

Proposal Response: Tyndall Waterway Restrictions

Friends of Shell Island, Inc.

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In response to Tyndall Air Force Base's (AFB's) proposed waterway restrictions as entered into the Federal Register dated Sept. 14, 2015 (COE-2013-0003), Friends of Shell Island provides this input, collected from many individuals and businesses since 2013 and summarized in this document. (Note that although Friends of Shell Island's mission is to protect citizen access to the island, the boating lifestyle in Bay County is part of this mission, therefore this topic is still of utmost importance to us and our members.)

Overview

Tyndall proposes a 500 foot buffer into the public's waterways around all Tyndall property (excluding Shell Island and much of Crooked Island), all or portions of which can be temporarily restricted to boater access during times of heightened security concerns. Tyndall military police may patrol the waters adjacent to Tyndall's shoreline "to observe the shoreline in order to identify any threats to the installation or personnel." The new regulation states specifically that Tyndall police will not have any authority to enforce federal, local or state laws on the water. If Tyndall declares a temporary restriction, the Tyndall police would be authorized to notify boaters in the areas of the restrictions, and tell them that they will be subject to prosecution for trespassing if they don't leave.

This latest proposal improves upon previous proposals by eliminating barrier island areas that do not contain Tyndall assets and are used recreationally, and it further restricts military police authority over civilians. We thank Tyndall for listening to local voices and responding to those concerns.



New map of proposed 500 Foot buffer around Tyndall property

While Friends of Shell Island supports Tyndall's requirements to secure our vitally important military assets, we propose that this might be done with less complexity, cost, and impact to the boating community and its economic contribution. Code of Federal Regulations 334.3 states that "restricted area regulations shall provide for public access to the maximum extent practicable." Our waters are held in the public trust by the State of Florida for use by the public, not the military. We believe our proposal would conform more completely to this requirement. We propose the following:

- Rework the regulation to minimize impact on the public's waterways and include cost comparisons of alternatives
- Have non-military agencies enforce restrictions and further define military police authority during times of closures
- Include a five year "renewal provision"
- Remove wording implying military use of the waterways
- Assess impact to seagrass and rework rule to minimize this impact
- Document the economic impact including an OMB assessment via EO 12866
- Further define notifications
- Strike or clarify wording about "contiguous inland waterways"

Minimize the 500-foot encroachment into the public waterway

Tyndall AFB owns approximately 29,000 contiguous acres of the most pristine waterfront and wooded property in Florida, yet Tyndall assets occupy only about 6,600 acres of this land. Friends of Shell Island respectfully asks that Tyndall use its own vast amounts of land for protection before taking almost 8,000 acres of the public's waterways for a buffer.

Public access to Tyndall's land and its shores should be allowed to the greatest possible extent. In fact, The Sikes Act (16 USC 670a-670o, 74 Stat. 1052), requires military bases to provide for multipurpose recreational use of military natural resources and public access, as practicable, while maintaining base readiness and security.

The Rivers and Harbors Act (40 Stat 266; 33 U.S.C. 1), under which this regulation would be enacted, allows for restrictions in the waters around military assets that represent a danger to boaters, or specific assets that need to be protected. It doesn't appear to be intended for a base to create an extensive, 8,000 acre "surveillance zone" upon entire bodies of water that protects, for the most part, vast amounts of undeveloped land.

Strategic land-based fencing specific to Tyndall assets (as done by other military bases) could make protection possible without depending on police patrols out in the waterways, and would put a protective barrier closer to the assets protected, making this method more effective than boat patrols many miles away from the assets. Modern technology incorporating cameras and sensors, with foot and vehicle patrols can save costs and increase security of the perimeter. Another approach would be to clear ATV trails around Tyndall's property perimeter, and patrol by ATV (as Tyndall already patrols Crooked Island) or even by foot.

Military police already have jurisdiction to patrol the land that Tyndall occupies. An analogy could be made that if it were private land adjacent to Tyndall property, Tyndall would not be likely to propose that military police patrol on the adjacent property to protect its assets. The public's waterways should be viewed as this "adjacent property" in light of this proposal. Another example would be that there would be major opposition to the Navy Base proposing to patrol Thomas Drive as part of their security plan.

As a result, we propose that Tyndall remove the 500' encroachment into waters that are not directly adjacent to critical assets or housing, and implement land-based protective fencing, cameras and/or other security barriers where needed to protect Tyndall assets from the land. Patrol only those areas by boat where the assets are close to shore. Specifically, as an example: draw the temporary 500' waterway restriction lines around only the shoreline of base housing in the "Beacon Beach" area, in the "Lands End" area, at the foot of the runway in East Bay, in the small bayous in East Bay that lead up into the Tyndall runway area, and in Fred Bayou because of the fuel depot. Use fencing on the land side of these assets areas and where a threat could approach Tyndall on the land bridge from the islands.

If Tyndall's response to the suggestions above is that the cost would be too high, we would request that Tyndall present a comparison, in unclassified terms, of the costs – and effectiveness - of protecting existing assets with fencing and technology – or ATVs - compared to patrolling 129 miles of shoreline by boat, looking for threats in the waters around Tyndall and enforcing activated restricted areas.

We would also like Tyndall to disclose how many patrol boats it expects to use to effectively patrol 129 miles of shoreline, and explain how it has concluded that personnel in patrol boat lookouts at sea level would be more effective than other security measures placed at specific areas of vulnerable mission activity. According to an article in *Airman Online* ("Water Police", July 7, 2014), MacDill Air Force in Tampa uses 8 boats to patrol 7.2 miles of shoreline. By that same equation Tyndall would need to purchase, maintain, fuel, store and maintain trained personnel to man 143 boats on our waters.

Have non-military agencies enforce any laws and further define military police authority during times of restrictions

Because Federal law prohibits the Air Force from enforcing laws on civilians (The Posse Comitatus Act, [18 U.S.C. § 1385](#), original at 20 [Stat. 152](#)), Friends of Shell Island proposes that enforcement of any temporary restricted area be performed by the US Coast Guard or the Florida Fish and Wildlife Commission, who have law enforcement authority over civilian boaters. Furthermore, military police are trained to enforce laws and regulations applicable to military and civilian personnel within the confines of a military installation. They are not trained to interact with and respect the Constitutional rights of private citizens outside the military installation.

This was tragically illustrated in October 2014, when a local fisherman was called in from the public waters, detained, searched and handcuffed in violation of his rights

(“There was a mistake” *News Herald*, Feb. 1, 2015). During the incident, Tyndall military police claimed that they ‘owned’ out 500 feet into the water when they did not. Power was abused in this incident and it was power that was not yet even in effect, nor was there a sufficient security situation that would have activated a restriction even if this rule had been in effect.

In a separate incident in May 2014, fishermen legally outside the Navy’s local restricted zone were approached by Navy military police (who never identified themselves) and questioned (“Letter – A Cautionary Tale”, *News Herald*, Sept. 17, 2015). Their IDs were checked and their telephone numbers were taken. They were warned that if they did not answer their phones at a later time, they would receive a summons to appear in court. The victims were never informed of what law they were being charged with breaking.

Both of the cases above show a clear lack of training and overreach of authority in which military police have mis-handled interactions with local boaters. So not only is it prohibited for military police to enforce laws on civilians, local incidents show that they lack the training to properly do so. Regardless, if this rule goes forward with an implication that military police will enforce any laws upon civilians in the case of a waterway restriction, we request that Tyndall provide the training plan and protocol used by the military police that would prevent further incidents and protect Constitutional rights and due process for civilians.

The proposed regulation states that in a restricted area, “On-scene installation personnel will notify boaters in the restricted area of the restriction and tell them that if they refuse to leave the area they will be trespassing and could be subject to prosecution.” The regulation does not specify what happens if a boater does not leave the area within the timeframe the “installation personnel” deem adequate. If that boater would be subject to prosecution, does this imply that they would be ticketed by the military personnel? In the magazine *Airman Online* (“Water Police”, July 7, 2014) MacDill AFB military police are said to issue a Federal DD 105, District Court Violation that comes with a \$ 275 fine.

Citizens need to know what they would be charged with and by whom. If the violation is trespassing, please specify the actual federal law that would be violated, and what the penalties and adjudication process would be.



U.S. Air Force security forces personnel patrolling a restricted area in waters off MacDill AFB. (Airman Online, “Airmen on Boats”, August 23, 2011)

Inclusion of a “renewal provision”

These proposed regulations are unprecedented, impact over 8,000 acres of the public’s waterways, and could impact the local economy and environment. As a result, if this proposed rule moves forward in any form, we propose a clause stating that this regulation will expire 5 years from its enactment. This will give the public, local businesses, and Tyndall a period during which the effects of the regulations could be observed. Any re-issue of this regulation or other similar Tyndall waterway restriction would be done using the standard Federal regulation processes, and would include at least one local public meeting using a 30-day notice period.

This could be done by writing a descriptive notation in the preamble of this rule that states Tyndall authorities would remove the regulation from the Federal Register on September 15, 2020, and at that time, if they determine a waterway security rule is still needed, would take input from the public for implementation of any new rule.

Remove wording implying military use of the waterways

New wording has been inserted into this rule stating, “The temporary restrictions in the proposed rule are also necessary to protect the public from potentially hazardous conditions that may develop as a result of military use of the area.” This wording could be interpreted to mean that this rule authorizes military exercises and operations in the 8,000 acres of the public’s waterway Tyndall proposes to restrict. Interpretation of this clause in this manner by future base leadership could expansively alter the “minimal impact” implied everywhere else in the wording of this rule. We recommend that this sentence be removed.

Define the environmental impact to seagrass

The proposed rule states that because there is no intended change in the use of the proposed restricted area, preparation of an environmental impact statement is not expected to be required – even though an environmental assessment (a primary purpose of which is to determine the need for an environmental impact statement) has not yet been completed. Yet the addition of unspecified numbers of shore patrols around 129 miles of Tyndall’s coastline will at a minimum impact the important seagrass beds that are extensive in the proposed restricted area, a large part of which is in a Florida Aquatic Preserve. The Florida Fish and Wildlife Commission cites civilian boaters with tickets for destroying seagrass, and state agencies have increasingly proposed restricting boater access to areas with seagrass. Friends of Shell Island suggests that Tyndall’s military police, operating off-base, be held to the same standards that the rest of the population in protecting this important natural resource.

The Florida statute (253.04) is as follows: “The duty to conserve and improve state-owned lands and the products thereof shall include the preservation and regeneration of seagrass, which is deemed essential to the oceans, gulfs, estuaries, and shorelines of the state. Any person operating a vessel outside a lawfully marked channel in a careless manner that causes seagrass scarring within an aquatic preserve established in ss. 258.39-

258.399,... commits a civil infraction, punishable as provided in s. 327.73. Each violation is a separate offense.”



Propeller scarring of seagrass (Source US Geological Survey)

We recommend that Tyndall rework its overall approach to security to use its vast land holdings, minimizing its impact in area waters that could damage seagrass. This is another reason that we recommend that Tyndall analyze the use of their existing land with ATV patrols, which would not impact seagrass. We also recommend that an Environmental Impact Statement be prepared before adoption of this rule, under the mandates of the National Environmental Policy Act as required by law, and that this assessment include an evaluation of the impact on area seagrasses by Tyndall water patrols placed in the public’s waters to look for threats and enforce activated restricted areas.

Document the economic impact

The section of Tyndall’s proposed regulations entitled “Procedural Requirements”, section b. “Review under the Regulatory Flexibility Act” states that “This proposal, if adopted, will have no significant economic impact on small entities.” However, Bay County has over 13,000 registered boaters serviced by small businesses such as marinas, fuel vendors, fishing and tackle retailers, and mechanics. Additionally, the local \$1 billion tourist industry relies on over 30 local water-based businesses which could be impacted. Fishing guides make their living taking customers into many of the bays and bayous that could be impacted at a moments’ notice, causing economic loss.

If the proposed regulation is implemented in a way that would cause the public to perceive an increase in the existing level of policing activity on the water, then some number of the boating public will definitely be discouraged from boating. Current law enforcement activity on the bay already includes the US Coast Guard, Florida Fish and Wildlife Commission, Department of Homeland Security, and various city and county police in boats. Adding another layer of law enforcement adds to the impression of excess. Every boater who abandons boating impacts the small business economy that caters to people’s desire to get out on the water.

If closures occur and are of a sufficient amount of time to cause visitors to be uncertain as to whether their fishing trip or their pontoon boat excursion will be cut short, they will choose another destination besides Panama City. And if small businesses that feed the

local tourist industry are discouraged from operating on the water, that too will impact the \$1B tourist economy.

We propose that an economic impact statement be included in this proposal via compliance with Executive Order 12866. In fact, the proposed rule states that review under 12866 do not apply. Review under Executive Order 12866 would answer many of these questions and ensure that taxpayer monies are spent wisely to protect the base.

Executive Order 12866 states that, “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, *including the alternative of not regulating*. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.” This order requires an evaluation by the federal Office of Management and Budget.

We can hardly imagine a federal rule more fitting for review by OMB than this one. We request that this review be performed before any further action is taken on this rule.

Further define notifications

In a meeting on November 18, 2013, we discussed with Tyndall personnel the notification of the public of any activations using commonly used cell phone alert technology to reach the largest percentage of the population. We propose that Tyndall incorporate this notification method.

The rule should also state that enforcement would start at a minimum time after notification, such as no sooner than 15 minutes, in order to give those in the restricted zones time to react.

This rule should also state provisions for notification of area boaters when a restricted zone is deactivated.

Strike or clarify the statement about “contiguous inland waterways”

The rule contains a statement that the proposed restricted area includes “all contiguous inland navigable waters which lie within the land boundaries of Tyndall AFB.” This statement, as explained to us verbally, is meant to describe completely inland waters such as lakes that are on Tyndall property. However, it could be interpreted to mean waters that are within the land boundaries of Tyndall property such as the waters in the sounds between Tyndall mainland property and Shell and Crooked Island, and also could include the many bayous in the area. We recommend that this sentence be deleted, or at a minimum, be worded to say “which lie *completely surrounded by* the land boundaries...”