleging violations of the APA, 5 U.S.C. §§ 551 *et seq.*, surrounding the Agency's implementation of the Security Zone Rule. *See* ECF No. 1. Plaintiff contends that the Agency did not follow the requisite laws necessary to enact this regulation. In Count One, Plaintiff alleges that the Agency did not have good cause to dispense with the notice-and-comment requirements. In Count Two, Plaintiff alleges that the Security Zone Rule is

arbitrary and capricious because it "does not meaningfully consider and respond to comments received from the community…, is overbroad, fails to provide adequate notice to the affected community regarding when it will be in force, lacks an end date and exceeds the scope of DHS's statutory authority." In Count Three, Plaintiffs contend that Defendants have violated 5 U.S.C. § 706(1) by failing to issue a permanent final rule, or otherwise rescind the interim final rule.

As the below analysis shows, none of these arguments hold merit, and the Court should award summary judgment in favor of the Defendants.

STANDARD OF REVIEW

I. Agency Decisions Enjoy Significant Deference Under the APA.

Under the APA, a reviewing court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 606; *Rudo v. Geren*, 818 F. Supp. 2d 17, 24 (D.D.C. 2011). However, the U.S. Supreme Court has explained that review under the "arbitrary and capricious" standard is narrow and "a court is not to substitute its judgment for that of the agency." *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As this Court has stated, "The APA's standard of review is highly deferential and presumes the agency action to be valid." *Sierra Club v. U.S. E.P.A.*, 162 F. Supp. 2d 406, 411 (D. Md. 2001) (internal citation omitted). Plaintiff bears the burden of overcoming this presumption of validity. *Id*. Courts should not disturb an agency's action as long as the agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *MD Pharm., Inc. v. Drug Enforcement Admin.*, 133 F. 3d 8, 16 (D.C. Cir. 1998). Should a court find that an agency action is invalid, "the court's power is limited to vacating the unlawful agency action and remanding the

matter to the agency for further proceedings…" *Sierra Club*, 162 F. Supp. 2d at 411 (internal citations omitted).

ARGUMENT

I. Defendants Had Good Cause to Issue the Security Zone Rule, Effective Immediately, Without Notice and Comment.

In Count One, Plaintiff contend that Defendants inappropriately enacted the Security Zone Rule without notice and comment. Plaintiff also contends that the Agency failed to provide the proper "grace period" of 30 days for any affected party to prepare for the rule's enactment prior to its enforcement. As explained below, Defendants had good cause to issue the Security Zone Rule in the manner that it did in order to ensure the safety and security of both high-ranking United States officials and the general public. Because delay could have resulted in serious harm, this Court should find that the good cause exception applies here.

a. Defendants Satisfy the APA Exception to Notice and Comment.

The APA provides that an agency should provide a notice and comment period before promulgating new regulations in most circumstances. 5 U.S.C. § 553. The statute also permits, however, an agency to skip notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

Defendants readily satisfy the "good cause" exception to the APA notice and comment requirement for the Security Zone Rule due to the "high risk of injury and damage to high-ranking United States officials and the public" at stake. *See* 82 Fed. Reg. 31720. As the Agency explained,

> Immediate action is necessary to provide waterway and waterside security and protection for persons and property on and along the Potomac River. The Coast

> Guard is establishing this security zone to ensure the appropriate level of protection for high-ranking United States officials and public.

See id.

Courts routinely find good cause for an agency's decision to bypass notice and comment where the regulation is necessary to prevent harm to the public. For example, in *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009), the U.S. Court of Appeals for the Fourth Circuit held that the Attorney General had "good cause" for the issuance of Sex Offender Registration and Notification Act ("SORNA") interim regulations without notice and comment given the concern for public safety that those offenders be registered with SORNA as quickly as possible. *See id.* at p. 470 ("Delaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk" by depriving local authorities and members of the public of awareness of sex offenders in their community).

The U.S. Court of Appeals for the Tenth Circuit employed similar logic in *North Am. Coal Corp. v. Dir., Off. Of Workers' Comp. Prog.*, 854 F. 2d 386, 387 (10th Cir. 1988). There, the Secretary of Labor published a proposed rule permitting eligible miners to file claims for medical benefits under the Black Lung Act. After publishing the final rule, the Secretary of Labor promulgated an amended rule—without notice and comment—that extended the deadline of the prior rule. The Tenth Circuit determined "the loss or delay of medical benefits to many eligible coal miners was a real harm" that satisfied the APA's good cause exception. *See id.*

In *Jifry v. F.A.A.*, the District of Columbia Circuit found good cause to bypass notice and comment and to revoke certain FAA airman certificates following the September 11, 2001, attacks as a matter of national security. 370 F. 3d 1174 (D.C. Cir. 2004). The court recognized the "emergency situation[ ]" and concluded, "[g]iven the respondents' legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001, the

agencies had 'good cause' for not offering advance public participation." *Id.* at 1179-80 (citations omitted). Moreover, in *Hawaii Helicopter Operators Ass'n v. F.A.A.*, the Ninth Circuit found good cause to invoke the exception where a "recent escalation of fatal air tour accidents" permitted the FAA to enact helicopter regulations requiring helicopter pilots to fly at a minimum 1,500 feet over Hawaii's unique, complicated topography. 51 F.3d 212, 214-15 (9th Cir. 1995).

Similar to the exigent situations faced by the agencies in the foregoing cases, the U.S. Coast Guard had ample justification to enact the Security Zone Rule without the notice-and-comment period that generally accompanies informal rulemaking. The Security Zone Rule plainly states that the security zone helps "mitigate potential terrorist attacks," and "protect[s] high-ranking United States officials and the public." *See* 82 Fed. Reg. 31720. It is difficult to conceive of a scenario involving safety issues as significant as those at issue here: avoiding terrorist attacks, protecting our commander in chief, and shielding the public from high risk of injury.

b. Defendants Satisfy the APA Exception to the 30-Day Effective Date Requirement.

The APA also requires an agency to publish any new substantive rule "not less than 30 days before its effective date." 5 U.S.C. § 553(d). However, the 30-day notice rule is inapplicable "for good cause found and published with the rule." *Id.* at § 553(d)(3). To demonstrate good cause to eliminate the 30-day waiting period, an agency need only to demonstrate that compliance with the notice requirements is "impracticable, unnecessary, or contrary to the public interest." *Yassini v. Crosland,* 618 F.2d 1356 (9th Cir. 1980). As the U.S. Court of Appeals for the Fourth Circuit has explained, "Examples of such circumstances under which good cause existed include an agency determination that new rules were needed 'to address threats posing a possible imminent hazard to aircraft, persons, and property within the United States,' or were 'of life-saving importance to mine workers in the event of a mine explosion,' or were necessary to 'stave off any

imminent threat to the environment or safety or national security.' *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F. 3d 755, 766 (4th Cir. 2012) (*quoting Mack Trucks, Inc. v. EPA*, 692 F. 2d 87, 93 (D.C. Cir. 2012).

Given the unpredictable nature of when the President visits Trump National, and the vital national security interest of protecting him from harm, a 30-day grace period before enforcement would thwart the Security Zone Rule's primary objective of protecting our commander in chief. Had a grace period been issued, any trip between the publication of the Security Zone Rule and the following thirty days would implicate significant security concerns since no legitimate security zone could exist under those circumstances. Given the heightened security threats to the President and other vital U.S. national security entities since the 9/11 attacks, the immediacy and importance of ensuring his protection exacerbates the immediate enforcement of the zone. The Security Zone Rule highlights this point by arguing that delay in enforcement "would introduce vulnerability to U.S. navigable waterway safety and the security of high-ranking United States officials, as well as that of the general public." *See* 82 Fed. Reg. 31720. In sum, sound reasons exist for bypassing the notice procedures. *See, e.g. United States v. Dean*, 604 F. 2d 1275, 1281 (11th Cir. 2010) ("Delaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk.").

II. The Security Zone Rule Was Enacted In Accordance with the 5 U.S.C. § 706(2)(A).

In Count Two, Plaintiff argues that the Security Zone Rule violates 5 U.S.C. § 706(2)(A) as it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". Specifically Plaintiff alleges that the rule: (1) did not adequately respond to the number of comments received and the concerns raised therein following its issuance; (2) is overbroad as it physically restricts a larger portion of the Potomac River than necessary; (3) does not provide the

affected public with adequate notice of when the security zone will be "turned on"; (4) lacks an end date; and (5) is not authorized by 46 U.S.C. § 70051 [previously 50 U.S.C. § 191], the statute on which the U.S. Coast Guard relies. As with Plaintiff's first cause of action, the Court should find that all these claims are meritless.

a. The U.S. Coast Guard's Declination to Respond to Comments Before the Security Zone Rule was Permissible.

The Agency's lack of response to comments submitted after the publication of the Security Zone Rule does not violate 5 U.S.C. § 706(A)(2). Similar to the analysis in response to Count One, the Court should again apply the rationale used to support the use of the "good cause" exception. The Security Zone Rule was designed to provide immediate and adequate protection for the President of the United States and the public at large. Given the President's involvement in global affairs, federal agencies must routinely act quickly to achieve his immediate and essential protection. Thus, a rule ensuring and fulfilling this imminent need – and the agencies enforcing that protection - cannot sit idle and respond to hundreds of concerns while simultaneously abdicating their obligated duty of protecting the nation's chief executive. Similarly, a court should not second-guess those agencies' decision to not respond to comments before carrying out their national security responsibilities, especially as it concerns the President of the United States.

The U.S. Supreme Court has plainly stated that courts are in no position to second-guess agency decisions concerning national security issues. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010) ("[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate.") (internal citation omitted). *See also Olivares v. Transp. Sec. Admin.*, 819 F.3d 454 (D.C. Cir. 2016) ("[C]ourts do not second-guess expert agency judgments on potential risks to national security. Rather we defer to the informed judgment of

agency officials whose obligation it is to assess risks to national security."). This Court should regard the Agency decisions at issue here with utmost deference.

b. The Physical Size of the Security Zone is Acceptable.

Concerning Plaintiff's argument that the Security Zone Rule physically restricts legal access beyond what is reasonably necessary for the rule's purpose, the Agency's decision to close portions of the Potomac River in furtherance of accomplishing the Security Zone Rule's objectives should be afforded great deference. The U.S. Coast Guard is responsible for safety, security and environmental stewardship in the navigable waters of the United States. Among its eleven statutory missions are: (1) ports, waterways, and coast security ("PWS"), (2) defense readiness, (3) marine safety, and (4) other law enforcement. *See* 6 U.S.C. § 468. It is within these roles and missions that the U.S. Coast Guard has allowed the COTP the ability to enact port security measures to safeguard vessels, property, and people (such as the security zone here). The Security Zone Rule was enacted "to protect high-ranking United States officials and the public, mitigate potential terrorist acts, and enhance public and U.S. navigable waterway safety in order to safeguard life, property, and the environment on or near the regulated area." *See* 82 Fed. Reg. 31720. These objectives are derived from the U.S. Coast Guard's roles and statutory missions. The U.S. Coast Guard must be given deference to appropriately define the physical parameters of the security zone at issue.

Additionally, and along with the USSS, the U.S. Coast Guard is part of the Department of Homeland Security, which is entrusted with securing the nation from myriad of threats. In short, both the USSS and the U.S. Coast Guard are subject matter experts in ensuring and maintaining adequate threat protection. Both entities rely on intelligence and other sensitive material in determining how to respond and accomplish that mission. Plaintiff's alleged injury in this instance

appears to be due to mere inconvenience. In essence, Plaintiff's qualm over the size of the security zone is a personal disagreement with the U.S. Coast Guard. Under these circumstances, this Court should not interject and find the U.S. Coast Guard's decision regarding the size of the security zone to be unreasonable.

c. The USCG Provides the Affected Public With Adequate as Practicable Notice of When the Security Zone will be "Turned On."

Similarly, Plaintiff's argument that the Security Zone Rule fails to provide the affected public of adequate notice of when the security zone will be enforced is not violative of 5 U.S.C. § 706(A)(2). As the Security Zone Rule explains, on five separate occasions between March 24, 2017, and July 10, 2017, the COTP has established temporary security zones in the affected area at the behest of the USSS. *See* 82 Fed. Reg. 31719. The primary reason that these zones were temporary was due to the short notice given by the USSS to the U.S. Coast Guard and publication of the security zone. *See id*. Given the clear national security concerns surrounding the public's knowledge of the President's schedule, the U.S. Coast Guard has little ability to provide the affected public of the security zone with any more advance notice than what it provides now. Moreover, even if the U.S. Coast Guard had prior knowledge of the President's schedule, disseminating those details to the public as soon as it receives them – and without taking proper precautions and preparations beforehand - would weaken its obligation to ensure protection and security in the area. As with the above argument concerning security zone size, the U.S. Coast Guard should enjoy deference. Moreover, ensuring that the security zone achieves its goal of providing adequate protection to the President and the surrounding public is of much greater priority than alerting the affected public of the security zone's activation as quickly as possible.

d. The Lack of an End Date Does Not Render the Security Zone Rule in Breach of the APA.

Plaintiff's assertion that the Security Zone Rule violates 5 U.S.C. § 706(2)(A) for its lack of end date should also fail. First, the Security Zone Rule indicates that such a security zone will not be *indefinitely* permanent, as it acknowledges the "events [necessitating the creation of the security zone] are anticipated to continue during the current Presidential term." *See* 82 Fed. Reg. 31720. The Security Zone Rule is silent either way as to whether it would remain in effect for subsequent presidents, most of whom will likely have no affiliation to Trump National.

Moreover, the actual enforcement of the security zone – and any resulting adverse effects to the Potomac River's users - is *not* permanent. Again, the security zone is only "turned on" when the President and other high-ranking officials are at Trump National.

Lastly, and as explained *supra*, the U.S. Coast Guard should be afforded substantial deference as to its ability to enforce the security zone in the relevant area if and when the President and other high-ranking officials frequent Trump National. Given the U.S. Coast Guard's role in marine safety and security, a court should not second-guess the necessity of maintaining this Security Zone Rule for the duration of this presidency, or in future administrations should circumstances require it.

e. 46 U.S.C. § 70051 [previously 50 U.S.C. § 191] Authorizes the U.S. Coast Guard's Implementation of the Rule.

Plaintiff's assertion that 46 U.S.C. § 70051 [previously 50 U.S.C. § 191] does not authorize the Security Zone Rule is incorrect. Under 46 U.S.C. § 70131, subparagraph (2) entitled, "Security Zone", Congress states: "The term 'security zone' means a security zone, established by the Commandant of the Coast Guard *or the Commandant's designee* pursuant to section 2 of title II of the Act of June 15, 1917 (*50 U.S.C. 191).*" *See* 46 U.S.C. § 70131. As the Security Zone Rule

states, "The Coast Guard [Commandant] has given each Coast Guard COTP the ability to implement comprehensive port security regimes designed to safeguard human life, vessels, and waterfront facilities while still sustaining the flow of commerce." *See* 82 Fed. Reg. 31720. Pursuant to 33 C.F.R. § 1.05-1(f), the Commandant has given COTPs the authority to establish such a regime as the security zone at issue here.[1] Thus, Plaintiff's assertion that 46 U.S.C. § 70051 does not support the Security Zone Rule is simply misplaced.

III. The Security Zone Rule Does Not Violate 5 U.S.C. § 706(1).

Finally, Plaintiff argues the U.S. Coast Guard has violated 5 U.S.C. § 706(1) by unlawfully withholding or by unreasonably delaying the issuance of a new rule, primarily due to its perceived inability to incorporate a new rule addressing concerns relating to the comments submitted by affected parties. Because of this alleged unreasonable delay, Plaintiff argues that "DHS is required by law to rescind the Rule, or in the alternative, to promptly replace the Rule through a new rulemaking." This assertion is misplaced, however. Plaintiff has not, and cannot, point to any statutory basis that requires the Agency to take this action.

a. Compelling Agency Action under 5 U.S.C. § 706(1) is Limited.

Plaintiff's invocation of 5 U.S.C. § 706(1) is of limited value to its position. In *Norton v. Southern Utah Wilderness Alliance,* the U.S. Supreme Court held that a § 706(1) claim can only proceed when a plaintiff asserts that an agency failed to take a "discrete agency action that it is required to take." 542 U.S. 55 (2004). The Court clearly stated that § 706(1) does not permit judicial direction of discrete agency action when such action is not demanded by law. *See id.*

[1] The applicable provision states, "Except for those matters specified in paragraph (c) of this section, the Commandant has redelegated to Coast Guard Captains of the Port, with the reservation that this authority must not be further redelegated, the authority to establish safety and security zones." *See* 33 C.F.R. § 1.05-1(f).

Thus, Plaintiff's argument will only be successful if it can point to a statute or regulation that explicitly requires the U.S. Coast Guard to take further action on this rule. None exists.

IV. The Majority of Plaintiff's Grievances Will Be Rendered Moot Due to a Forthcoming Second Final Rule.

As explained in Captain Lorings Declaration, *see* Ex. 1, the U.S. Coast Guard is currently in the process of creating a new, superseding Second Interim Final Rule to incorporate the concerns of comments received following the publication of the Security Zone Rule. Contrary to Plaintiff's assertions, the Agency did solicit and encourage comments to be submitted following publication of its July 10, 2017 rule. As Captain Loring explains, the U.S. Coast Guard is currently in the process of considering and formulating responses to the public comments submitted. *See* Ex. 1 at ¶ 4. Thus, the Agency is currently undertaking the very actions Plaintiff requests, albeit for a second and superseding final Security Zone Rule. By doing so, the Agency is exhibiting its willingness to accept and review the public comments submitted from the interim final rule. Moreover, the U.S. Coast Guard anticipates this Second Interim Final Rule will take effect and be published in the federal register in the summer of 2019. *See* Ex. 1 at ¶ 4. Hence, many of Plaintiff's current grievances will be rendered moot in the near future.

CONCLUSION

The U.S. Coast Guard's decisions surrounding the implementation of the Security Zone Rule should be afforded significant deference. The purpose of the Security Zone Rule is to create an immediate zone of protection for the President of the United States, high-ranking United States officials, and the general public. Implementation of the normal notice-and-comment period, and a 30-day waiting period, would frustrate that aim. For the foregoing reasons, the Court should grant summary judgment in favor of the Defendants.

Respectfully Submitted,
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