



Billing Code 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

Gulf of Mexico, Apalachicola Bay, East Bay, St. Andrew Bay and St. Andrew Sound at Tyndall Air Force Base, Florida; restricted areas.

AGENCY: U.S. Army Corps of Engineers, DoD

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is amending its regulations by revising an existing restricted area regulation and establishing a new restricted area along portions of the Tyndall Air Force Base (AFB) facility shoreline that will be activated on a temporary basis. The duration of temporary restricted area activations will be limited to those periods where it is warranted or required by specific and credible security threats and will be inactive at all other times. The restricted area will be partitioned using 23 pairs of coordinates to facilitate quick geographic recognition. Tyndall AFB is surrounded on three sides by water with approximately 129 miles of unprotected coastline. This includes several areas where the lack of security or lack of restriction on access to these areas leaves Tyndall AFB personnel and resources vulnerable to security threats. This amendment is necessary to implement an enhanced threat security plan for Tyndall AFB which will allow temporary activation of one or more portions of the restricted area as necessary to provide the appropriate level of security required to address the specific and credible threat triggering the need for activation.

DATES: Effective: [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW-CO (David B. Olson), 441 G Street NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, D.C. at 202-761-4922 or Mr. Ed Sarfert, U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division, at 850-439-9533.

SUPPLEMENTARY INFORMATION:

Executive Summary

External reviews of security at Tyndall AFB identified the lack of jurisdiction to respond to threats from the waterways as a major weakness. Tyndall AFB does not currently have the authority to restrict access to the shoreline of Tyndall AFB if needed to respond to a security threat. The purpose of this regulatory action is to establish a restricted area in the waters surrounding portions of Tyndall AFB that will only be activated on a temporary basis in response to specific and credible security threats. Additionally this amendment provides an administrative correction to the existing regulation at 33 CFR 334.660.

The Corps' authority to establish the restricted area is Section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3).

Background

Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3) the Corps is amending the regulations at 33 CFR part 334 by adding § 334.665 and revising § 334.660. Adding § 334.665 will establish a restricted area in the waters surrounding Tyndall AFB. This amendment will allow the Installation Commander, Tyndall AFB to temporarily restrict the passage of persons, watercraft, and vessels in waters contiguous to this facility when a specific and credible security threat is identified, providing greater security for personnel and equipment during those periods. The administrative correction at 33 CFR 334.660(b)(3) will clarify who is responsible for enforcing the provisions of § 334.660.

A proposed rule was published in the Federal Register on May 9, 2013 (78 FR 27126). One hundred seventy-one comments were submitted in response to that proposed rule. As a result of the comments received in response to the May 9, 2013, proposed rule, substantial revisions were made to the proposed restricted area to address the concerns of the commenters. A revised proposed rule was published in the September 14, 2015, issue of the Federal Register (80 FR 55052). The regulations.gov docket number for these proposed rules is COE-2013-0030. In response to the publication of the second proposed rule, forty six (46) comments were received. Many of the comments expressed concern about loss of use of waterways and beaches, particularly around Shell Island and Crooked Island. Many commenters also stated their belief that the restricted areas would not be activated temporarily in response to elevated security threats, but would be made permanent. Several commenters stated that the regulation

should expire in five years. One commenter objected to the rule because they do not believe there is a threat.

The Corps determined that due to the temporary nature of the restrictions, and the removal of the most popular areas used for recreational water sports from the originally proposed restricted area, the restricted area will have no more than minimal detrimental impact on the continued utilization of the overall waterway by the public. The impact will be further mitigated because the restrictions will be limited to those specific areas necessary to address security threats. Restrictions will only be activated when security threats are identified that dictate a need for the restrictions, and after the security threats are no longer present, the restrictions will be lifted to allow the public to use the waterway. Given the existing security environment, it is not expected that all threats will be eliminated within five years. In consideration of this, and since restrictions will be only temporarily activated due to specific and credible threats, resulting in no more than minimal detrimental impact on the continued public utilization of the overall waterway, an expiration provision is not warranted. The restricted area does not affect Shell Island, and only covers limited portions of Crooked Island.

Many commenters expressed concern about harassment by United States Air Force (USAF) personnel, and the belief that federal control and police powers do not extend into these waters. Other commenters stated that Tyndall AFB was using this rule to increase its control over these waters and the public. Some commenters said that the United States Coast Guard (USCG) has authority in these waters, and that Tyndall AFB should rely on the USCG or local boaters to observe the area and provide security. One

commenter stated that Tyndall AFB personnel will impact seagrass beds while patrolling, and should be held to the same standards for seagrass impacts as the public.

The River and Harbor Act of 1917 (33 U.S.C. 1) provides the Corps with the authority to issue regulations that govern the use, administration, and navigation of the navigable waters of the United States that are necessary for the protection of life and property. United States Air Force personnel do not have authority to enforce federal, state or local laws on the water. This rule does not change that. Law enforcement actions by USAF personnel related to implementation of this rule will be in the form of issuance of a trespassing ticket if an individual violated the regulation and refused to leave; any further action will be referred to the USCG. Impacts to seagrass that might occur during patrols by USAF personnel are outside the scope of this rule. The purpose of this rule is to establish a restricted area to protect Tyndall AFB personnel and resources from security threats.

Several commenters expressed concern that small businesses, particularly those associated with the boating industry, would be adversely impacted. Some commenters also stated that Executive Order 12866 requires an economic impact statement and Office of Management and Budget review of the proposed rule. Another commenter stated that Executive Order 13422 has similar requirements and applies here as well.

The Corps has complied with the requirements of the Regulatory Flexibility Act. As discussed below, the Corps has determined that the rule will not have a significant economic impact on a substantial number of small entities. The Corps does not anticipate any small entities will be significantly impacted by the rule because the restricted areas will only be activated based on specific local or national intelligence information, the

geographic scope of the activation will be limited to providing the level of security required in response to specific and credible threats, and the duration of any activation will be limited to those periods where it is warranted by such threats. In addition, the removal from the proposed restricted area of the most popular areas for recreational water sports – Shell Island and portions of Crooked Island – further supports the determination that the rule will have no more than minimal detrimental impact on small entities. The provisions of Executive Orders 12866 and 13422 do not apply because this rule is issued with respect to a military function of the Department of Defense (see section 3(d)(2) of Executive Order 12866).

Many commenters stated that rather than create a restricted area over water, Tyndall AFB should enhance its security on land, using methods such as smaller perimeters, cameras, sensors, fencing, and expanded foot and vehicle patrols. Several commenters expressed opposition to language referencing the restrictions being necessary to protect the public from potentially hazardous conditions that may develop as a result of military use of the area.

Tyndall AFB has approximately 129 miles of coastline, portions of which are difficult for security personnel to access from land and require a marine patrol to monitor. While activation of temporary restrictions will not create significant costs for Tyndall AFB, the alternative security measures suggested were found by Tyndall AFB to incur significant costs. Since any activation of the restricted area will be only temporary, and only those portions of the restricted area required in response to a specific and credible threat will be activated, the rule ensures no more than minimal impacts on the public use of the overall waterway. The language regarding hazardous conditions and military use

is not part of § 334.665 itself, but was included in the Procedural Requirements section of the notice as part of the Corps' description of how it reviewed the proposed rule under the Regulatory Flexibility Act. The term "hazardous conditions and military use" was intended only to relate to the modifications of the restricted area provisions in § 334.660 for the existing drone recovery area. Since those existing restricted area provisions in § 334.660 are only being administratively modified in terms of the enforcement provision, we have removed the statement in the Regulatory Flexibility Act section referencing "hazardous conditions and military use."

One commenter expressed concern about the restricted area extending 500 yards from the shoreline and its effects on fishing. Another commenter stated that additional buoys and markers in the water would be unappealing and/or disregarded by boaters. A commenter asked if oysters from manmade beds in nearshore areas of East Bay would now belong to Tyndall AFB. One commenter said that this rulemaking requires a consistency determination under the Coastal Zone Management Act.

The restricted area will only be activated when security threats are identified that dictate a need for the restrictions, and after the security threats are no longer present, the restrictions will be lifted to allow the public to use the waterway, including for fishing. If activated, the restricted area will encompass the area up to 500 feet waterward of the shoreline, not 500 yards. No buoys or markers are authorized by this rule. This rule will not alter who may harvest oysters from East Bay. In a letter dated May 17, 2016, the Florida Department of Environmental Protection stated that the proposed rule is consistent with the Florida Coastal Management Program.

Two commenters stated that the Corps should complete an Environmental Impact Statement (EIS) for this rule. One commenter stated that language in the rule about contiguous inland waterways could be viewed as applying to large areas of water outside of the restricted area, and should be changed or deleted.

An EIS is required by the National Environmental Policy Act (NEPA) for certain federal actions that are determined to "significantly affect the quality of the human environment." An EIS is not required if the federal agency prepares an environmental assessment and determines that the proposed federal action will not have a significant impact on the quality of the human environment. The Corps completed an environmental assessment for this rule and determined the rule will not significantly affect the quality of the human environment, and will have no more than minimal adverse impact on the public's use of the waterway. The rule clearly describes the waters that are part of the restricted area, including providing coordinates and measurements. The language used in the rule states the restricted area "shall encompass all navigable waters of the United States as defined at 33 CFR part 329 within the area described and includes all contiguous inland navigable waters which lie within the land boundaries of Tyndall Air Force Base (AFB)". The restricted area is limited to the navigable waters identified in the rule text, and does not extend to areas of navigable waters outside of the designated area.

Some commenters stated that the procedures for notifying the public about restricted area activation would not be effective, and that there was no procedure for early deactivation. One commenter said that one portion of the restricted area should be

renamed to correspond with the United States Geological Survey Geographic Names Information System.

In response to these comments received and at the Corps' request, Tyndall AFB agreed to expand its restricted area notification procedures for both activation and early deactivation, and modify the name of the pair of coordinates originally entitled Little Cedar Lake to Little Cedar Bayou for clarity and consistency.

Procedural Requirements

a. Review Under Executive Orders 12866 and 13771. The rule is issued with respect to military and national security functions of the Department of Defense and the provisions of Executive Orders 12866 and 13771 do not apply.

b. Review Under the Regulatory Flexibility Act. This rule has been reviewed under the Regulatory Flexibility Act (Public Law 96-354). The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (i.e., small businesses and small governments). Tyndall AFB has approximately 129 miles of unprotected shoreline, including several areas where the lack of security or restriction on access leaves Tyndall AFB personnel and resources vulnerable to security threats. Therefore, the restricted area regulation is necessary to implement an enhanced threat security plan for Tyndall AFB which will allow for the temporary activation of one or more portions of the restricted area as necessary to provide the appropriate level of

security required to address the specific and credible threats that are identified by Tyndall AFB. When the restricted area is activated, small entities can continue to use the navigable waters surrounding Tyndall AFB that are outside of the restricted area. After considering the economic impacts of this restricted area regulation on small entities, I certify that this action will not have a significant impact on a substantial number of small entities.

c. Review Under the National Environmental Policy Act. This regulation will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. An environmental assessment has been prepared. It may be reviewed at the district office listed at the end of FOR FURTHER INFORMATION CONTACT, above.

d. Unfunded Mandates Act. This regulation does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Reform Act (Public Laws 104-4, 109 Stat. 48, 2 U.S.C. 1501 et seq.). We have also found under Section 203 of the Act, that small governments will not be significantly or uniquely affected by this regulation.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps amends 33 CFR part 334 as follows:

PART 334 – DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Revise § 334.660(b)(3) to read as follows:

§334.660 Gulf of Mexico and Apalachicola Bay south of Apalachicola, Fla., Drone Recovery Area, Tyndall Air Force Base, Fla.

* * * * *

(b) * * *

(3) The federal regulations in this section shall be enforced by the Installation Commander, Tyndall Air Force Base, Florida, and such other agencies as he/she may designate.

3. Add §334.665 to read as follows:

§334.665 East Bay, St. Andrew Bay and St. Andrew Sound, enhanced threat restricted area, Tyndall Air Force Base, Florida.

(a) *The area.* (1) The coordinates provided herein are approximations obtained using a commercial mapping program which utilizes simple cylindrical projection with a WGS84 datum for its imagery base and imagery dated February 15 and May 3, 2014.

(2) Each portion of the temporary restricted area described in paragraphs (a)(4)(i) through (xxiii) of this section shall encompass all navigable waters of the United States as defined at 33 CFR part 329 within the area described and includes all contiguous inland navigable waters which lie within the land boundaries of Tyndall Air Force Base (AFB).

(3) Because of the dynamic nature of these geographic features near barrier islands, the coordinate points provided may not reflect the current situation regarding the location of a point at the mean high water line or 500 feet waterward of the mean high water line. Even if the landform has shifted through erosion or accretion, the intent of the

area description will be enforced from the existing point at the mean high water line that is closest to the shoreline point provided herein out to a point located 500 feet waterward of the mean high water line.

(4) The restricted area will be partitioned using 23 pairs of coordinates to facilitate quick geographic recognition. The first point in each pair of coordinates is located on the shoreline, and the second point is a point 500 feet waterward of the shoreline. From the first point in each pair of coordinates, a line meanders irregularly following the shoreline and connects to the first point in the next pair of coordinates. From the second point in each pair of coordinates, a line beginning 500 feet waterward of the shoreline meanders irregularly following the shoreline at a distance of 500 feet waterward of the shoreline and connects to the second point in the next pair of coordinates. The restricted area shall encompass all navigable waters of the United States as defined at 33 CFR part 329 within the area bounded by lines connecting each of the following pairs of coordinates:

(i) *Farmdale Bayou*: 30° 1.156' N, 85° 26.915' W to 30° 1.238' N, 85° 26.915' W.

(ii) *Baker Bayou*: 30° 1.325' N, 85° 29.008' W to 30° 1.402' N, 85° 28.977' W.

(iii) *Blind Alligator Bayou*: 30° 2.094' N, 85° 29.933' W to 30° 2.151' N, 85° 29.864' W.

(iv) *Little Oyster Bay Point*: 30° 3.071' N, 85° 30.629' W to 30° 3.133' N, 85° 30.568' W.

(v) *Goose Point South*: 30° 3.764' N, 85° 31.874' W to 30° 3.719' N, 85° 31.795' W.

- (vi) *Goose Point North*: 30° 4.599' N, 85° 31.577' W to 30° 4.650' N, 85° 31.503' W.
- (vii) *Little Cedar Bayou*: 30° 4.974' N, 85° 33.476' W to 30° 5.024' N, 85° 33.401' W
- (viii) *Chatters on Bayou*: 30° 5.729' N, 85° 34.632' W to 30° 5.811' N, 85° 34.625' W.
- (ix) *Fred Bayou*: 30° 5.992' N, 85° 35.296' W to 30° 6.071' N, 85° 35.325' W.
- (x) *Pearl Bayou*: 30° 6.039' N, 85° 36.651' W to 30° 6.043' N, 85° 36.557' W.
- (xi) *Military Point*: 30° 7.394' N, 85° 37.153' W to 30° 7.459' N, 85° 37.096' W.
- (xii) *Freshwater Bayou*: 30° 7.425' N, 85° 38.655' W to 30° 7.473' N, 85° 38.578' W.
- (xiii) *Smack Bayou*: 30° 7.826' N, 85° 39.654' W to 30° 7.838' N, 85° 39.560' W.
- (xiv) *Redfish Point*: 30° 8.521' N, 85° 40.147' W to 30° 8.598' N, 85° 40.113' W.
- (xv) *Davis Point*: 30° 7.348' N, 85° 41.224' W to 30° 7.364' N, 85° 41.317' W.
- (xvi) *Tyndall Marina*: 30° 5.827' N, 85° 39.125' W to 30° 5.762' N, 85° 39.184' W.
- (xvii) *Heritage Bayou*: 30° 3.683' N, 85° 35.823' W to 30° 3.743' N, 85° 35.887' W.
- (xviii) *NCO Beach North*: 30° 4.209' N, 85° 37.430' W to 30° 4.272' N, 85° 37.368' W. The restricted Area will end on the west side of the land bridge that extends into Shell Island. The Restricted Area resumes on the east side of the land bridge that extends into St. Andrew Sound.
- (xix) *St. Andrew Sound west*: 30° 1.327' N, 85° 33.756' W to 30° 1.377' N,

85° 33.681' W.

(xx) *St. Andrew Sound northwest*: 30° 1.921' N, 85° 33.244' W to 30° 1.869' N,

85° 33.317' W.

(xxi) *St. Andrew Sound northeast*: 30° 0.514' N, 85° 31.558' W to 30° 0.452' N,

85° 31.619' W.

(xxii) *Wild Goose Lagoon*: 29° 59.395' N, 85° 30.178' W to 29° 59.319' N, 85°

30.216' W.

(xxiii) *Crooked Island North*: 29° 59.003' N, 85° 30.396' W to 29° 59.082' N, 85°

30.371' W.

(b) *The regulations.* (1) Unless one or more portions of the restricted area identified in paragraphs (a)(4)(i) through (xxiii) of this section is activated, all persons, vessels and other craft are permitted access to all of the navigable waters described in paragraph (a) of this section.

(2) During times when the restricted area defined in paragraphs (a)(4)(i) through (xxiii) of this section is not active, U.S. Air Force boat patrols may operate in the waters adjacent to Tyndall AFB's shoreline to observe the shoreline in order to identify any threats to the installation or personnel. U.S. Air Force personnel will not have any authority to enforce federal, state, or local laws on the water.

(3) Due to the nature of security threats, restricted area activation may occur with little advance notice. Activation will be based on local or national intelligence information related to threats against military installations and/or resources common to Tyndall AFB in concert with evaluations conducted by the Tyndall AFB Threat Working Group and upon direction of the Installation Commander, Tyndall AFB. The Installation

Commander activates only those portions of the restricted area identified in paragraphs (a)(4)(i) through (xxiii) of this section that are necessary to provide the level of security required in response to the specific and credible threat(s) triggering the activation. The duration of activation for any portion(s) of the restricted area defined in paragraph (a) of this section, singularly or in combination, will be limited to those periods where it is warranted or required by security threats. Activated portions of the restricted area will be reevaluated every 48 hours to determine if the threat(s) triggering the activation or related threats warrant continued activation. The activated portion(s) of the restricted area expire if no reevaluation occurs or if the Installation Commander determines that activation is no longer warranted.

(4) Public notification of a temporary waterway restricted area activation by the Installation Commander will be made by the 325 Fighter Wing Public Affairs office using all available mediums (marine VHF broadcasts [channels 13 and 16], local notices to mariners, local news media releases, social media postings on both the Tyndall official web page [www.tyndall.af.mil] and Facebook [www.facebook.com/325FWTyndall], radio beepers through locally broadcasting stations, and the Tyndall Straight Talk [recorded telephone line 1-478-222-0011]). These mediums will be updated should the waterway restriction be extended beyond the initial 48 hour activation and/or terminated upon direction of the Installation Commander.

(5) During times when the Installation Commander activates any portion(s) of the temporary restricted area defined in paragraph (a) of this section all entry, transit, drifting, anchoring or attaching any object to the submerged sea-bottom within the activated portion(s) of the restricted area is not allowed without the written permission of

the Installation Commander, Tyndall AFB, Florida or his/her authorized representative. Previously affixed mooring balls established to support watercraft during intense weather conditions (i.e., tropical storms, hurricanes, etc.) may remain within the activated portion(s) of the restricted area, however watercraft should not be anchored to the mooring balls without the permission of the Installation Commander, Tyndall AFB, Florida or his/her authorized representative.

(c) *Enforcement.* The regulations in this section shall be enforced by the Installation Commander, Tyndall AFB and/or such persons or agencies as he/she may designate.

Dated: March 27, 2017. APPROVED _____

Susan Whittington.

Acting Chief, Operations and Regulatory Division

Directorate of Civil Works

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