

necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.” 29 U.S.C. 623(f)(1). Since the employer indisputably bears the burden of proving BFOQ,<sup>7</sup> the most natural construction of section 4(f)(1) as a whole is that the employer similarly bears the burden of proving RFOA. In addition, when Congress enacted the Older Workers Benefit Protection Act (“OWBPA”) amendments to the ADEA in 1990, it specifically stated that the employer bears the burden of proof on the RFOA affirmative defense in section 4(f)(1). S. Rep. No. 101–263, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1535 (noting that Congress was incorporating into section 4(f)(2) “the language of [section] 4(f)(1) that is commonly understood to signify an affirmative defense”). This approach also is consistent with the allocation of burdens under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), which precludes liability when the employer establishes that a pay differential is “based on any other factor other than sex,” 29 U.S.C. 206(d)(1)(iv).<sup>8</sup> The *Smith* Court did not need to discuss the burden of proof because the employer’s actions were so eminently reasonable that it easily prevailed regardless of who bore the ultimate burden.

The Commission invites comments on these proposed changes from all interested parties. The Commission also invites comments on whether the regulations should address other matters concerning the application of the disparate impact theory of discrimination under the ADEA. In particular, the Commission would welcome comments on the following specific question:

1. Should the regulations provide more information on the meaning of “reasonable factors other than age”? If so, what should the regulations say? For example, should the regulations refer to tort law standards such as negligence and reasonable standard of care when addressing the meaning of “reasonable”? Should the regulations offer factors relevant to whether an employment practice is based on reasonable factors other than age? If so, what should those factors be?

<sup>7</sup> See *Smith*, 544 U.S. at 233 n.3 (2005) (referring to the BFOQ provision as “an affirmative defense to liability”).

<sup>8</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974) (shifting the burden of proof to the employer “is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof”).

## Regulatory Procedures

### Executive Order 12866

Pursuant to Executive Order 12866, EEOC has coordinated this proposed rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

### Paperwork Reduction Act

This proposal contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it imposes no economic or reporting burdens on such firms and makes no change to employers’ compliance obligations under the Act. Instead, the proposed rule brings the Commission’s regulations into compliance with a recent Supreme Court interpretation of the Act. For this reason, a regulatory flexibility analysis is not required.

### Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee benefit plans, Equal employment opportunity, Retirement.

Dated: March 25, 2008.

For the Commission.

**Naomi C. Earp,**  
Chair.

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

## PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

**Authority:** 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary’s Order No. 10–68; Secretary’s Order No. 11–68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

### Subpart A—Interpretations

2. Revise paragraphs (d) and (e) of § 1625.7 to read as follows:

#### § 1625.7 Differentiations based on reasonable factors other than age.

\* \* \* \* \*

(d) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a “reasonable factor other than age.” An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities.

(e) Whenever the exception of “a reasonable factor other than age” is raised, the employer bears the burden of proving that the “reasonable factor other than age” exists factually.

\* \* \* \* \*

[FR Doc. E8–6517 Filed 3–28–08; 8:45 am]

BILLING CODE 6570–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG–2008–0065]

RIN 1625–AA00

#### Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes establishing a safety zone on the Nansemond River in the vicinity of Suffolk, VA in support of the Stars and Stripes Fourth of July Fireworks event. This action is intended to restrict vessel traffic movement on the Nansemond River to protect mariners from the hazards associated with fireworks displays.

**DATES:** Comments and related material must reach the Coast Guard on or before April 30, 2008.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG–2008–0065 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call Lieutenant Junior Grade Chris Porter, Assistant Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

#### **SUPPLEMENTARY INFORMATION:**

#### **Public Participation and Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

#### *Submitting Comments*

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0065), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax,

or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

#### *Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time, click on "Search for Dockets," and enter the docket number for this rulemaking (USCG–USCG–2008–0065) in the Docket ID box, and click enter. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the Commander, Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

#### **Privacy Act**

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://DocketsInfo.dot.gov>.

#### **Public Meeting**

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

#### **Background and Purpose**

On July 4, 2008, the City of Suffolk, VA will sponsor a fireworks display on the Nansemond River in position 36° – 44' – 27.3" N/076° – 34' – 42" W (NAD

1983). Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, access to the Nansemond River within 500 feet of the fireworks barge will be temporarily be restricted.

#### **Discussion of Proposed Rule**

The Coast Guard is establishing a safety zone on specified waters of the Nansemond River in the vicinity of Constant's Wharf in Suffolk, VA. This safety zone will encompass all navigable waters within 500 feet of the fireworks barge located in position 36° – 44' – 27.3" N/076° – 34' – 42" W (NAD 1983). This regulated area will be established in the interest of public safety during the Stars and Stripes spectacular event and will be enforced from 5 p.m. to 10 p.m. on July 04, 2008. Access to the safety zone will be restricted during the specified date and times. Except for participants and vessels authorized by the Captain of the Port or his Representative, no person or vessel may enter or remain in the regulated area.

#### **Regulatory Evaluation**

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analysis based on 13 of these statutes or executive orders.

#### *Executive Order 12866*

This proposed 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.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. Although this regulation restricts access to the regulated area, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; and (ii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

#### *Small Entities*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities because the zone will only be in place for a limited duration and maritime advisories will be issued allowing the mariners to adjust their plans accordingly. However, this rule may affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in that portion of the Nansemond River from 5 p.m. to 10 p.m. on July 4, 2008.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

#### **Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Junior Grade Chris Porter, Assistant Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5584. 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.

#### **Collection of Information**

This proposed rule would call 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 proposed 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 proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### **Taking of Private Property**

This proposed rule would not effect 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 proposed 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 proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

#### **Indian Tribal Governments**

This proposed 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. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a “tribal implication” under the Order.

#### **Energy Effects**

We have analyzed this proposed 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. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

#### **Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### **Environment**

We have analyzed this proposed rule under Commandant Instruction M16475.1D which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. A preliminary “Environmental Analysis Check List” supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### **List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

#### **Words of Issuance and Proposed Regulatory Text**

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:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05–008 to read as follows:

**§ 165.T05–008 Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA.**

(a) *Location.* The following area is a safety zone: All waters of the Nansemond River, located within 500 feet of position 36° – 44' – 27.3" N/076° – 34' – 42" W in the vicinity of Constant's Wharf, Suffolk, VA. These coordinates are based upon (NAD 1983).

(b) *Definition:* Captain of the Port Representative; means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:*

(1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(1) The Captain of the Port, Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone Number (757) 668–5555 or (757) 484–8192.

(2) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM 13 and 16. (d) Effective Period: This regulation will be in effect from 5 p.m. to 10 p.m. on July 4, 2008.

Dated: March 14, 2008.

**Patrick B. Trapp,**

*Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.*

[FR Doc. E8–6474 Filed 3–28–08; 8:45 am]

BILLING CODE 4910–15–P

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****33 CFR Part 165**

[Docket No. USCG–2008–0097]

RIN 1625–AA00

**Safety Zone: Thames River, New London, CT**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a temporary safety zone on the federal channel of the Thames River surrounding the Amtrak Railroad Bridge in the Town of New London, Connecticut. This safety zone is necessary to protect vessels transiting in the area from hazards imposed by construction barges and equipment. The barges and equipment are being utilized to remove the old bascule bridge and install a new vertical lift span bridge over the Thames River. Entry into this zone will be prohibited unless authorized by the Captain of the Port, Long Island Sound.

**DATES:** Comments and related material must reach the Coast Guard on or before April 30, 2008.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG–2008–0097 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call LT D. J. Miller, Chief, Waterways Management, Coast Guard Sector Long Island Sound, 203–468–4596. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Public Participation and Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

**Submitting Comments**

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0097), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

**Viewing Comments and Documents**

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time. Enter the docket number for this rulemaking (USCG–2008–0097) in the Search box, and click "Go >>." You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or U.S. Coast Guard Sector Long Island Sound, 120 Woodward Ave, New Haven, Connecticut 06512 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.