

**PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES**

■ 1. The authority citation for part 1308 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

■ 2. Section 1308.12 is amended in the table by adding a new paragraph (c)(28) to read as follows:

**§ 1308.12 Schedule II.**

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(c) \* \* \*

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Dated: May 15, 2009.

**Michele M. Leonhart,***Deputy Administrator.*

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

[Docket No. USCG-2009-0089]

RIN 1625-AA00

**Safety Zone; Red Bull Air Race, Detroit River, Detroit, MI****AGENCY:** Coast Guard, DHS.**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the Detroit River, Detroit, Michigan. This zone will restrict vessels from portions of the Detroit River during the Red Bull Air Race. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with air races.

**DATES:** This rule is effective from 9 a.m. on June 11, 2009 through 6:30 p.m. on June 14, 2009.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2009-0089 and are available online by going to <http://www.regulations.gov>, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG-2009-0089 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at the 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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail CDR Joseph Snowden, Prevention Department, Sector Detroit, Coast Guard; telephone (313) 568-9580, e-mail [Joseph.H.Snowden@uscg.mil](mailto:Joseph.H.Snowden@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:****Regulatory Information**

On April 16, 2009, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; Red Bull Air Race, Detroit River, Detroit, MI in the **Federal Register** (74 FR 17627). We received one comment on the proposed rule. No public meeting was requested, and none was held.

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 this rule would be contrary to the public interest of ensuring, to the extent practicable, the safety and security of the spectators and participants during this event and immediate action is necessary to prevent possible injury, loss of life, or property.

**Background and Purpose**

This temporary safety zone is necessary to ensure, to the extent practicable, the safety of vessels and spectators from hazards associated with an air race. The Captain of the Port Detroit has determined air races in close proximity to watercraft and infrastructure pose significant risk to public safety and property. The likely combination of large numbers of recreation vessels, possible alcohol use, airplanes traveling at high speeds and performing aerial acrobatics, and large numbers of spectators in close proximity to the water could easily result in serious injuries or fatalities. Establishing a safety zone around the location of the race course will help ensure the safety of persons and property at these events and help minimize the associated risks.

**Discussion of Comments and Changes**

We received one letter, containing several comments on this rulemaking. First, the commenter stated that closure of the Detroit River for these air races violates the Boundary Waters Treaty of 1909. The Coast Guard disagrees that the Coast Guard's action or the action by

Canada violates this treaty. The Boundary Waters Treaty does guarantee that "navigation of all navigable boundary waters" shall be "free and open" to "inhabitants \* \* \* ships, vessels, and boats" of both the United States and Canada, "subject, however, to any laws and regulations of either country." Both the United States and Canada have determined, pursuant to each country's laws and regulations, that brief closures of the Detroit River are reasonably necessary to protect spectators and vessels from hazards associated with these air races. Moreover, under fundamental principles of international law, only the States that are a party to an international agreement are generally entitled to allege a breach of the terms of the agreement by the other. For this event, Canada has also agreed that a closure of a small portion of the river for a short period of time is a reasonable and necessary measure.

Second, the commenter stated that the proposed rule constituted a "public taking" in contravention of the Fifth Amendment to the United States Constitution; in that vessel owners will experience delays that will result in lost profits. This commenter did not put forward any specific company or vessel that would be so affected. The Coast Guard disagrees with this comment. In general, a "taking" occurs when a governmental entity uses its powers to permanently deprive a person or entity of property. The Captain of the Port has considered the needs of port stakeholders and the maritime community and has determined that this safety zone is necessary to protect the public and maintain safety of navigation. Further, the rule is only temporary in nature, not permanent, and in the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Detroit to transit through the safety zone. Moreover, the safety zone will only be enforced for a short period of time on the enforcement dates. Lastly, the Coast Guard believes vessel owners have had sufficient advance notice of this safety zone, such that they should be able to work vessel schedules around the enforcement periods of the proposed safety zone to minimize or avoid lost profits.

Third, the commenter stated that the race sponsor must be required to agree in advance to reasonably compensate vessel owners for losses incurred by delays and post a bond sufficient to cover anticipated vessel losses. Otherwise, this commenter stated, there is no incentive for race organizers to work collaboratively with vessel

operators. The commenter also stated that if a vessel delayed by the proposed safety zone missed the closing of the Sault Ste. Marie locks at the end of the navigation season in January 2010, then that vessel owner should be compensated for any lost cargo transportation opportunities by the race sponsors.

This comment is outside the scope of this rulemaking and the Coast Guard disagrees with this comment. The Coast Guard is authorized by Congress to provide for safe navigation and vessel safety in U.S. waters and to ensure the safety of all waterway users. As such, in this rule, the Coast Guard is balancing all competing needs by enforcing the safety zone during the air race, but also providing ample notification to vessel owners so that they may plan according and thereby reduce or avoid lost profits. The Coast Guard does not believe that a compensation agreement is necessary in order for the race sponsors to work collaboratively with vessel owners. Compensation for vessel delays based on the existence of a safety zone is not required under the law. Likewise, the Coast Guard has no authority to order the race sponsors to post bond or agree to any sort of compensation scheme.

#### **Regulatory Analyses**

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

#### **Regulatory Planning and Review**

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.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary.

This determination is based on the minimal time that vessels will be restricted from the zone; the location of the zone, which is an area where the Coast Guard expects insignificant adverse impact to mariners from the zone's activation; and the ability of commercial vessels to request permission from the Captain of the Port Detroit to transit through the safety zone.

#### **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 transit or anchor in the safety zone located in the Detroit River between 9 a.m. and 6:30 p.m. on June 11, through June 14, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for short period of time each day it is enforced. Additionally, small entities such as passenger vessels, have been informed of this event since its planning stages, and have had ample time to make alternate arrangements with regards to mooring positions and business operations during the hours this safety zone will be in place. Furthermore, local sailing and yacht clubs will be notified prior to the event by Coast Guard Station Belle Isle with information on what to expect during the event with the intention of minimizing interruptions in their normal business practices. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Detroit to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect. Additionally, the COTP will suspend enforcement of the safety zone if the event for which the zone is established ends earlier than the expected time.

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

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

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. We did not receive any comments for this section.

#### **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). We did not receive any comments for this section.

#### **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. We did not receive any comments for this section.

#### **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. We did not receive any comments for this section.

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

This rule will 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. We did not receive any comments for this section.

#### **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. We did not receive any comments for this section.

### 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. We did not receive any comments for this section.

### Indian Tribal Governments

The Coast Guard recognizes the treaty rights of Native American Tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate Tribal concerns. We have determined that this rule and fishing rights protection need not be incompatible. We have also determined that 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. Nevertheless, Indian Tribes that have questions concerning the provisions of this rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**. We did not receive any comments for this section.

### 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. 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.

We did not receive any comments for this section.

### 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 rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards. We did not receive any comments for this section.

### Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction. This event establishes a safety zone, therefore paragraph (34)(g) of the Instruction applies.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

### 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:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Public Law 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Section 165.T09-0089 is added to read as follows:

#### § 165.T09-0089 Safety Zone; Red Bull Air Race, Detroit River, Detroit, MI.

(a) *Location*. The following area is a temporary safety zone: all U.S. waters of the Detroit River, Detroit, MI, bound by

a line extending from a point on land southwest of Joe Louis Arena at position 42°19.4' N; 083°3.3' W, northeast along the Detroit shoreline to a point on land at position 42°20.0' N; 083°1.2' W, southeast to the international boarder with Canada at position 42°19.8' N; 083°1.0' W, southwest along the international border to position 42°19.2' N; 083°3.3' W, and northwest to the point of origin at position 42°19.4' N; 083°3.3' W. (DATUM: NAD 83).

(b) *Enforcement Period*. The safety zone will be enforced daily from 9 a.m. to 6:30 p.m. on June 11, 2009 through June 14, 2009.

(c) *Regulations*. (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so.

(5) Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: May 6, 2009.

**F.M. Midgett,**

*Captain, U.S. Coast Guard, Captain of the Port Detroit.*

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