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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2018-0970]

RIN 1625-AA11

Regulated Navigation Area; Thea Foss, Middle Waterway, and Wheeler-Osgood

Waterways EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA.

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending the Thea Foss and Wheeler-Osgood Regulated Navigation Area (RNA) for Commencement Bay to establish a permanent regulated navigation area within the Middle Waterway. This action is necessary to protect sediment cap areas in the U.S. Environmental Protection Agency's Commencement Bay Nearshore-Tideflats Superfund Cleanup Site within the Middle Waterway. This RNA would prohibit certain activities that could disrupt the integrity of the engineered sediment caps placed within the Middle Waterway.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER 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-2018-0970 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 Zachary Spence, Sector Puget Sound Waterways Management Branch, U.S. Coast Guard; telephone 206-217-6051, email SectorPugetSoundWWM@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

On April 5, 2005, the Middle Waterway Action Committee requested the establishment of a regulated navigation area to prohibit activities that could compromise the integrity of the sediment caps placed over the contaminated sites within the Middle Waterway. In 2006 and 2015, the Coast Guard issued NPRMs related to this issued but never finalized the rule. On March 6, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Regulated Navigation Area; Thea Foss and Wheeler-Osgood Waterways EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA 84 FR 8051. There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this regulated navigation area. During the comment period that ended April 6, 2019, we received two comments.

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 Coast Guard District Thirteen Commander has

determined that there are potential hazards associated with the five Environmental Protection Agency's Superfund Cleanup Sites located within the Middle Waterway. The purpose of this rule is to ensure safety of persons and environment within the navigable waters of the Middle Waterway by prohibiting activities that could compromise the integrity of the engineered sediment caps.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received two comments on our NPRM published March 6, 2019. One comment we received was in support of the rule.

The second comment discussed current marine operations prohibited by this rule, these operations include marine piling construction, anchoring system for a dry-dock, and other mooring systems. The commenter discussed these operations occur within the proposed regulated navigation area but outside of the five separate contaminated sites contained within the Middle Waterway Regulated Navigation Area. Additionally, the comment discussed concerns over the ingress and egress of tugboats within the designated area.

The Coast Guard is aware marine operations occur within the regulated navigation area that do disturb the seabed outside of the contaminated Superfund cleanup sites. In the initial request for a regulated navigation area submitted by the Middle Waterway Action Committee, April 5, 2005, we were informed of the dry-dock anchored outside one of the sediment caps within the waterway. The COTP, upon written request, may authorize a waiver from this regulation. The COTP will consult with the Environmental Protection Agency in making this determination when necessary and practicable.

The vessel traffic navigating within the regulated navigation area is not prohibited by this regulation and therefore falls outside the scope of this rulemaking.

There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule amends the Thea Foss and Wheeler Osgood Waterway by establishing a permanent regulated navigation area for the Middle Waterway. The purpose of this rule is to prevent the disturbance of the five sediment caps established within the Middle Waterway Problem Area of the Superfund Cleanup Site that are not geographically encompassed by the Thea Foss and Wheeler-Osgood Waterways RNA. Disrupting the integrity of the caps in this area may result in a hazardous condition harming the marine environment and the public. Therefore, this proposed RNA expansion is necessary to protect the integrity of the caps and will do so by prohibiting maritime activities that could cause disturbance or damage.

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 small geographic area encompassed by the RNA, and the limited amount of commercial and recreational traffic passing through the area. Additionally, prohibited activities are not routine in the designated area.

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 received no comments from the Small Business Administration on this rulemaking. 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 regulated navigation area 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.

In preparation for this rulemaking, we identified the area encompassed by the proposed rule overlaps with the usual and accustomed fishing grounds for the Puyallup and Muckleshoot tribes. We informed both tribes of the proposed rulemaking, but only received a response from the Muckleshoot tribe. We conducted a meeting with the Muckleshoot tribe's Fish Commission on September 12, 2018. During this meeting, the

Muckleshoot Fish Commission and the Coast Guard discussed potential impacts of the proposed rulemaking on the Muckleshoot tribe. Following the meeting, the Coast Guard concluded that this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, as it would 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.

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 Commandant Instruction M16475.1D, 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 amending a regulated navigation area that would prohibit activities that

could disturb the engineered sediment caps on the seabed. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. 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 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; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5;

Department of Homeland Security Delegation No. 0170.1.

2. In § 165.1329, revise the section heading, add paragraph (a)(4), and revise paragraphs (b)(1) and (2) to read as follows:

§ 165.1329 Regulated Navigation Area; Thea Foss, Middle Waterway, and Wheeler-Osgood Waterways EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA.

(a) * * *

(4) All waters of the Middle Waterway south of a line connecting a point of the shore at 47° 15' 51" N, 122° 25' 53" W; thence southwest to 47° 15' 48.6858"N, 122° 26' 02.2374" W; thence south to 47° 15' 46.7316" N, 122° 26' 01.1214" W [Datum: NAD 1983].

(b) * * *

(1) All vessels and persons are prohibited from activities that would disturb the seabed, such as anchoring, dragging, spudding, or other activities that involve disrupting the integrity of the sediment caps installed in the designated regulated navigation area, pursuant to the remediation efforts of the U.S. Environmental Protection Agency (EPA) and others in the Thea Foss, Middle Waterway, and Wheeler-Osgood Waterways EPA superfund cleanup site. Vessels may otherwise transit or navigate within this area without reservation.

(2) The prohibition described in paragraph (b)(1) of this section does not apply to vessels or persons engaged in activities associated with remediation efforts in the Thea Foss, Middle Waterway, or Wheeler-Osgood Waterways superfund sites, provided that the Captain of the Port, Puget Sound (COTP), is given advance notice of those activities by the EPA.

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Dated: September 26, 2019.

A. J. Vogt,
RADM, U.S. Coast Guard,
Commander, Thirteenth Coast Guard District.

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