

Dated: October 18, 2011.

Waverly W. Gregory, Jr.,

Bridge Program Manager, By direction of the
Commander, Fifth Coast Guard District.

[FR Doc. 2011-27721 Filed 10-25-11; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2011-0972]

Drawbridge Operation Regulation; Nanticoke, Seaford, DE

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation
from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the SR 13 Bridge across the Nanticoke River, mile 39.6, at Seaford, DE. The deviation is necessary to accommodate the cleaning and painting of the bridge. This deviation allows the bridge to remain in the closed position throughout the month of November to facilitate the maintenance work.

DATES: This deviation is effective from 12:01 a.m. on November 1, 2011 to 11:59 on November 30, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG-2011-0972 and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0972 in the "Keyword" box and then clicking "Search". They are 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 Lindsey Middleton, Bridge Management Specialist, Coast Guard; telephone 757-398-6629, e-mail Lindsey.R.Middleton@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION: Marinis Bros. Inc., on behalf of Delaware Department of Transportation (DelDOT), has requested a temporary deviation from the current operating regulation of

the SR 13 Bridge across the Nanticoke River, mile 39.6, at Seaford, DE. The requested deviation is to accommodate painting and cleaning of the bridge. The vertical clearance of this single-leaf bascule bridge is three feet at mean high water (MHW) in the closed position and unlimited in the open position. During this deviation period, the vertical clearance will be limited to one foot at MHW due to the scaffolding that will be used for the maintenance of the bridge. The bridge will remain in the closed position for the entire month. In critical situations the bridge will be able to open if at least 24 hours of notice is given. There are no alternate routes available to vessels.

The current operating schedule for the bridge is set out in 33 CFR 117.243(b). According to that schedule, during the month of November the bridge shall open on signal, except that from 6 p.m. to 8 a.m. Monday through Friday and 3:30 p.m. through 7:30 a.m. Saturday and Sunday, if at least four hours notice is given.

Logs from November 2010 have shown that there were 20 openings for the entire month. Sixteen of those openings were on November 13th and 14th. The openings were due to a Bass Fishing Tournament; however, the tournament is not scheduled for this year minimizing the amount of anticipated openings. The majority of vessel traffic utilizing this waterway is recreational boaters. There is one mariner that requests most of the bridge openings throughout the winter months. Marinis Bros., Inc. has coordinated with this mariner. DelDOT has coordinated with the town concerning the month long bridge closure as well. The Coast Guard will inform all other users of the waterway through our Local and Broadcast Notices to Mariners so that mariners can arrange their transits to minimize any impact caused by the temporary deviation. The Coast Guard will also require the bridge owner to post signs on either side of the bridge notifying mariners of the temporary regulation change.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 12, 2011.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

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POSTAL SERVICE

39 CFR Part 241

Post Office Organization and Administration: Establishment, Classification, and Discontinuance

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service is amending its regulations to improve the administration of the Post Office closing and consolidation process. This final rule adopts changes to Postal Service regulations pertaining to the definition of "consolidation" and the staffing of Post Offices.

DATES: *Effective Date:* December 1, 2011.

FOR FURTHER INFORMATION CONTACT: Jim Boldt, (202) 268-6799.

SUPPLEMENTARY INFORMATION: On March 31, 2011, the Postal Service published a proposed rule in the **Federal Register** (76 FR 17794) to improve the process for discontinuing Post Offices and other Postal Service-operated retail facilities. The proposed rule also included various proposals to apply certain discontinuance procedures to all retail facilities operated by Postal Service employees. The Postal Service requested comments on the proposed rule.

On July 13, 2011, the Postal Service published an initial final rule (76 FR 41413), with minor corrections published on July 21, 2011 (76 FR 43898). That final rule responded to comments and made numerous changes from the proposed rule, resulting in revised regulations that took effect on July 14, 2011. In the final rule, the Postal Service noted that certain aspects of the proposed rule were subject to then-ongoing consultations under 39 U.S.C. 1004(b)-(d). As a result, the first final rule implemented only changes to 39 CFR part 241 that were not subject to ongoing consultations. 76 FR 41413. The Postal Service advised that changes subject to consultation—namely, those concerning the definition of "consolidation" and the staffing of Post Offices—were being deferred and could be addressed in a subsequent final rule. *Id.* at 41414-15.

At this time, the consultations referenced in the first final rule have run their course, and the Postal Service is prepared to issue the remaining proposed changes, with minor modifications as explained in section III below. Analysis of the pertinent comments received appears below. With the changes described herein, the final rule will take effect upon the publication of corresponding changes in

the *Postal Bulletin*, scheduled for December 1, 2011.

I. Response to Comments Received

As recounted in the first final rule (76 FR 41413), the Postal Service received approximately 257 comments in response to the proposed rule. Commenters included 34 Members of Congress, the Postal Regulatory Commission (“Commission” or “PRC”), five state legislators, three postmasters’ and postal supervisors’ organizations, one postal lessors’ organization and various of its members, one mailing industry stakeholder, and numerous other postal customers. Although some comments were favorable about certain aspects of the proposed rule, almost all of the comments expressed concerns about various aspects of the proposed rule. Below we discuss the comments pertinent to this final rule and our response to each.

A. Definition of “Consolidation”

Several commenters expressed concern about the proposed rule’s interpretation of “consolidation,” such that the term would no longer apply to the conversion of a Post Office into a Postal Service-operated station or branch. In particular, these commenters claim that this approach, combined with the fact that 39 U.S.C. 404(d)(5) does not confer appeal rights for closings or consolidations of stations and branches, could result in an effective denial of appeal rights if the Postal Service were to convert a Post Office into a station or branch and then proceed to close or consolidate the facility. Comments about appeal rights were discussed in the first final rule (76 FR 41414–15).

Overall, this rulemaking expands the circumstances in which full-blown discontinuance studies are used; hence, it increases the overall transparency of discontinuance decisions affecting Postal Service-operated retail facilities. Previously, stations and branches studied for discontinuance were studied in a faster, less intensive process. See PRC, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches (“SBOC Opinion”), Docket No. N2009–1, March 10, 2010, at 48–57, 61–65 (exploring differences between the discontinuance processes for Post Offices and for stations and branches).

Contrary to longstanding arguments by the Postal Service resting on much of the legislative history and case law on which some of the comments rely, the Commission, labor organizations, and others have asserted that customers perceive no functional difference between a Post Office and a classified

station or classified branch. See, e.g., SBOC Opinion at 52, 64; Comments of American Postal Workers Union, AFL–CIO, Eugene Area Local No. 679, PRC Docket No. A2011–4, January 21, 2011, at 1–3. While the Postal Service continues to disagree with the proponents of this view as to whether that lack of perceived difference has legal relevance, the Postal Service acknowledges the practical vitality of the observation. As a result, it is difficult to understand what concrete purpose would be furthered by continuing to apply discontinuance procedures to the conversion of one Postal Service-operated retail facility type to another, when customers will not see any significant difference in service. In contrast, customers are more likely to experience or perceive an impact from the replacement of a Postal Service-operated retail facility with a contractor-operated retail facility.

“Consolidation,” in its former sense of changing a Post Office into a station or branch of another Post Office, has rarely been applied over the last 20 years. From the perspective of postal customers, a conversion between Postal Service-operated retail facility types has only minimal impact, as few customers are aware of the distinction between different types of retail units.

Unlike classified stations and branches, contractor-operated retail facilities can be closed without being subject to the discontinuance process. Relationships established through a contract have alternative mechanisms for termination or other changes. The continuation of contractor-operated facilities is much more dependent on the contractor’s willingness to furnish services under contract for a reasonable fee. Contractor-operated units may accordingly experience less predictability in their continuation. Hence, it is more important that customers and other stakeholders have an opportunity to provide input when a Postal Service-operated retail facility is converted into a contractor-operated retail facility than when a conversion results in Postal Service-operated classified station or branch. The latter are not subject to the greater unpredictability of a contractor-operator, and so customers are unlikely to perceive a significant difference in service when a Post Office is converted into a Postal Service-operated classified station or branch.

Two postmaster organizations submitted a legal opinion to the effect that the proposed approach to “consolidation” runs counter to a consistent definition provided by legislative history, courts, and the Postal

Service itself. This legal analysis appears to overlook the fact that most of the authorities on which it relies, some of which date back to the 1970s, were premised on Postal Service regulations in effect at the time and did not speak to whether the Postal Service was somehow precluded from changing those regulations. That the Postal Service’s previous interpretation of “consolidation” was found to be reasonable does not mean that that interpretation is the only reasonable and valid one. See *Citizens for the Hopkins Post Office v. United States Postal Serv.*, 830 F. Supp. 296, 299 (D.S.C. 1993) (“This court finds the definition of ‘consolidation’ advanced by the Postal Service [in its then-current regulations] to be one which is reasonable[.]” (emphasis added)).¹

The United States Supreme Court has long held that an “initial agency interpretation [of a statute] is not instantly carved in stone” and that any agency “must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–64 (1984). This is the case even where a revised interpretation “represents a sharp break with prior interpretations.” *Id.* at 862. Because the plain language of the statute is silent and ambiguous as to the intended definition of “consolidation,” and because the Postal Service is charged with implementing 39 U.S.C. 404(d), the Postal Service is free to revise its interpretation of the statute so long as its interpretation is reasonable. See *id.* at 842–43; *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991); see also *Citizens for the Hopkins Post Office*, 830 F. Supp. at 298–99 (“The term ‘consolidation’ as used in § 404(b) [now 404(d)] is not defined in the statute. Consequently, this court will begin with the principle that the construction placed on a statute by the agency charged with administering it is entitled to considerable deference and should be upheld if reasonable.”). In the proposed rule and elsewhere in this final rule, the Postal Service has explained why it is reasonable to revise its interpretation of “consolidation” in order to give sensible and feasible effect to larger regulatory

¹ The author of the legal opinion appears to have misquoted this sentence of the *Citizens for the Hopkins Post Office* opinion as referring to “the [sic] one which is reasonable.” This error may help to explain why the author reads the opinion as supporting the author’s conclusion that the Postal Service’s historical interpretation of “consolidation” is the *only* permissible one, rather than one of multiple interpretive possibilities. The actual quotation supports the latter view.

changes that will increase transparency and public participation.

The same legal opinion cited a pleading filed by the Postal Service in an ongoing federal action to support its view that the instant rulemaking somehow undoes an indelible aspect of postal law. The legal opinion fails to note that the subject matter of the litigation and the quoted pleading itself concern Postal Service regulations in effect at the time. They do not prejudice the Postal Service's authority or discretion to revise those regulations at a later time. An agency is entitled to defend its actions based on its legal interpretation and regulations in effect at the applicable time, rather than on prior or subsequent policies and regulations. As the Postal Service noted in its proposed rule and first final rule, and reiterates here, this rulemaking is not retroactive and does not affect any actions taken by the Postal Service under previous regulations. See generally, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that agency regulations are not retroactive except as specifically authorized by Congress).

In sum, the proposed reinterpretation of "consolidation" is within the Postal Service's authority to administer the statutory scheme. The Postal Service is adopting a new interpretation of the existing statutory term, while continuing to apply the discontinuance procedures established by Congress to consolidations as distinct from closings. The proposed interpretation is reasonable in its own right and goes a long way toward closing the gap between respective Postal Service and Commission positions. It also fits into the larger framework of changes to orient discontinuance processes more appropriately around customer expectations—as the Commission and others have recommended for years—and to increase public transparency and participation.

B. Staffing of Post Offices

Many commenters expressed the view that the Postmaster Equity Act, Public Law 108–86 (2003), precludes the proposed change to 39 CFR 241.1 such that a Post Office may be staffed by non-postmaster personnel. As codified in 39 U.S.C. 1004(i)(3), the Postmaster Equity Act defines a "postmaster" as "an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors."

The Postmaster Equity Act serves the purpose of requiring consultation by the Postal Service with groups representing middle management tiers regarding,

among other things, pay policies and schedules. It was not intended to—and unambiguously did not—modify the Postal Service's authority to determine the staffing and scope of its retail facility network. See 39 U.S.C. 403(b)(1), 403(b)(3), 404(a)(3), 1001(e)(4)–(5). Congress was explicit in framing Section 1004(i)'s definitions as applicable only "for purposes of this section." 39 U.S.C. 1004(i). Cf. *United States v. Cons. Life Ins. Co.*, 430 U.S. 725, 769 (1977) (White, J., dissenting) (finding a definition under section 801(c)(2) and (3) of the Internal Revenue Code of 1954 to be inapplicable to rules for taxing the income of life insurance companies from modified coinsured contracts under section 820 of the Internal Revenue Code of 1954, because the definition was applicable only "for purposes of * * * subsection 801(a)"); *Thomas v. U.S. Bank Nat'l Ass'n*, 575 F.3d 794, 798 (8th Cir. 2009) (construing preemption language "for purposes of this section" in 12 U.S.C. 1831d(a) as meaning that "conflicting state constitutions or statutes are not preempted for every and all purposes, but only for purposes of 'this section'"). Congress could have applied Section 1004(i)'s definitions to title 39 more broadly or even to section 404(d) in particular, but it did not do so. Therefore, the limited context of the Postmaster Equity Act is inapposite to this rulemaking.

Even if the Postmaster Equity Act had some import in this context, the proposed rule would not be inconsistent with the definition of a "postmaster" therein. The Postmaster Equity Act does not require that each postmaster manage only one Post Office or that every Post Office be individually staffed by a postmaster. Indeed, in many cities, postmasters are responsible for a main Post Office and several classified stations and branches, which the Commission has repeatedly described as having no functional difference from customers' perspectives from Post Offices. The Postal Service is confident that rural postmasters would be similarly capable of overseeing operations at more than one retail facility.

Decisions about the staffing of Post Offices are within the Postal Service's general authority to manage Post Offices and staff appointments under the Postal Reorganization Act provisions cited above. The proposed rule is consistent with the definition of a postmaster under the Postmaster Equity Act, exercises appropriate and reasonable rule-making authority under the Postal Reorganization Act, and streamlines postal operations in order to reduce

costs and enhance value. Therefore, it is a reasonable exercise of the Postal Service's authority to administer its statutory objectives, and it is not inconsistent with title 39 of the U.S. Code.

One commenter was concerned that, as a result of the same change, the presence of Post Offices staffed by non-postmaster personnel would make it easier for the Postal Service to close those facilities. It is unclear how such an effect would flow from mere staffing arrangements, however. The same requirements, criteria, and procedures apply to all Post Offices, regardless of how they are staffed. As explained in the proposed rule, those same requirements, criteria, and procedures are now applied, as a matter of policy, to Postal Service-operated stations and branches, which are not staffed by postmasters today. If anything, this change could lead to the continued operation of Post Offices that otherwise would be discontinued, due to the Postal Service's ability to staff them in a more flexible and economical fashion.

Another commenter viewed the proposed change to 39 CFR 241.1 as inconsistent with Employee and Labor Relations Manual (ELM) 113.3, which the commenter believed to correspond to 39 U.S.C. 1004(i)(3). ELM 113.3(k) reflects the Postal Service's previous practice of requiring a postmaster at all Post Offices. As explained above, 39 U.S.C. 1004(i)(3) defines a "postmaster" in association with a Post Office, but does not require that a Post Office be associated with a postmaster staffing each Post Office in all cases. Hence, the Postal Service is not precluded by statute from taking a different approach. The Postal Service plans to update ELM 113.3(k) to reflect the change to 39 CFR 241.1.

A postal supervisors' organization raised concerns that the replacement of Executive and Administrative Schedule (EAS) employees with bargaining-unit employees, and/or postmasters with clerks-in-charge, would increase workload, deprive communities of access to knowledgeable management personnel, and not offer significant cost savings in light of current pay ceilings. The Postal Service has not yet determined to take any such specific action in furtherance of these changes to the overarching regulations. Any particular staffing decision would presumably take account of workload, community needs, and cost savings. In this rulemaking, the Postal Service only removes, as a general matter, a self-imposed restriction on its discretion to make such decisions in instances where

more flexible staffing may be the most rational option.

II. Explanation of Changes From Proposed Rule

The final rule includes the following additional changes to the proposed rule.

Paragraph 241.1(a) has been revised to clarify that the operation or staffing of a Post Office by non-postmaster personnel must be at the direction of the postmaster, and that it may include times when the postmaster is not physically present. While the proposed rule referred to whether a Post Office was “operated or managed” by non-postmaster personnel, the phrase “operated or staffed” better reflects the intended meaning that a postmaster would continue to manage operations at the Post Office, albeit possibly without personally operating or staffing it on a continuous basis.

A sentence is added to paragraph 241.3(a)(1)(ii) (redesignated as 241.3(a)(1)(iii)) to clarify that these regulations will no longer apply to discontinuance actions pending as of December 1, 2011, that pertain to the conversion of a Post Office to another type of USPS-operated facility.

The definition of “consolidation” in paragraph 241.3(a)(2)(iv) is revised to restrict the term’s definition to instances where a Postal Service-operated retail facility is replaced with a contractor-operated retail facility that reports to a Postal Service-operated retail facility. Consistent with the proposed rule, the term no longer encompasses situations where a Post Office is replaced with a Classified Station or Classified Branch.

Paragraph 241.3(b)(4) is revised to indicate the possibility that a consolidated facility’s name, or a similar name, can be used by the succeeding facility, rather than suggesting an expectation that the former name will be maintained, thereby allowing for the range of contract- and service-specific circumstances that can affect such a determination.

The Postal Service hereby adopts the following changes to 39 CFR part 241.

List of Subjects in 39 CFR Part 241

Organization and functions (government agencies), Postal Service.

Accordingly, 39 CFR part 241 is amended as follows:

PART 241—RETAIL ORGANIZATION AND ADMINISTRATION: ESTABLISHMENT, CLASSIFICATION, AND DISCONTINUANCE

■ 1. The authority citation for 39 CFR part 241 continues to read as follows:

Authority: 39 U.S.C. 101, 401, 403, 404, 410, 1001.

■ 2. In § 241.1, paragraph (a) is revised to read as follows:

§ 241.1 Post offices.

(a) *Establishment.* Post Offices are established and maintained at locations deemed necessary to ensure that regular and effective postal services are available to all customers within specified geographic boundaries. A Post Office may be operated or staffed by a postmaster or by another type of postal employee at the direction of the postmaster, including when the postmaster is not physically present.

* * * * *

■ 3. In § 241.3:

- a. Paragraph (a)(1)(i)(B) is revised;
- b. Paragraph (a)(1)(ii) is redesignated as paragraph (a)(1)(iii), and new paragraph (a)(1)(ii) is added;
- c. Newly redesignated paragraph (a)(1)(iii) is revised;
- d. Paragraph (a)(2)(iv) is revised;
- e. Paragraph (b)(2)(i) is revised;
- f. Paragraph (b)(4) is revised; and
- g. Paragraph (c)(2) is revised.

The revisions and additions read as follows:

§ 241.3 Discontinuance of USPS-operated retail facilities.

- (a) * * *
- (1) * * *
- (i) * * *

(B) Combine a USPS-operated Post Office, station, or branch with another USPS-operated retail facility, or

(ii) The conversion of a Post Office into, or the replacement of a Post Office with, another type of USPS-operated retail facility is not a discontinuance action subject to this section. A change in the staffing of a Post Office such that it is staffed only part-time by a postmaster, or not staffed at all by a postmaster, but rather by another type of USPS employee, is not a discontinuance action subject to this section.

(iii) The regulations in this section are mandatory only with respect to discontinuance actions for which initial feasibility studies have been initiated on or after July 14, 2011. Unless otherwise provided by responsible personnel, the rules under § 241.3 as in effect prior to July 14, 2011 shall apply to discontinuance actions for which initial feasibility studies have been initiated prior to July 14, 2011. Discontinuance actions pending as of December 1, 2011, that pertain to the conversion of a Post Office to another type of USPS-operated facility are no longer subject to these regulations.

(2) * * *

(iv) “Consolidation” means an action that converts a Postal Service-operated retail facility into a contractor-operated retail facility. The resulting contractor-operated retail facility reports to a Postal Service-operated retail facility.

* * * * *

(b) * * *

(2) * * *

(i) In a consolidation, the ZIP Code for the replacement contractor-operated retail facility is the ZIP Code originally assigned to the discontinued facility.

* * * * *

(4) *Name of facility established by consolidation.* If a USPS-operated retail facility is consolidated by establishing in its place a contractor-operated facility, the replacement unit can be given the same name of the facility that is replaced, if appropriate in light of the nature of the contract and level of service provided.

(c) * * *

(2) *Consolidation.* The proposed action may include a consolidation of USPS-operated retail facilities. A consolidation arises when a USPS-operated retail facility is replaced with a contractor-operated retail facility.

* * * * *

Stanley F. Mires,

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0538; FRL–8891–3]

Bacteriophage of *Clavibacter michiganensis* Subspecies *michiganensis*; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of lytic bacteriophage of *Clavibacter michiganensis* subspecies *michiganensis* produced in *Clavibacter michiganensis* subspecies *michiganensis* in or on tomato when applied as a bactericide in accordance with good agricultural practices. On behalf of OmniLytics, Inc., Interregional Research Project Number 4 (IR–4) submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA) requesting an exemption from