

you are the operator of a vessel in the vicinity of the safety zone, you may not enter, remain in, or transit through the safety zone unless authorized to do so by the COTP or his representative, and you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

Dated: November 20, 2023.

**David E. O'Connell,**

*Captain, U.S. Coast Guard, Captain of the Port, Sector Maryland-National Capital Region.*

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2023-0662]

RIN 1625-AA00

#### Safety Zone; Ashtabula Power Plant Breakwater Armor Stone Removal, Lake Erie, Ashtabula, OH

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for certain waters of Lake Erie. This action is necessary to provide for the safety of life and property on these navigable waters near Ashtabula, Ohio during the Ashtabula power plant breakwater armor stone removal project. This rule will prohibit persons and vessels from entering the safety zone unless authorized by the Captain of the Port Buffalo.

**DATES:** This rule is effective without actual notice from November 28, 2023 through 11:59 p.m. on December 1, 2024. For the purposes of enforcement, actual notice will be used from 7 a.m. on November 16, 2023, until November 28, 2023.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2023-0662 in the search box and click "Search." Next, in the Document Type column, select "Supporting & Related Material."

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or

email Lieutenant Jared Stevens, Waterways Management Division, MSU Cleveland, U.S. Coast Guard; telephone 216-937-0124, email [Jared.M.Stevens@uscg.mil](mailto:Jared.M.Stevens@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  
COTP Caption of the Port

##### II. Background Information and Regulatory History

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 because insufficient time remains to publish an NPRM and receive public comments prior to commencement of the deconstruction and removal project.

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 to wait for a comment period to run would be contrary to the public interest by inhibiting the Coast Guard's ability to protect vessels in these navigable waters during this deconstruction and removal project.

##### 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 Buffalo has determined a safety zone is needed to protect vessel traffic from November 16, 2023, through December 1, 2024, during this deconstruction and removal project which will remove the breakwater armor stone near the Ashtabula power plant in Ashtabula, Ohio.

##### IV. Discussion of the Rule

This rule establishes a safety zone from 7 a.m. on November 16, 2023, through 11:59 p.m. on December 1, 2024. The safety zone will cover all navigable waters encompassing a 350-

yard radius zone centered on coordinates 41°54'43" N, 080°46'09" W (NAD83) located near the Ashtabula power plant located at 2133 Lake Road East, Ashtabula, Ohio. The zone may require enforcement beyond the stated times in the case that the construction project runs into unforeseen delays.

The COTP Buffalo has determined a safety zone is needed to protect vessels during this deconstruction and removal project. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP, or a designated representative.

##### 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. This rule has not been designated a "significant regulatory action," under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the need to ensure the safety of vessels in these navigable waters during this construction project.

###### 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 (Pub. L. 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 call or email 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.

#### 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, Rev. 1, associated implementing instructions, 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 establishment of a temporary safety zone intended to ensure the safety of vessels near a construction project. It is categorically excluded from further review under paragraph L63(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email 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, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

- 2. Add § 165.T09–0662 to read as follows:

#### **§ 165.T09–0662 Safety Zone; Ashtabula Power Plant Breakwater Armor Stone Removal, Lake Erie, Ashtabula, OH.**

(a) *Location.* The safety zone will cover all navigable waters encompassing a 350-yard radius zone centered on position 41°54'43" N, 080°46'09" W (NAD83), located near the old Ashtabula power plant (2133 Lake Road East, Ashtabula, Ohio) on Lake Erie in Ashtabula, Ohio.

(b) *Enforcement period.* This section will be enforced from 7 a.m. on November 16, 2023, through 11:59 p.m. on December 1, 2024.

(c) *Definitions.* Official Patrol Vessel means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector Buffalo, (COTP) in the enforcement of the regulations in this section. Participant means all persons and vessels attending the event.

(d) *Regulations.* (1) The Coast Guard may patrol the event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign “PATCOM.”

(2) All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators. The “official patrol vessels” consist of any Coast Guard, state or local law enforcement and sponsor provided vessels designated or assigned by the COTP Sector Buffalo, to patrol the event.

(3) Spectator vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer and will be operated at a no wake speed in a manner which will not endanger participants in the event or any other craft.

(4) No spectator shall anchor, block, loiter, or impede the through transit of official patrol vessels in the regulated area during the effective dates and times, unless cleared for entry by or through an official patrol vessel.

(5) The Patrol Commander may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(6) Any spectator vessel may anchor outside the regulated areas specified in this chapter, but may not anchor in, block, or loiter in a navigable channel.

(7) The Patrol Commander may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(8) The Patrol Commander will terminate enforcement of the special regulations at the conclusion of the event.

Dated: November 17, 2023.

**S.M. Murray,**

*Commander, U.S. Coast Guard, Alternate Captain of the Port Buffalo.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 51

RIN 2900–AR62

#### Payments Under State Home Care Agreements for Nursing Home Care

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) adopts as final, with one change, a proposed rule amending its State home per diem regulation to provide a new formula for calculating the prevailing rate VA would pay a State home that enters into a State home care agreement to provide nursing home care to eligible veterans.

**DATES:** This rule is effective December 28, 2023.

**FOR FURTHER INFORMATION CONTACT:**

Colette Alvarez, Chief of Staff Home Per Diem Program, Geriatrics and Extended Care (12GEC), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–6750. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:**

In a document published in the **Federal Register** (FR) on December 21, 2022, VA proposed to amend its per diem regulations in part 51 of title 38, Code of Federal Regulations (CFR) to provide a new formula for calculating the prevailing rate VA will pay a State home that enters into a State home care agreement to provide nursing home care to eligible veterans. 87 FR 78038. VA provided a 60-day comment period, which ended on February 21, 2023. Two comments were received, one of which included multiple issues, and these comments are addressed below by topic. VA makes one change to the rule based on the comments received.

#### U.S. Public Health Service (USPHS) and Eligibility for Care in a State Home

One commenter questioned whether veterans of the USPHS are eligible for care in State homes even if the State does not recognize service in the USPHS for veteran status. The commenter further asserts that USPHS veterans are veterans by Federal law and eligible for all VA benefits, and if a State home is receiving funding from VA then a USPHS veteran should be eligible for care in that State home even if the State does not recognize a USPHS veteran for other State benefits.

While VA considers this comment outside of the scope of the rulemaking, we clarify that an individual is a veteran under 38 United States Code (U.S.C.) 101(2) if the individual “served in the active military, naval, air, or space service and . . . was discharged or released therefrom under conditions other than dishonorable.” “Active military, naval, air, or space service” includes “active duty” and certain periods of “active duty for training” and “inactive duty training” which are all defined by 38 U.S.C. 101(21)–(24). These terms prescribe the type of service an individual needs to have had to be eligible for VA health care benefits under 38 U.S.C. 1710 and 1705 and are inclusive of service in the USPHS. 38 Code of **Federal Register** (CFR) 17.31 generally incorporates the 38 U.S.C. 101 definitions of active service, active duty, active duty for training, and inactive duty training, as well as certain other service recognized as active service under 38 U.S.C. 106. In short, § 17.31 addresses the duty periods considered under active service for eligibility for VA medical benefits, and it is inclusive of service in the USPHS. Thus, an individual with full-time service in the USPHS may qualify as a “veteran” for purposes of health care benefits administered by VA.

However, the designation of veteran for purposes of VA health care benefits does not require a State home to accept a veteran into State home. The VA State home program pays per diem to State homes for three types of care provided to eligible veterans: nursing home care, domiciliary care, and adult day health care (ADHC). The statutory authority for the payment program is set forth at 38 U.S.C. 1741–43 and VA has published regulations governing this program at 38 CFR part 51. Sections 51.50 through 51.52 address which veterans are eligible for purposes of payment of per diem for nursing home care, domiciliary care, and ADHC, respectively. An important distinction is that while VA can pay per diem to State homes for care

provided to eligible veterans, State homes are not obligated to accept all eligible veterans. VA does not have management authority over State homes. State homes are owned and operated by State governments and each State establishes eligibility and admission criteria for its homes. State homes may have additional admission requirements such as age, wartime service, years of service, and residency requirements. Therefore, VA is unable to dictate which eligible veterans for purposes of payment of per diem may be admitted to a State home. VA makes no changes based on this comment.

#### State Home Responsibilities Under the Prevailing Rate

One commenter raised concerns that VA is proposing to continue to use the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System (PPS) for creating the baseline for the prevailing rate without utilizing Medicare’s consolidated billing guidelines to confirm which services are covered under the rate. Specifically, the commenter referred to the Medicare Claims Processing Manual Chapter 6—Skilled Nursing Facility (SNF) Inpatient Part A Billing and SNF Consolidated Billing (Medicare Manual).<sup>1</sup> The commenter stated that all services considered within the scope and capability of nursing home care are paid under the PPS rate and that the Medicare Manual lists which services are included and excluded under the PPS rate. Further, the commenter suggested that VA should use the Medicare Manual to confirm which services are covered under the prevailing rate because State homes are finding more instances where there is an expectation for State homes to pay for services that have been specifically excluded under PPS. The commenter specifically mentioned psychologist and psychiatric services, and high-cost medications (e.g., high-intensity anti-cancer drugs). The commenter also stated that all drugs not listed on the most recent VA formulary should qualify for an exclusion from the prevailing rate calculation since these medications are not routinely administered in a SNF or are exceptionally expensive. Finally, the commenter requested a guide for State homes and VA staff to determine the

<sup>1</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Medicare Claims Processing Manual Chapter 6—SNF Inpatient Part A Billing and SNF Consolidated Billing (Rev. 11109, 11–04–21), <https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/clm104c06.pdf> (last visited April 11, 2023).