

Report of Birth Abroad, based on the facts and law in effect at the time such action was taken.

- 13. Revise § 51.72 to read as follows:

**§ 51.72 Transcript and record of the hearing.**

A qualified reporter, provided by the Department, will make a complete verbatim transcript of the hearing. The person requesting the hearing or his or her attorney may review and purchase a copy of the transcript directly from the reporter. The hearing transcript and all the information and documents received by the hearing officer, whether or not deemed relevant, will constitute the record of the hearing. The hearing officer's preliminary findings and recommendations are deliberative, and shall not be considered part of the record unless adopted by the Deputy Assistant Secretary for Passport Services, or his or her designee.

- 14. Revise § 51.73 to read as follows:

**§ 51.73 Privacy of hearing.**

Only the person requesting the hearing, his or her attorney, an interpreter, the hearing officer, the reporter transcribing the hearing, and employees of the Department concerned with the presentation of the case may be present at the hearing. Witnesses may be present only while actually giving testimony or as otherwise directed by the hearing officer.

- 15. Revise § 51.74 to read as follows:

**§ 51.74 Final decision.**

After reviewing the record of the hearing and the preliminary findings of fact and recommendations of the hearing officer, and considering legal and policy considerations he or she deems relevant, the Deputy Assistant Secretary for Passport Services, or his or her designee, will decide whether to uphold the denial or revocation of the passport or cancellation of the Consular Report of Birth Abroad. The Department will promptly notify the person requesting the hearing of the decision in writing. If the decision is to uphold the denial, revocation, or cancellation, the notice will contain the reason(s) for the decision. The decision is final and is not subject to further administrative review.

Dated: May 3, 2018.

**Carl C. Risch,**

*Assistant Secretary of State for Consular Affairs, Department of State.*

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**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

[Docket Number USCG-2017-0234]

**RIN 1625-AA00**

**Safety Zone; Pacific Ocean, Kilauea Lava Flow Ocean Entry on Southeast Side of Island of Hawaii, HI**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing a permanent safety zone surrounding the area of entry of lava from the Kilauea volcano into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. This action is necessary to protect persons and vessels from the potential hazards associated with molten lava entering the ocean. This regulation prohibits persons and vessels from being in the safety zone during active lava flow reaching the Pacific Ocean on Kilauea volcano's southeast coast unless specifically authorized by the Captain of the Port Honolulu or a designated representative.

**DATES:** This rule is effective without actual notice May 11, 2018. For purposes of enforcement, actual notice will be used if active lava associated with the Kilauea activity enters into the Pacific Ocean prior to May 11, 2018.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2017-0234 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Commander John Bannon, Waterways Management Division, Coast Guard; telephone 808-541-4359, email [John.E.Bannon@uscg.mil](mailto:John.E.Bannon@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

BLS Bureau of Labor Statistics  
 COTP Captain of the Port  
 DHS Department of Homeland Security  
 FR Federal Register  
 FRFA Final regulatory flexibility analysis  
 HVO Hawaii Volcano Observatory  
 IRFA Initial regulatory flexibility analysis  
 NAICS North American Industry Classification System  
 NPRM Notice of proposed rulemaking  
 OMB Office of Management and Budget  
 § Section symbol

RFA Regulatory Flexibility Act  
 SNPRM Supplemental notice of proposed rulemaking  
 TFR Temporary final rule  
 U.S.C. United States Code

**II. Background Information and Regulatory History**

Molten lava that enters the ocean is potentially hazardous to anyone near it, particularly when lava deltas collapse. A lava delta is new land that forms when lava accumulates above sea level, and extends from the existing base of a sea cliff. Persons and vessels near active lava flow ocean-entry sites face potential hazards, including—

- Plumes of hot, corrosive seawater laden with hydrochloric acid and fine volcanic particles that can irritate the skin, eyes, and lungs;
- Explosions of debris and eruptions of scalding water from hot rock entering the ocean;
- Sudden lava delta collapses; and
- Waves associated with these explosions and collapses.

Lava began entering the ocean at the Kamokuna lava delta on Kilauea volcano's south coast in July 2016. Lava continued to enter the ocean at the Kamokuna lava delta from July 2016 to mid-November 2017.

Ocean safety concerns began on December 31, 2016, when a large portion of the new lava delta collapsed into the ocean, producing waves and explosions of debris at 19°19'12" N, 155°02'24" W near the Kamokuna entry point. Following this collapse, portions of the adjacent sea cliff continued to collapse into the Pacific Ocean, producing localized waves and showers of debris.

In March 2017, a new delta began to form at the Kamokuna ocean-entry point, and from March 2017 to July 2017, several collapses of the lava bench were observed by National Park Service and Hawaiian Volcano Observatory (HVO) staff. Beginning in the middle of November 2017, the lava flow slowed down and subsequently stopped entering the ocean, and as of March 2018, the lava flow remains inactive.

Though the Kamokuna lava delta is not currently active, this region and associated coastline remains hazardous both to visitors on land and to the boating public due to active seismic and lava activity associated with the Kilauea lava flow. According to the HVO, which is part of the U.S. Geological Survey and responsible for monitoring volcanoes and earthquakes in Hawaii, the lava delta remains unstable and resumed ocean lava flow is realistic. Hazards to the public include hot gases, lava, scalding water, unstable vertical sea

cliffs and possible sudden explosions should the lava delta begin to collapse. Additionally, cracks parallel to the sea cliff in the surrounding area indicate that further collapses with little or no warning are possible. Therefore, the safety zone remains relevant. When the safety zone is being enforced, access into the safety zone can still be requested to the Captain of the Port (COTP) Honolulu.

On March 28, 2017, the COTP Honolulu issued a temporary final rule (TFR) under docket number USCG–2017–0172. The TFR established a safety zone to immediately protect persons and vessels from the potential hazards associated with molten lava entering the ocean. The safety zone encompassed all waters extending 300 meters (984 feet) in every direction around all ocean-entry points of lava. The Coast Guard prohibited entry of persons or vessels into the safety zone, unless authorized by the COTP Honolulu, or his designated representative.

The TFR was published in the **Federal Register** (82 FR 16109) on April 3, 2017. A six-month extension of the TFR was published in the **Federal Register** (82 FR 45461) on September 29, 2017, extending the TFR through March 28, 2018. The TFR extension allowed the Coast Guard to analyze the economic impact of the safety zone and provide for additional public comment.

On April 3, 2017, the Coast Guard also published a notice of proposed rulemaking (NPRM) in the **Federal Register** (82 FR 16142), which proposed to make the temporary safety zone a final rule, and invited the public to comment during the comment period. During this comment period, which ended June 2, 2017, we received 67 comments.

On May 8, 2017, we held a public meeting in Hilo, HI, that allowed local citizens and small businesses affected by the TFR to discuss the lava safety concerns, the safety zone impact, and the impact the proposed rule would have on ocean users. Participants were encouraged to submit formal feedback to the rulemaking docket.

On December 20, 2017, the Coast Guard published a supplemental notice of proposed rulemaking (SNPRM) in the **Federal Register** (82 FR 60341). Its purpose was to address additional concerns related to the potential impact of the safety zone on small entities should lava flow resume. Lava flow entering the ocean ended in November, 2017. The SNPRM addressed the past and future concerns, and invited the public to further comment during the comment period, which ended February

20, 2018. During this comment period, we received two comments that were not germane to the rulemaking and only one from the public.

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 would be impracticable because immediate action is needed due to recent volcanic activity. Active eruption of lava and gas has recently commenced and continues from Kilauea Volcano. On Friday, May 4, 2018, a magnitude 6.9 earthquake was measured in the region and HVO advises that more should be expected with a larger aftershocks potentially producing rockfalls, localized tsunamis, and associated ash clouds. High levels of lava and volcanic gas including Sulphur Dioxide are being emitted from the fissure vents. In consideration of the events, safety hazards and concerns, the Coast Guard finds that good cause exists for making this regulation effective immediately. This rule is needed to protect personnel and vessels in the navigable waters with the safety zone.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The COTP Honolulu has determined that there are potential hazards associated with the molten lava at the Kamokuna lava delta or future locations associated with the Kilauea lava flow, which pose potential safety concerns for anyone within 300 meters of the ocean-entry point.

The purpose of this rule is to establish a permanent safety zone around the lava flow entry area associated with the Kilauea lava delta entry coastline to mitigate ocean hazards during times when lava is entering the ocean. Additionally, this rule allows the Coast Guard to impose and enforce restrictions on vessels operating near the lava flow that enters the ocean as the Coast Guard determines necessary. This action is necessary to promote safe navigation, and to preserve the safety of life and property. Vessels capable of safely operating inside the safety zone may be authorized to enter by the COTP Honolulu or his designated representative. Vessels approved for transiting within the safety zone during active lava ocean entry are required to adhere to specific conditions set by the COTP Honolulu. Mariners who seek initial authorization to enter the safety zone when there is active lava ocean entry must submit a written request by email or letter. The request must explain how the vessel will operate safely in

proximity to lava. A typical request should note the vessel's condition, the operator's familiarity with the surrounding waters, and any specific safety practices for operating near the lava ocean-entry points. Once initial authorization is received, a vessel owner or operator only needs to contact COTP Honolulu by phone or radio to request permission to enter the safety zone.

### IV. Discussion of Comments, Changes, and the Rule

In response to the NPRM, the Coast Guard received 67 public comments. In addition to both the NPRM and the public meeting held in Hilo, HI, on May 8, 2017, we published a SNPRM to further address economic impacts on small entities potentially affected by the safety zone. The Coast Guard received two public comments on the SNPRM, neither of which were germane to the rulemaking. All public comments and the public meeting summary are available in the docket for this rulemaking where indicated under **ADDRESSES**.

Based on all the comments received, the Coast Guard adopts the rule as proposed in the NPRM and supplemented in the SNPRM as 33 CFR 165.1414 without major change. After review of the SNPRM proposed language, we made a minor edit to paragraph (c) to clarify that this is no longer proposed language. In paragraph (c)(2), we also further clarify that entry into or remaining in this safety zone, when enforced, is prohibited unless authorized by the COTP Honolulu or his designated representative. This clarification is necessary to highlight that when lava is not a threat to mariners, the safety zone is not enforced. Finally, in paragraph (c)(3), we added further clarification that notice for entry into the safety zone is necessary only when the safety zone is enforced.

We received nine comments on the NPRM in support of the proposed rule. One commenter noted that he had taken a lava boat tour and felt that the vessel got too close to the entry point and that he experienced adverse health symptoms from being in the lava plume. Several commenters agreed that the safety zone should be consistent with that of the landside restriction of 300 meters. Other commenters supported the safety zone due to the hazards resulting from the entry of volcanic lava into the ocean.

The Coast Guard received 18 comments regarding the safety zone's size and location. These comments ranged from being in favor of the 300-meter safety zone to being opposed.

Nine opposing views stated that 300 meters is excessively restrictive. One comment from the National Oceanic Atmospheric Administration stated that the Coast Guard should “provide definitive bounding coordinates for the safety zone, instead of a general statement that the safety zone will encompass all waters extending 300 meters in all directions around the entry point of lava flow into the ocean associated with the lava flow at the Kamokuna lava delta or Kilauea crater.”

We believe that because of the unpredictable and varying nature of the active lava flowing into the ocean at this area, the Coast Guard cannot issue specific geographic coordinates of the safety zone in the final rule, but will note the current entry site and update for future sites. We note, with the concurrence of NOAA’s Nautical Data Branch, Marine Chart Division, the position 19°19’08” N, 155°02’36” W. These are the coordinates provided for Kamokuna Beach in the U.S. Geological Survey’s Geographic Names Information System. Future lava entry locations may vary from the Kamokuna Beach location.

Additionally, because of the varying dangers of the lava entry and fragile bench shelf development, the Coast Guard cannot provide a specific distance at which a vessel can safely operate. However, the COTP Honolulu has permitted vessels to operate within the 300-meter safety zone under certain conditions when the safety zone is actively enforced.

The Coast Guard received one comment from Hawaii Volcanoes National Park supporting a safety zone “that is flexible to account for whatever location the lava may occur since it is not a static event in time or space,” and a recommendation “that the proposed rule apply not just to the Kamokuna ocean-entry point, but any location in the future where lava enters the ocean.”

We agree, and the final rule includes language stating that all locations associated with the Kilauea lava flow entering the Pacific Ocean on the eastern side of the Island of Hawaii, HI, are included under the safety zone.

Sixteen commenters recommended that the Coast Guard reduce the 300-meter radius of the safety zone.

We believe that based on Sector Honolulu’s review of the historical observations of delta collapses and ejecta distances from HVO records, a radius of 300 meters remains a safe and reasonable distance for a high-hazard zone for the general boating public. The HVO reports that explosions from delta collapses “have hurled hot rocks nearly a meter (yard) in size as far as about 250

m (273 yards) inland from the collapsed delta and scattered rock debris onshore over an area the size of several football fields. These explosions also hurl rocks seaward, probably to similar distances.”<sup>1</sup>

The 300-meter safety zone also mirrors land and air restrictions for lava flow viewing. Furthermore, HVO staff reiterated the need for a 300-meter safety zone at the public meeting held on this rulemaking. Accordingly, the Coast Guard will maintain the safety zone’s 300-meter radius, with the option of allowing operators to request authorization to enter the safety zone from the COTP Honolulu.

The Coast Guard received 30 comments in favor of allowing the lava tour-boat owners and operators to enter and operate in the safety zone.

Under this final rule, any vessel owner or operator may submit a written request to the COTP Honolulu, or his designated representative, for authorization to enter the safety zone. Such written requests must explain how the vessel will operate safely in proximity to lava. A typical request should note the vessel’s condition, the operator’s familiarity with the surrounding waters, and any specific safety practices for operating near the lava ocean-entry points. Once initial authorization is received, a vessel owner or operator only needs to contact COTP Honolulu by phone or radio to request permission to enter the safety zone. Prior to the NPRM, the Coast Guard promulgated a TFR for a 300-meter safety zone at the Kamokuna lava delta. Pursuant to the TFR, the COTP Honolulu granted four lava tour-boat owners and operators and one photographer access to operate within the safety zone. If lava begins to flow into the ocean again, these tour operators will be granted renewed permission to enter the safety zone. The Coast Guard received three comments regarding access or exclusive access to the lava flow by Hawaiian natives. This rule is concerned with the safety aspect of access to the lava flow area. Mandating exclusive access to the lava flow is outside the scope of this rulemaking and is outside the Coast Guard’s authority. When the safety zone is enforced, this rule provides guidance for requesting permission to enter the safety zone from the COTP Honolulu or his designated representative.

The Coast Guard received one comment regarding the lack of reliable VHF radio communications near the lava flow area, thereby preventing lava

tour-boat owners and operators from hailing the Coast Guard via VHF radio.

We are aware of the VHF radio limitations in this area, and are currently researching how to improve radio coverage. The COTP Honolulu and Coast Guard Base Honolulu are attempting to install equipment in the vicinity to enhance communications in this area. In the meantime, vessel owners and operators are encouraged to use alternate means to communicate effectively near the lava flow ocean-entry points. They are also encouraged to contact the Coast Guard in advance of their transits to the lava ocean-entry points and departure in order to facilitate effective communications as well as the timely processing of any written request for authorization to enter the safety zone.

The Coast Guard received four comments regarding general unsafe conditions at the boat ramp where tour operators launch.

Boat ramps and associated safe boating concerns are a state management issue. We have forwarded this comment to the appropriate state office.

One comment proposed the safety zone be stationary and move with the lava shelf, essentially creating a moving safety zone.

Title 33 CFR 165.20 defines a safety zone as a water area to which, for safety purposes, access is limited to authorized persons or vessels. It further states that a safety zone may be stationary and described by fixed limits. We believe that in this situation, the entry point of the lava changes based on flow, and as such, the safety zone would encompass all waters extending 300 meters (984 feet) in all directions around the entry point of lava flow into the ocean. The Coast Guard does not define this as a moving safety zone around a moving object, but rather as a necessary adjustment to a dynamic environmental occurrence, which may have multiple lava entry points.

The Coast Guard also received a comment stating that our certification under 5 U.S.C. 605(b), concerning the economic impact on small entities, was potentially arbitrary as it lacked any factual basis for the certification. An initial regulatory flexibility analysis in accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, was conducted through an SNPRM, which allowed for public comment. The Coast Guard received no comments on the initial regulatory flexibility analysis (IRFA).

The Coast Guard received two comments regarding Executive Order 13771, Reducing Regulation and

<sup>1</sup> [https://volcanoes.usgs.gov/observatories/hvo/hawaii\\_ocean\\_entry.html](https://volcanoes.usgs.gov/observatories/hvo/hawaii_ocean_entry.html).

Controlling Regulatory Costs, which directs a reduction of the promulgation of new regulations. As discussed in the following section, this rule is exempt from this Executive order.

**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 discuss First Amendment rights of protestors.

*A. Regulatory Planning and Review*

Executive Orders 13563, Improving Regulation and Regulatory Review, and 12866, Regulatory Planning and Review, 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

We only received one public comment on the SNPRM and it was beyond the scope of this regulation. Therefore, we adopt the preliminary regulatory analysis for the proposed rule as final. A summary of that analysis follows.

This regulatory analysis provides an evaluation of the economic impacts associated with this final rule. The Coast Guard is issuing a final rule to ensure the safety of mariners, lava tour-boat passengers, and the protection of property by establishing a 300-meter

safety zone from every direction and all points where lava enters the ocean. In order to mitigate the potential costs of this rule, the Coast Guard has and will continue to issue exemptions to mariners that can demonstrate a level of safety sufficient for the additional hazards present where lava enters the ocean.

In November 2017, lava ceased flowing from Kilauea volcano into the Pacific Ocean. Consequently, the Coast Guard has temporarily stopped enforcing the safety zone. In the final rule, we added regulatory text clarifying that the regulation is only enforced when lava is actively flowing into the ocean. This change will not impose any economic costs on any mariners or members of the public because it does not create any requirements. Other than changes clarifying that the safety zone is enforced as long as lava flows into the ocean, we made no further changes to the regulatory text.

Table 1 provides a summary of the affected population, costs, and benefits of this rule.

**TABLE 1—SUMMARY OF IMPACTS OF THE FINAL RULE**

Category	Summary
Affected population ...	4 tour boat operators.
Costs to industry .....	593.88.
Costs to government .....	378.00.
Total costs .....	971.88.
Unquantified benefits	Protection from unsafe operations where vessels enter the safety zone.

**Affected Population**

This final rule makes permanent the existing TFR safety zone for the navigable waters surrounding the entry of lava from Kilauea volcano into the Pacific Ocean. The TFR restricted access to those vessels that contacted the COTP Honolulu and requested permission to enter the temporary safety zone.

Therefore, this rule affects any vessel that would normally travel within 300 meters of points where lava reaches the ocean. Due to the hazards and relative remoteness of the area, the Coast Guard is not aware of any vessel operations within 300 meters of where lava enters the ocean other than those conducted by lava tour-boat owners and operators. While the TFR was still in effect, the COTP Honolulu granted four lava tour-boat owners and operators and one photographer authorization to enter the safety zone under certain conditions. When lava reenters the safety zone, these four tour operators will constitute

the affected population because the Coast Guard does not believe other entities are likely to operate near the safety zone.

**Costs**

Under the TFR, published concurrently with the NPRM on April 3, 2017, vessel owners and operators were required to prepare and submit a written request to the COTP Honolulu to enter the safety zone. Because the requirements of this final rule are consistent with the requirements in the TFR, we are presenting the costs associated with the TFR in this final rule. Four operators that previously applied will be grandfathered in and permitted to operate in the safety zone when the lava flow returns in the future. Additional operators that wish to enter the safety zone will need to submit written requests to the COTP Honolulu. The Coast Guard is not aware of any additional individuals that are likely to request access to enter the safety zone in the future.

The written request requirement was contained in the previous TFR and each lava tour-boat owner and operator seeking authorization to enter the safety zone complied. Based on discussions with COTP Honolulu personnel, we estimated it takes about four hours for a vessel owner or operator to submit a written request to enter the safety zone. This includes the time it would take lava tour-boat owners and operators to respond to questions from the COTP concerning the written request. Lava tour-boat owners and operators would only be required to make a written request once rather than for each voyage. The Coast Guard is not aware that any voyages were terminated due to a lack of authorization to enter the safety zone during the period operators requested to enter.

We obtained the mean hourly wage rate for a captain of a lava tour-boat from the May 2016 Bureau of Labor Statistics (BLS) Occupational Employment Statistics National Occupational Employment and Wage Estimates. Based on BLS data, the mean hourly wage rate for captains, mates, and pilots of water vessels with the North American Industry Classification System (NAICS) occupational code of 53–5021 in the “Scenic and Sightseeing Transportation, Water” industry is \$24.42.<sup>2</sup> Because this is an unloaded

<sup>2</sup> Captains, mates, and pilots may work in numerous industries. We use the BLS industry-specific mean hourly wage rate for the affected tour boat operators from the “Scenic and Sightseeing Transportation, Water” industry. See <http://www.bls.gov/oes/2016/may/oes535021.htm>.

hourly wage rate, we added a load factor of 1.52 derived from the May 2016 BLS “Employer Cost for Compensation” database to obtain a loaded hourly wage rate of \$37.12.<sup>3</sup> Using this information, we estimated the one-time initial cost for an owner or operator to prepare a written request and respond to comments from the Coast Guard to be \$148.47.<sup>4</sup> Therefore, we estimated the total cost of the proposed rule on tour operators to be \$593.88.<sup>5</sup>

Since all four lava tour-boat owners and operators were each granted permission to enter the safety zone

through an initial written request, the only cost to these lava tour-boat owners and operators was the cost of the initial request. Each owner or operator would also be required to notify the COTP Honolulu by phone during the normal course of their duties before entering the safety zone. We did not estimate a cost for the call because the equipment already exists onboard each vessel and the time cost is minimal. The total costs to industry are therefore \$593.88.

Government costs to implement this rule include the one-time cost of reviewing the written requests. We did

not estimate a cost for the time to receive a call from an owner or operator when entering the safety zone because the COTP Honolulu conducts this review in the normal course of duties and the time requirements are minimal. To process the written requests, we estimated one non-commissioned officer with a rank of E-7, and three officers with ranks of O-4, O-5, and O-6 would take about one hour each to review the written request. Based on the labor rates listed in Table 2,<sup>6</sup> we estimated the total cost of the rule to the Federal government to be \$378.00.

TABLE 2—TOTAL GOVERNMENT COSTS OF THE TEMPORARY FINAL RULE

Rank	Wage rate	Labor hours	Total cost
E-7 .....	\$65	1	\$65
O-4 .....	92	1	92
O-5 .....	104	1	104
O-6 .....	117	1	117
Total .....		4	378

We estimated the total cost of this rule to lava tour-boat owners and operators and to the Federal government to be \$971.88.<sup>7</sup>

Benefits

Lava flow that enters the ocean is potentially hazardous and presents a danger to vessels navigating within close proximity of where the flow enters the ocean, particularly when lava deltas collapse. These hazards include, but are not limited to, plumes of hot, corrosive seawater laden with hydrochloric acid and fine volcanic particles that can irritate the skin, eyes, and lungs; explosions of debris and eruptions of scalding water from hot rock entering the ocean; sudden lava delta collapses; and waves associated with these explosions and collapses. The primary benefit of this rule is to promote safe navigation, and preserve the safety of life and property by ensuring that vessel operators are prepared for the greater risks present where lava enters the ocean. If vessel operators wish to transit through the safety zone they will be required to first contact the COTP Honolulu for permission with an explanation of how their safety and

lifesaving equipment is adequate to meet the greater risks present.

B. Impact on Small Entities

The Regulatory Flexibility Act (RFA) (Pub. L. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. 601-612)) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”<sup>8</sup>

When an agency promulgates a final rule under section 553 of the Administrative Procedure Act, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency must prepare a FRFA or have the head of the agency certify pursuant to RFA section 605(b) that the rule will not, if promulgated, have a significant

economic impact on a substantial number of small entities. The RA prescribes the content of the FRFA, which we discuss below.

In accordance with the RFA, the Coast Guard prepared this FRFA that examines the impacts of the final rule on small entities. A small entity may be:

- A small independent business, defined as independently owned and operated, is organized for profit, and is not dominant in its field per the Small Business Act (15 U.S.C. 632);
- A small not-for-profit organization (any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or
- A small governmental jurisdiction (locality with fewer than 50,000 people).

This FRFA addresses the following:

- (1) A statement of the need for, and objectives of, the rule;
- (2) A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) The response of the agency to any comments filed by the Chief Counsel for

<sup>3</sup> A loaded wage rate is what a company pays per hour to employ a person, not an hourly wage. The loaded wage rate includes the cost of benefits (health insurance, vacation, etc.). The load factor for wages is calculated by dividing total compensation by wages and salaries. For this analysis, we used BLS Employer cost of employee compensation/Transportation and Materials Moving Occupations, Private Industry Report (Series IDs, CMU2010000520000D and CMU2020000520000D) for all workers using the multi-screen data search.

Using 2016 Q4 data for the cost of compensation per hour worked, we divided the total compensation amount of \$28.15 by the wage and salary amount of \$18.53 to obtain the load factor of 1.52, rounded. See the following websites: <https://beta.bls.gov/dataQuery/find?fq=survey:loe&rs=popularity:D> and <https://data.bls.gov/cgi-bin/dsrv?cm>. Multiplying 1.52 by \$24.42, we obtained a loaded hourly wage rate of \$37.12, rounded.

<sup>4</sup> \$37.12 × 4 hours.

<sup>5</sup> \$148.47 × 4 tour operators.

<sup>6</sup> We obtained the hourly wage rates for government personnel from Enclosure (2) of Commandant Instruction 7310.1R (29 March 2017) using the “In Government Rate.”

<sup>7</sup> \$593.88 in costs to industry + \$378 in costs to the Coast Guard.

<sup>8</sup> See RFA section 2(b), 94 Stat. 1164, 1165.

Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Below is a discussion of FRFA analysis by each of these six elements:

(1) A statement of the need for, and objectives of, the rule.

Lava entered the ocean at Kamokuna on Kilauea volcano's south coast between July of 2016 and November of 2017. Lava will continue to enter the ocean again in the foreseeable future. When lava enters the ocean, potential hazards emerge such as: Plumes of corrosive seawater can irritate the skin, eyes, and lungs; explosions of debris and scalding water can injure passengers; collapses of lava deltas can cause large waves potentially capsizing vessels. Unless vessels have the proper equipment and their operators take sufficient precautions, passengers and operators face significant hazards to their lives as well as property. This rule is necessary to promote navigational safety, provide for the safety of life and property, and facilitate and accommodate the reasonable demands of commerce related to tourism surrounding the lava ocean-entry points.

This safety zone will ensure the safety of mariners, lava tour-boat passengers, and the protection of property by establishing a 300-meter safety zone from every direction and all points where lava enters the ocean.

(2) A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in

the proposed rule as a result of such comments.

We only received one public comment which was beyond the scope of the rule; therefore, we made no changes to the proposed rule as a result of public comments.

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

We received no comments the Chief Counsel for Advocacy of the SBA.

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

This rule affects any vessel that would normally travel within 300 meters of points where lava reaches the ocean. Due to the hazards and relative remoteness of such an area, the Coast Guard believes only lava tour operators would regularly operate within 300 meters of a point where lava enters the ocean. Based on the Coast Guard's understanding, there are four known lava tour-boat operators and one photographer who regularly come within 300 meters of the Kilauea lava flow.

Of the four lava tour-boat owners and operators who would transit within the safety zone, we could not find publically available information such as annual revenues and number of employees for three of the four operators. We assumed these three operators qualified as small entities. We found revenue information on the fourth lava tour-boat owner. Using Manta, a publicly available database for businesses in the United States, we found this lava tour-boat owner to have annual revenues of \$220,000 and a NAICS code of 561520, "Tour Operators."<sup>9</sup> This NAICS code has a size threshold of \$20.5 million for annual revenues, based on the Small Business Administration's table of size standards.<sup>10</sup> Based on this information, this lava tour-boat operator also qualified as a small entity.

Based on discussions with COTP Honolulu personnel and using the wage rates and labor hour estimates as established above, we estimated it would take about four hours for an owner or operator of a lava tour-boat to prepare a written request to enter the

safety zone. This includes the time it would take lava tour-boat owners or operators to respond to questions from the COTP concerning the written request. Lava tour-boat owners and operators would be only required to make this request once rather than for every voyage.

Above we obtained a loaded hourly wage rate of \$37.12 for captains, mates, and pilots of water vessels. We estimated the one-time initial cost for an owner or operator to prepare a written request and respond to comments from the Coast Guard to be about \$148.47. We estimated the total cost of the rule on tour operators to be about \$593.88.

As mentioned above, we only found revenue data on one of the four operators. Therefore, we estimate the initial revenue impact of this rule on this lava tour-boat owner to be about \$148.47, which is 0.07% of the company's revenue. There are no annual revenue impacts because the written request needs to be made once, after which each lava tour-boat operator would notify the COTP Honolulu by phone to obtain permission to enter the safety on a given day.

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The Coast Guard considered the alternative of not establishing a safety zone. However, without a safety zone, vessel owners and operators would be unprepared for the greater hazards that are present near the Kilauea lava flow ocean-entry point. These vessel owners and operators and passengers could suffer grave injury or in the extreme case death, in addition to damage to or loss of property, if adequate protection is not provided. Therefore, the Coast Guard decided a safety zone was necessary to promote navigational

<sup>9</sup> Accessed July 17, 2017 from <https://www.manta.com/c/mb05066/kalapana-cultural-tours-inc>.

<sup>10</sup> [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

safety, provide for the safety of life and property, and to accommodate and facilitate the reasonable demands of commerce relating to tourism surrounding the lava entry points. No cost to industry or government would be associated with this alternative; nevertheless, we rejected this alternative because it would not ensure that the boating public would operate within a safe distance of where the lava flow enters the ocean.

Alternatively, the Coast Guard could have instituted a safety zone without permitting any entry into the safety zone. This alternative would have imposed substantial cost onto the four small entity tour operators. As a result, the Coast Guard did not select this alternative.

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. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### 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 Management Directive 023-01 and Commandant Instruction M16475.ID, 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 establishing a safety zone that would prohibit persons and vessels from entry into the 300-meter (984 feet) safety zone extending in all directions around the entry of lava flow into the Pacific Ocean. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1, of DHS Instruction Manual 023-01-001-01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a specified environmental impact from this rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact 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:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.1414 to read as follows:

#### § 165.1414 Safety Zone; Pacific Ocean, Kilauea Lava Flow Ocean Entry on Southeast Side of Island of Hawaii, HI.

(a) *Location.* The safety zone area is located within the Captain of the Port (COTP) Honolulu Zone (See 33 CFR 3.70-10) and encompasses all primary areas from the surface of the water to the ocean floor at the Kilauea active lava flow entry into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The entry point of the lava may change based on flow. The safety zone encompasses all waters extending 300 meters (984 feet) in all directions around entry points of lava flow into the ocean associated with the Kilauea active lava flow.

(b) *Definitions.* As used in this section, designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the COTP Honolulu to assist in enforcing the safety zone described in paragraph (a) of this section.

(c) *Regulations.* The general regulations governing safety zones contained in § 165.23 apply to this safety zone.

(1) All persons and vessels are required to comply with the general regulations governing safety zones found in this part.

(2) Entry into or remaining in this safety zone when enforced is prohibited unless authorized by the COTP Honolulu, or his designated representative.

(3) Persons or vessels desiring to enter the safety zone identified in paragraph (a) of this section should submit a written request to the COTP Honolulu before initial entry into the safety zone when the Coast Guard notifies the public of safety zone enforcement. The request must explain how the vessel will operate safely in proximity to lava. A typical request should note the vessel's condition, the operator's familiarity with the surrounding waters, and any specific safety practices for

operating near the lava ocean-entry points. Persons authorized initial entry may, thereafter, contact the COTP Honolulu through his designated representatives at the Command Center via telephone: 808-842-2600 and 808-842-2601; fax: 808-842-2642; or on VHF channel 16 (156.8 Mhz) to request permission to transit the safety zone.

(4) If permission is granted, all persons and vessels must comply with the instructions of the COTP Honolulu, or his designated representative, and proceed at the minimum speed necessary to maintain a safe course while transiting through or in the safety zone as well as maintain a safe distance from the lava hazards.

(5) The COTP Honolulu will provide notice of enforcement of the safety zone described in this section by verbal radio broadcasts and written notice to mariners. The Coast Guard vessels enforcing this section can be contacted on marine band radio VHF-FM channel 16 (156.8 MHz). The COTP Honolulu and his or her designated representatives can be contacted at telephone number listed in paragraph (c)(3) of this section.

(6) The Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

Dated: May 7, 2018.

**M.C. Long,**

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

[FR Doc. 2018-10049 Filed 5-10-18; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2018-0387]

RIN 1625-AA00

#### **Safety Zone; Barge PFE-LB444, San Joaquin River, Blackslough Landing, CA**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters of the San Joaquin River due to an unstable, partially submerged barge with hull number PFE-LB444. The temporary safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the barge and associated recovery efforts. Entry of

vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Francisco.

**DATES:** This rule is effective without actual notice from May 11, 2018 until May 31, 2018. For the purposes of enforcement, actual notice will be used from May 7, 2018 until May 11, 2018.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2018-0387 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Junior Grade Emily K. Rowan, U.S. Coast Guard Sector San Francisco; telephone 415-399-7443, email [emily.k.rowan@uscg.mil](mailto:emily.k.rowan@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

##### **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 of the emergent nature of the situation. Notice and comment procedures would be impracticable because immediate action is needed protect personnel, vessels, and the marine environment from potential hazards associated with the barge and associated recovery efforts.

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**. For the reasons stated above, delaying the effective date of the rule would be impracticable.

##### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231; 50

U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to establish safety zones. The Captain of the Port San Francisco (COTP) has determined that potential hazards associated with the barge and associated recovery efforts will be a safety concern for anyone within a 90-yard radius of the barge. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone.

##### **IV. Discussion of the Rule**

This rule establishes a temporary safety zone from May 7, 2018 through May 31, 2018. The safety zone will cover all navigable waters within 90 yards of the unstable barge and associated recovery efforts centered in approximate position 37° 59' 41.88" N, 121° 25' 8.88" W (NAD 83). The effect of the temporary safety zone is intended to protect personnel, vessels, and the marine environment in these navigable waters from potential hazards associated with the barge and associated recovery efforts. 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. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the limited duration and narrowly tailored geographic area of the safety zone. Although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant because the local waterway users will be notified via