



DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2019-0435]

RIN 1625-AA00

Safety Zone, Dive Operations; Cape May Canal, Cape May, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 100-yard radius of all vessels and equipment involved in diving and debris removal operations within the Cape May Canal in Cape May, New Jersey. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by dive operations and debris removal near the railroad bridge in the Cape May Canal. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Delaware Bay or his designated representative.

DATES: This rule is effective without actual notice from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through 4 pm on June 13, 2019. For the purposes of enforcement, actual notice will be used from 6 am on June 3, 2019, through [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2019-0435 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Edmund Ofalt, U.S. Coast Guard Sector Delaware Bay, Waterways Management Division; telephone 215-271-4889, e-mail Edmund.J.Ofalt@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

II. Background Information and Regulatory History

In mid-May, the Coast Guard was notified that part of the fendering system for the Cape May Canal Railroad Bridge failed and fell into the Cape May Canal. The bridge owner has contracted services needed to remove the debris and, with it, the hazard it poses to waterway users.¹ Due to potential dangers associated with the debris removal, the Captain of the Port Delaware Bay (COTP) has determined that a safety zone is necessary to protect personnel, vessels, and the marine environment while the debris is recovered.

¹ While the fallen debris poses a potential hazard to waterway users, due to the depth of the water, the Coast Guard has determined that waterway restrictions have not been needed to adequately address the threat prior to this time. The Coast Guard has been issuing safety marine information broadcasts every 6 hours to mariners regarding the hazard.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule. It is impracticable and contrary to the public interest to publish an NPRM because immediate action is needed to respond to the potential safety hazards associated with dive operations and debris removal scheduled to take place on June 3, 2019.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with dive operations and debris removal. The rule must be in place by the time the dive operations and debris removal occur on June 3, 2019, to protect personnel, vessels, and the marine environment while the debris is recovered.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that potential hazards associated with diving and debris removal operations starting June 3, 2019, will be a safety concern for anyone within a 100-yard radius of associated dive vessels and working barges. This

rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during diving and debris removal operations.

IV. Discussion of the Rule

This rule establishes a safety zone from 6 am on June 3, 2019 through 4 pm on June 13, 2019. The safety zone will cover all navigable waters within 100 yards of dive vessels and working barges being used for dive and debris recovery operations. Dive vessels and working barges refers to those vessels used as dive platforms and 40 foot by 15 foot flexi-float barges utilized for the purpose of debris removal. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the debris is recovered. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or his designated representative. Vessels with a beam greater than 15 feet must contact the working vessels via VHF-FM channel 13 or 16 at least 30 minutes prior to arrival in order to arrange safe passage.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a

“significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size and duration of the zone. Small vessels with a beam less than 15 feet will generally be able to pass through the zone as needed upon receiving authorization from the COTP or his designated representative. Vessels with a beam greater than 15 feet will be able to pass through the zone if at least 30 minutes notice is given prior to arrival. Diving and debris recovery operations will only take place from 7 am through 4 pm daily beginning June 3, 2019 through June 13, 2019.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule.

If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

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.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have

a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023-01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within 100 yards of dive vessels and working barges being used for diving and debris recovery operations in the Cape May Canal. It is categorically excluded from further review under paragraph L[60a] in Table 3-1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this

determination is available in the docket where indicated under ADDRESSES.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the FOR FURTHER INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

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: 46 U.S.C. 70034, 70051; 50 U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05-0435 to read as follows:

§ 165.T05-0435 Safety Zone, Dive Operations; Cape May Canal, Cape May, NJ.

(a) Location. The following area is a safety zone: All navigable waters within 100 yards of dive vessels and working barges being used for diving and debris recovery operations within the Cape May Canal.

- (b) Definitions As used in this section—

Designated representative means a Coast Guard Patrol Commander, including a Coast Guard petty officer, warrant or commissioned officer on board a Coast Guard vessel or on board a federal, state, or local law enforcement vessel assisting the Captain of the Port (COTP), Delaware Bay in the enforcement of the safety zone.

Working barges means those vessels associated with debris removal near the Cape May Canal Railroad Bridge in the Cape May Canal.

Dive vessels means those vessels used for dive operations, and marked appropriately in accordance with navigation rules of the road, which are associated with debris removal near the Cape May Canal Railroad Bridge in the Cape May Canal.

(c) Regulations. (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter or remain in the zone, contact the COTP or the COTP's representative via VHF-FM channel 16 or 215-271-4807. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) Vessels with a beam greater than 15 feet must contact working vessels, via VHF-FM channel 13 or 16, at least 30 minutes prior to arrival in order to arrange safe passage.

(4) This section applies to all vessels except those engaged in law enforcement, aids to navigation servicing, and emergency response operations.

(d) Enforcement. The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) Enforcement period. This zone will be enforced from 6 am on June 3, 2019, through 4 pm on June 13, 2019.

Dated: May 31, 2019.

Scott E. Anderson,

Captain, U.S. Coast Guard,

Captain of the Port Delaware Bay.

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