

(2) Valdez Narrows Tanker Optimum Track line is a line commencing at 61°05'23.0" N, 146°37'22.5" W; thence south westerly to 61°04'03.2" N, 146°40'03.2" W thence southerly to 61°03'00" N, 146°41'12" W.

(3) This security zone encompasses all waters approximately 200 yards either side of the Valdez Narrows Optimum Track line.

(c) *Effective dates.* This section is effective from 8 a.m. April 1, 2002 until July 30, 2002.

(d) *Authority.* In addition to 33 U.S.C. 1231 and 49 CFR 1.46, the authority for this section includes 33 U.S.C. 1226.

(e) *Regulations.* (1) The general regulations governing security zones contained in 33 CFR 165.33 apply.

(2) Tank vessels transiting directly to the TAPS terminal complex, engaged in the movement of oil from the terminal or fuel to the terminal, and vessels used to provide assistance or support to the tank vessels directly transiting to the terminal, or to the terminal itself, and that have reported their movements to the Vessel Traffic Service may operate as necessary to ensure safe passage of tank vessels to and from the terminal. All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port and the designated on-scene patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a vessel displaying a U.S. Coast Guard ensign by siren, radio, flashing light, or other means, the operator of the vessel shall proceed as directed. Coast Guard Auxiliary and local or state agencies may be present to inform vessel operators of the requirements of this section and other applicable laws.

Dated: April 1, 2002.

P.M. Coleman,

Commander, U.S. Coast Guard, Captain of the Port Prince William Sound, Alaska.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[PAC AREA-02-001]

RIN 2115-AG33

Protection of Naval Vessels

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing regulations for the safety

and security of U.S. naval vessels in the navigable waters of the United States. Naval Vessel Protection Zones will provide for the regulation of vessel traffic in the vicinity of many U.S. naval vessels in the navigable waters of the United States.

DATES: This rule is effective beginning June 15, 2002.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [PAC AREA 02-001] and are available for inspection or copying at U.S. Coast Guard, Pacific Area Marine Transportation Branch (Pmt), Coast Guard Island, Bldg. 50-6, Alameda, CA 94501 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Commander Steve Danscuk, Commander, Pacific Area Marine Transportation Branch (Pmt), at telephone number (510) 437-2943.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 20, 2002, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled Protection of Naval Vessels in the **Federal Register** (67 FR 12940). The Coast Guard received five letters commenting on the proposed rule. No public hearing was requested, and none was held.

On February 21, 2002, Coast Guard Commander, Atlantic Area, Marine Safety Division, Response Branch (Amr), published a notice of proposed rulemaking in the **Federal Register** (67 FR 7992) proposing to establish a permanent subpart G to 33 CFR part 165 and setting out general provisions pertaining to that subpart. On May 13, 2002, Atlantic Area's final rule was published in the **Federal Register** (67 FR 31958). The general provisions of subpart G are discussed in the preamble to the Atlantic Area rule and would apply to Pacific Area naval vessel protection zones. This rule, applicable in Coast Guard Pacific Area, adds a new § 165.2030, which creates restrictions similar to Atlantic Area's § 165.2025.

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**. Because naval commanders have an urgent and critical security need to control the movements of vessels in the vicinity of large naval vessels, this rule needs to become effective on June 15, 2002. Otherwise, there will be a regulatory gap when the temporary final rule (66 FR 48780 and

48782), which is now in effect, expires on that date. The Coast Guard believes that its finding of good cause in this instance is consistent with the principle of fundamental fairness which requires that all affected persons be afforded a reasonable time to prepare for the effective date of a rulemaking. This is because the temporary final rule, which has been in effect since September 21, 2002, is very similar to this rule. The Coast Guard believes that the temporary final rule has given the public adequate time to adjust to and prepare for naval vessel protection zones.

Background and Purpose

These zones are necessary to provide for the safety and security of United States naval vessels in the navigable waters of the United States. The regulations are issued under the authority contained in 14 U.S.C. 91. On September 21, 2001, the Coast Guard published temporary final rules entitled "Protection of Naval Vessels" in the **Federal Register** (66 FR 48780 and 48782). Before issuing these temporary final rules, no regulations existed implementing 14 U.S.C. 91. The temporary final rules are in effect until June 15, 2002.

We have determined that a continuing need exists for the protection of naval vessels. Therefore, we are implementing a permanent rule that will replace the Pacific Area temporary rule (66 FR 48782) by June 15, 2002.

Discussion of Comments and Changes

The Coast Guard received five letters in response to the March 20, 2002 notice of proposed rulemaking (67 FR 12940). Letters from the Suquamish Tribe, the Muckleshoot Indian Tribal Council, the law firm of Morisset Schlosser representing the Tulalip Tribe, and the Northwest Indian Fisheries Commission expressed concern over the rule's potential impact on the treaty fishing rights of federally recognized Indian Tribes in Puget Sound, Washington. The Office of Hawaiian Affairs, a state agency that represents Native Hawaiian interests, expressed concern over the impacts of the proposed rule on ocean activities conducted by Native Hawaiians.

Comment 1. The Puget Sound Tribes stated that they have reserved rights of access for fishing in usual and accustomed places. They conduct fisheries enforcement patrols, perform fisheries and water quality research and harvest shellfish. They stated that such activities may bring tribal members and their vessels in proximity to naval vessels. The Tribes averred that there is a potential for substantial direct effects

on their activities in the following circumstances: when the naval vessel protection zone around a moored or anchored naval vessel prevents tribal vessels from fishing in a prime tribal area during peak fishing times; when a transiting vessel interrupts a tribal fishing activity in progress; and when a tribal vessel, while engaged in fishing, drifts into a naval vessel protection zone of a moored or anchored naval vessel.

Response 1. The Coast Guard recognizes the rights of the treaty Indian fishers under the Stevens Treaties, as clarified in the well-known *U.S. v. Washington* line of cases, beginning with *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974). We took those rights into account during the rulemaking process. The Coast Guard acknowledges that there could be some effects if a naval vessel protection zone causes a tribal vessel to be displaced. The rule has built-in flexibility, however, to address the Tribes' concerns. And, based on the Coast Guard's consideration of the comments received, the Coast Guard Thirteenth District will continue to facilitate dialogue between the Tribes and the Navy to develop local implementation policies in Puget Sound designed to minimize the possibility of effects on the Tribes, consistent with security concerns.

Treaty rights are not absolute and must be balanced against the rights of the United States. The Justice Department articulated the position of the United States as follows: "The Justice Department represents the United States on its own behalf and as a trustee on behalf of the affected Indian Tribes who claim fishing rights under the Stevens treaties. No claims have been made [in this case, *i.e.* *U.S. v. Washington*] against the United States. The United States reserves its right to assert all available defenses, including but not limited to navigational servitude and defense powers." *Response by the Department of Justice to Judicial Interrogatories Posed by the U.S. District Court, Western District of Washington, dated 3 November 1992.*

In this instance, the treaty rights must be balanced against the United States' inherent right and obligation to safeguard and protect its warships and naval vessels from sabotage and attack. Since the October 2000 bombing of the U.S.S. COLE in Yemen, which was carried out by an explosives-laden small boat, the U.S. military has placed increased emphasis on naval force protection. And the terrorist attacks of September 11, 2001 proved that the U.S. mainland is not immune from attack. Therefore, the Coast Guard has

implemented this rule as a force protection measure to help Naval commanders within Pacific Area to protect their ships and their crews.

Comment 2. The Tribes commented that naval vessel security and Tribal fishing rights protection can both be achieved if there is improved communication and coordination, scheduling of port calls and routine non-emergency vessel movements to avoid fisheries, and placement of Tribal liaison personnel on Coast Guard and Seattle Harbor Patrol vessels to assist in the identification of Tribal fishers during peak tribal fishing periods. To assist the government, the Tribes can provide information about Tribal fishery openings and the names of authorized fishers and their vessels. There should be a single government point of contact in each geographic area to foster good communication so that accidental encroachment incidents can be quickly and agreeably resolved.

Response 2. The Coast Guard agrees that communication and coordination between the Tribes, the Coast Guard, and the Navy is vital so that any impact of the rule on Tribal treaty fishing rights can be minimized. The Coast Guard has already had an informative meeting with representatives of the Muckleshoot Tribe, Suquamish Tribe, and the Navy on April 25, 2002. The Coast Guard Thirteenth District plans to continue to facilitate discussions between potentially affected Tribes and the Navy to develop local implementation policies in Puget Sound designed to minimize the possibility of effects on the Tribes, consistent with security concerns.

The Coast Guard believes that the Tribes' recommendation to the Navy to schedule port calls and routine non-emergency vessel movements to avoid impacts on Tribal fishers and fisheries has potential merit, when such actions are consistent with naval vessel and national security. The Coast Guard has received assurances from the Navy that the Navy is willing and able to gather information from the Tribes about fishery dates, locations, and expected number of Tribal vessels and relay this information to naval commanders in the area. The Navy's primary point of contact for gathering this information from the Tribes is the Watch Commander, Regional Operations Center, Navy Region Northwest, who can be reached 24 hours per day at (360) 315-5123.

The Coast Guard is committed to working with the Tribes and agrees that additional discussions with representatives of potentially affected Tribes and the Navy are desirable to

establish specific local implementation policies to achieve both security and tribal objectives. Towards that end, the Coast Guard's point of contact is the Coast Guard District Thirteen's Tribal Liaison Office, which can be reached 24 hours per day via the District Command Center at (206) 220-7001.

With regard to the Tribes' concern over accidental encroachment into naval vessel protection zones, the rule does not distinguish between an accidental or intentional violation of the 100-yard exclusionary zone. An accidental violation may result in enforcement action. But the rule is written to encourage those who may need to come within 100 yards of a large naval vessel to request permission from the on-scene Coast Guard personnel, senior naval officer present in command, or official patrol. In most cases, the commanding officer of the naval vessel will be the individual to grant or deny permission to enter the 100-yard exclusionary zone because he or she will be in the best position to assess the security needs of his or her ship. Additional coordination suggestions will be given full consideration during a cooperative process to develop practical local implementation guidelines.

Comment 3. The Tribes stated that for local Coast Guard and Navy personnel to have the flexibility to accommodate the needs of the Tribes, it is important that the final regulation provide direction to local Coast Guard and Navy personnel to implement measures that allow tribal members access to fishing rights. The Tribes recommended the insertion of the following language as a new paragraph (g) to § 165.2030: "The Coast Guard, senior naval officer present in command, or the official patrol shall work with affected tribal governments to provide treaty Indian fishers access to usual and accustomed fishing sites within 100 yards of large U.S. naval vessels."

Response 3. The Coast Guard believes that adding a new paragraph (g) to § 165.2030 of the rule is not necessary or prudent. The rule already has built-in flexibility for addressing Tribal issues. In those instances where the 100-yard exclusionary zone would exclude Tribal fishers from their usual and accustomed grounds, the rule allows Tribal fishers to request permission to enter the zone by contacting the Coast Guard, senior naval officer present in command or the official patrol on VHF-FM Channel 16. After making an on-scene assessment of the naval vessel's security situation relative to any perceived threat, the Coast Guard, senior naval officer present in command or the official patrol would have the

discretion to allow the requestor within 100 yards.

Addition of the language would not be prudent from a security standpoint because the Coast Guard interprets the proposed paragraph (g)'s use of the term "shall" as requiring the on-scene Coast Guard or Navy commander to notify the Tribes every time a large naval vessel transit takes place. The Coast Guard does not believe the rule should require coordination when it is not needed or when it would not be prudent from a security perspective. By employing language in the rule that would limit the on-scene commander's ability to use his or her discretion on a case-by-case basis, naval vessels might become vulnerable to one of the threats that naval vessel protection zones were designed to guard against—small boats intent on attacking naval vessels.

The Coast Guard and the Navy will work with the affected Tribes on measures to implement the rule in a way that will allow the Tribes to reach their objectives to the fullest extent possible while accomplishing naval vessel and national security objectives.

Comment 4. The Office of Hawaiian Affairs commented that existing human use activities such as ocean access and fishing should not be restricted spatially or in duration beyond that which is reasonable to provide for the security concerns of the proposed rule.

Response 4. Because this rule does not restrict ocean activities permanently in any location and because the duration of any restrictions on human use activities would be limited to the time period that a large naval vessel is in transit or is anchored or moored, the Coast Guard believes the effect of this rule on the public is minimized. In addition, the rule has several built-in mitigation measures to limit public impact. Vessels that need to pass within 100 yards of a large U.S. naval vessel may contact the Coast Guard, the senior naval officer present in command, or the official patrol on VHF-FM Channel 16 to obtain the necessary permission. And once security concerns permit, the rule encourages the Coast Guard, senior naval officer present in command, or the official patrol to publicize in advance the movement of the naval vessel.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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. It is not "significant" under the

regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Although this regulation will restrict access to some areas and regulate speed in other areas, the effect of this regulation will not be significant because: (1) Individual naval vessel protection zones are limited in size; (2) the Coast Guard, senior naval officer present in command, or official patrol may authorize access to the naval vessel protection zone; (3) the naval vessel protection zone for any given transiting naval vessel will only effect a given geographical location for a limited time; and (4) when conditions permit, the Coast Guard, senior naval officer present in command, or the official patrol should give advance notice of all naval vessel movements on VHF-FM channel 16 so mariners can adjust their plans accordingly. Further, the Coast Guard received no comments related to economic impact following implementation of the temporary final rule.

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. 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.

This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to operate near or anchor in the vicinity of U.S. naval vessels in the navigable waters of the United States.

This regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) Individual naval vessel protection zones are limited in size; (2) the official patrol may authorize access to the naval vessel protection zone; (3) the naval vessel protection zone for any given transiting naval vessel will only affect a given geographic location for a limited time; and (4) when conditions permit, the

Coast Guard, senior naval officer present in command, or the official patrol should give advance notice of all naval vessel movements on VHF-FM channel 16 so mariners can adjust their plans accordingly.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offered to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking.

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).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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 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.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

The Coast Guard received five letters commenting on the proposed rule, three from Indian Tribal Governments in Puget Sound, Washington, one from the Northwest Indian Fisheries Commission and one from the Office of Hawaiian Affairs. They are discussed under "Comments and Responses." The Coast Guard recognizes the Indian Tribes' rights under the Stevens Treaties. And the Coast Guard is committed to working with the Navy and the Tribal Governments to implement local policies to mitigate the concerns that have been identified. Given the flexibility of the rule to accommodate the special needs of mariners in the vicinity of large naval vessels and the Coast Guard's commitment to working with the Tribes, we have determined that naval vessel security and fishing rights protection need not be incompatible and therefore have determined that this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because 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.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the

Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have conducted an analysis for this action according to the Coast Guard National Environmental Policy Act Manual, COMDTINST M16475.1D, which guides Coast Guard compliance with the National Environmental Policy Act of 1969 (NEPA) and have concluded that there are no factors present which would limit the use of Coast Guard Categorical Exclusion (34)(g). Comments from the public were considered prior to approval of a final Categorical Exclusion Determination (CED) documenting our decision to exclude this action from further environmental review. Refer to *Comments and Changes* for a summary of comments received and the Coast Guard's response. Public comments, an environmental checklist and CED for this action are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Protection of naval vessels, 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

Subpart G—Protection of Naval Vessels

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

Authority: 14 U.S.C 91 and 633; 49 CFR 1.45.

2. Add § 165.2030 to read as follows:

§ 165.2030 Pacific Area.

(a) This section applies to any vessel or person in the navigable waters of the United States within the boundaries of the U.S. Coast Guard Pacific Area, which includes the Eleventh, Thirteenth, Fourteenth, and Seventeenth U.S. Coast Guard Districts.

Note to paragraph (a): The boundaries of the U.S. Coast Guard Pacific Area and the Eleventh, Thirteenth, Fourteenth, and Seventeenth U.S. Coast Guard Districts are set out in 33 CFR part 3.

(b) A naval vessel protection zone exists around U.S. naval vessels greater than 100 feet in length overall at all times in the navigable waters of the

United States, whether the large U.S. naval vessel is underway, anchored, moored, or within a floating dry dock, except when the large naval vessel is moored or anchored within a restricted area or within a naval defensive sea area.

(c) The Navigation Rules shall apply at all times within a naval vessel protection zone.

(d) When within a naval vessel protection zone, all vessels shall operate at the minimum speed necessary to maintain a safe course, unless required to maintain speed by the Navigation Rules, and shall proceed as directed by the Coast Guard, the senior naval officer present in command, or the official patrol. When within a naval vessel protection zone, no vessel or person is allowed within 100 yards of a large U.S. naval vessel unless authorized by the Coast Guard, the senior naval officer present in command, or official patrol.

(e) To request authorization to operate within 100 yards of a large U.S. naval vessel, contact the Coast Guard, the senior naval officer present in command, or the official patrol on VHF-FM channel 16.

(f) When conditions permit, the Coast Guard, senior naval officer present in command, or the official patrol should:

(1) Give advance notice on VHF-FM channel 16 of all large U.S. naval vessel movements;

(2) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to pass within 100 yards of a large U.S. naval vessel in order to ensure a safe passage in accordance with the Navigation Rules; and

(3) Permit commercial vessels anchored in a designated anchorage area to remain at anchor when within 100 yards of passing large U.S. naval vessels; and

(4) Permit vessels that must transit via a navigable channel or waterway to pass within 100 yards of a moored or anchored large U.S. naval vessel with minimal delay consistent with security.

Note to paragraph (f): The listed actions are discretionary and do not create any additional right to appeal or otherwise dispute a decision of the Coast Guard, the senior naval officer present in command, or the official patrol.

Dated: May 23, 2002.

E.R. Riutta,
Vice Admiral, U.S. Coast Guard, Commander,
Coast Guard Pacific Area.

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