

the “actual delivery” exception is available?

*Question 4:* As noted above, CEA sections 4(a), 4(b), and 4b apply to retail commodity transactions “as if” the transaction was a futures contract.<sup>74</sup> Therefore, absent an exception, a retail commodity transaction must be offered on or subject to the rules of a designated contract market (“DCM”).<sup>75</sup> Separately, an entity soliciting or accepting orders for retail commodity transactions and accepting money, securities, or property (or extending credit in lieu thereof) to margin, guarantee, or secure such transactions must register with the Commission as a futures commission merchant (“FCM”).<sup>76</sup> As a result of these requirements, the Commission recognizes that certain entities or platforms will choose not to offer virtual currency retail commodity transactions. This business decision is not unique to any particular commodity. However, as noted earlier, the Commission does not intend to stifle innovation. Rather, it is acting to protect U.S. retail customers regarding transactions that fall within its jurisdiction. Therefore, the Commission requests comments as to what factors may be relevant to consider regarding the Commission’s potential use of its exemptive authority under CEA section 4(c)<sup>77</sup> in this regard. For example, please note any advantages and disadvantages regarding the potential to establish a distinct registration and compliance regime for entities that seek to offer retail commodity transactions in virtual currency. Why would such treatment be uniquely warranted<sup>78</sup> in the context of virtual currency? Please also note any other issues that the Commission should consider regarding such an analysis. What other alternatives should the Commission consider instead of establishing a distinct registration and compliance regime?

*Question 5:* In Example 2, the Commission sets forth a proposed set of facts that permits actual delivery to a depository instead of the purchaser. What should the Commission consider in further clarifying the meaning of “depository” for purposes of this interpretation? For example, could the depository maintain certain licenses or registrations in order to qualify for this example? In addition, should the

Commission further prohibit the depository from being owned or operated by the offeror (including any offeror parent company, partner, agent, and other affiliates)? Please note any factors the Commission should consider in making this determination (such as the effect of contractual agreements between the depository and the offeror).

*Question 6:* Example 2 also requires the purchaser to secure full control over the virtual currency once it is deposited in a depository in order for the fact pattern to constitute actual delivery. The Commission requests comment regarding what types of circumstances would ensure a purchaser has obtained “full control” of the commodity. For example, is possession of a unique key or other credentials that allow full access and ability to transfer virtual currency sufficient to provide full control? Similarly, how should the Commission view full control by a user in light of commonly used cybersecurity techniques and money transmitter procedures otherwise required by law?

*Question 7:* Example 2 also requires that no liens resulting from the use of margin, leverage, or financing used to obtain the entire quantity of the commodity purchased by the buyer continue forward at the expiration of 28 days from the date of the transaction. The Commission requests comment regarding circumstances under which a lien would be considered terminated for purposes of this interpretation. For example, are there circumstances where the Commission should consider allowing “forced sale” scenarios, whereby the purchased virtual currency is used to satisfy any resulting liens from the retail commodity transaction, while still interpreting the transaction as having resulted in actual delivery to the purchaser? Should the Commission consider other types of lien scenarios or interests, such as those liens that would not provide a right to repossession of the commodity?

*Question 8:* As noted above, the status of “title” is one of the factors the Commission considers in an actual delivery determination for retail commodity transactions.<sup>79</sup> In Examples 1 and 2, this interpretation notes that “title” may be reflected by linking an individual purchaser with proof of ownership of the particular wallet or wallets that contain the purchased virtual currency. What additional examples, if any, should the Commission consider to address the status of “title” for the purposes of an actual delivery determination?

*Question 9:* While this interpretation is solely focused on the actual delivery exception to CEA section 2(c)(2)(D), the Commission recognizes other exceptions may be available.<sup>80</sup> Specifically, the Commission recognizes that the SEC recently issued a statement regarding the application of federal securities laws to certain initial coin offerings (“ICOs”).<sup>81</sup> Depending on their use, the tokens or units issued in an ICO may be commodities, commodity options, derivatives, or otherwise fall within the Commission’s virtual currency definition described in this interpretation. However, any such tokens that are deemed securities (and trade in a manner that qualifies as a retail commodity transaction) would be excepted from the retail commodity transaction definition pursuant to section 2(c)(2)(D)(ii)(II) of the Act. Are there concerns with the scope of this exception with regard to retail commodity transactions? What factors should the Commission consider if it were to issue further guidance regarding this exception?

Issued in Washington, DC, on December 15, 2017 by the Commission.

**Christopher J. Kirkpatrick,**  
*Secretary of the Commission.*

#### **Appendix to Retail Commodity Transactions Involving Virtual Currency—Commission Voting Summary**

On this matter, Chairman Giancarlo and Commissioners Quintenz and Behnam voted in the affirmative. No Commissioner voted in the negative.

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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:** Supplemental notice of proposed rulemaking.

<sup>80</sup> See generally 7 U.S.C. 2(c)(2)(D)(ii).

<sup>81</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (Jul. 25, 2017).

<sup>74</sup> 7 U.S.C. 2(c)(2)(D)(iii).

<sup>75</sup> 7 U.S.C. 6(a).

<sup>76</sup> 7 U.S.C. 1a(28); 7 U.S.C. 6d(a).

<sup>77</sup> 7 U.S.C. 6(c).

<sup>78</sup> Arguably, beyond the distributed ledger technologies, entities offering virtual currency retail commodity transactions operate in a similar manner to any other entity offering retail commodity transactions online.

<sup>79</sup> See 78 FR at 52428.

**SUMMARY:** On April 3, 2017, the Coast Guard published a notice of proposed rulemaking to establish a permanent safety zone surrounding the entry of lava from the Kilauea volcano into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The safety zone is needed to protect persons and vessels from the potential hazards associated with molten lava entering the ocean. After considering comments received from the public, the Coast Guard analyzed the economic impact of the proposed rule and made minor modifications to the proposed rule. This supplemental notice requests comments on the analysis and revised proposal.

**DATES:** Comments and related material must be received by the Coast Guard on or before February 20, 2018.

**ADDRESSES:** You may submit and view comments identified by docket number USCG–2017–0234 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, 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  
 IRFA Initial Regulatory Flexibility Analysis  
 NAICS North American Industry Classification System  
 NPRM Notice of proposed rulemaking  
 OMB Office of Management and Budget  
 RFA Regulatory Flexibility Act  
 § Section symbol  
 SNPRM Supplemental notice of proposed rulemaking  
 TFR Temporary final rule  
 U.S.C. United States Code

**II. Background**

Lava flow 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, which 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.

Lava has been entering the ocean at the Kamokuna lava delta on Kilauea volcano’s south coast since July 2016. On December 31, 2016, a large portion of the new lava delta collapsed into the ocean, producing waves and explosions of debris near 19°19’12” N, 155°02’24” W at the Kamokuna entry point. Following this collapse, portions of the adjacent sea cliff continued to collapse into the ocean, producing localized waves and showers of debris. The lava delta continues to undergo a series of formation and subsequent collapses as lava pours into the Pacific Ocean. Additionally, cracks parallel to the sea cliff in the surrounding area persist, indicating further collapses with very little or no warning are possible. As of March 2017, a new delta began to form at the Kamokuna ocean-entry point. As it continues to grow and collapse, cracks parallel to the sea cliff surrounding it persist, indicating the possibility of further collapses.

On March 28, 2017, the Captain of the Port (COTP) Honolulu issued a temporary final rule (TFR) under docket USCG–2017–0172. The TFR was published in the **Federal Register** (82 FR 16109) on April 3, 2017 and an extension of the TFR was published in the **Federal Register** (82 FR 45461) on September 29, 2017. The TFR established a safety zone to immediately protect persons and vessels from the potential hazards associated 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.

In addition to the TFR, the Coast Guard also published a notice of proposed rulemaking (NPRM) on April 3, 2017, proposing to make the temporary safety zone a final rule. Its purpose was to mitigate the potential threats that molten lava posed to the maritime public when it entered the ocean by implementing the safety zone as a permanent control measure for vessels operating near the lava entry points. The NPRM addressed these concerns, and invited the public to comment during the comment period, which ended June 2, 2017. Subsequently, the Coast Guard extended the TFR to allow the Coast Guard to

analyze the economic impact of the safety zone and allow for public comments on this supplemental NPRM. The TFR will remain in effect through March 28, 2018, unless the COTP Honolulu cancels or modifies the TFR.

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

The Coast Guard is proposing this SNPRM 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, which pose potential safety concerns for anyone within 300 meters of the ocean-entry point. The purpose of this proposed rule is to clarify the regulatory language for the entry requirements of the safety zone, and emphasize the safety concerns related to boating near lava ocean-entry points. The regulatory text we are proposing appears at the end of this document. It differs from the text proposed in the NPRM, primarily in its discussion of enforcement and how to gain permission to enter the safety zone.

This proposed rule would establish a permanent safety zone around the lava flow at the Kamokuna lava delta. Additionally, this proposed rule would allow the Coast Guard to impose and enforce restrictions on vessels operating near the lava flow that enters the ocean. 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, such as approved lava tour-boat operations, are required to adhere to specific conditions set by the COTP Honolulu. Mariners who seek first time authorization to enter the safety zone 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. On May 8, 2017, at a public meeting held in Hilo, HI, meeting participants discussed the proposed rule as well as the dangers associated with lava ocean-

entry points. The public comments and meeting summary are available in the public docket for this proposed rule where indicated under **ADDRESSES**. Because several comments raised similar concerns, we will address the main comment topic, followed by our responses. Unless we receive recommendations for change during the SNPRM comment period, we plan to adopt the regulations proposed in the NPRM with minor modifications as reflected in this SNPRM. The SNPRM provides an additional comment period to shape the final regulatory action. Concerns received in the NPRM and this SNPRM will be addressed in the final rule.

The Coast Guard received nine comments 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 as well as 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."

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 rulemaking, but will discuss the current entry site in the final rule. We have noted, with the concurrence of NOAA's Nautical Data Branch, Marine Chart Division, the position 19°19'08" N, 155°02'36" W for their charting systems. That is the coordinate provided for Kamokuna Beach in the U.S. Geological Survey's Geographic Names Information System.

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.

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. As such, we recommend 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 proposed 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 the Hawaii Volcano Observatory (HVO) records, a radius of 300 meters remains a safe and reasonable distance for a high-hazard zone for the general boating public. The Hawaiian Volcano Observatory 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, the 300 meter restriction was discussed at the public meeting held on this rulemaking and staff from the Hawaiian Volcano Observatory reiterated the need for a 300 meter restriction. Accordingly, the Coast Guard proposes to 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.

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

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

the safety zone. We believe that because of the potential hazards associated with the active lava flow and cliff fragility at lava ocean-entry points, specific distances from the lava flow a vessel can safely operate cannot be provided.

Under this proposed 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.

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. This proposed rule provides for access after requesting permission from the COTP to enter the zone. We encourage persons or vessel owners and operators seeking access to the safety zone to make their request by following the guidance above.

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 in order to facilitate effective communications as well as timely processing 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. This SNPRM includes an Initial Regulatory Flexibility Analysis (IRFA) in Section V. B. in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612).

The Coast Guard received two comments regarding Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directing a reduction of the promulgation of new regulations. As discussed in the next 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 12866, Regulatory Planning and Review,” and 13563, “Improving Regulation and Regulatory 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. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” 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, it 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. See OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

### Costs

This SNPRM proposes to make permanent the existing TFR safety zone for the navigable waters surrounding the entry of lava from Kilauea volcano into the Pacific Ocean. The safety zone would remain to include waters within 300 meters (984 feet) of where lava enters the ocean. Entry of persons or vessels into the safety zone may only occur if granted permission by the COTP Honolulu, or his designated representative.

Lava has been entering the ocean at Kamokuna lava delta on Kilauea volcano’s south coast since July of 2016 and will continue to do so in the future. When lava enters the ocean, hazards emerge. The hazards include, but are not limited to, plumes of corrosive seawater, which can irritate the skin, eyes, and lungs; explosions of debris and scalding water, which can injure passengers; and sudden collapses of lava deltas, which can cause large waves potentially capsizing vessels. This SNPRM seeks to establish a minimum safe operating distance to protect individuals and vessel owners and operators from the hazards of the Kilauea lava flow at sea.

Prior to the original TFR, any vessel could enter within 300 meters of the point where lava reaches the ocean. This SNPRM proposes to make permanent the original TFR so that any vessel wishing to enter the safety zone must request permission in writing to enter the safety zone from the COTP Honolulu.

Therefore, this proposed 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 is not aware of any vessel operations within 300 meters of a point where lava enters the ocean other than those by lava tour-boat owners and operators. So far, the COTP Honolulu has granted four lava tour-boat owners and operators as well as one photographer authorization to enter the safety zone under certain conditions while the TFR is still in effect. These entities are required to notify the COTP Honolulu by phone before departing for each tour in which they plan on entering the 300-meter safety zone.

When the Coast Guard published the original TFR 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 this SNPRM is consistent with the requirements in the TFR, we are presenting the costs associated with this SNPRM.

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 has complied. Based on discussions with COTP Honolulu personnel, we estimated it takes about 4-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 hourly wage rate, we added a load factor of 1.52 derived from the May 2016 BLS “Employer Cost for Compensation” databases to obtain a loaded hourly wage rate of \$37.12.<sup>3</sup> Using this

<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>.

<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. CMU2010000 520000D 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 about 1.52, rounded. See the following websites: <https://beta.bls.gov/data>

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 about \$148.47 (\$37.12 per hour × 4 hours). Therefore, we estimated the total cost of the proposed rule on industry to be about \$593.88 (\$148.47 × 4 lava tour-boat owners or operators).

Since all four lava tour-boat owners and operators (and one photographer, who this proposed rule would not affect) were each granted permission to enter the safety zone through an initial written request, the only potential cost to these lava tour-boat owners and

operators would be 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 duty before entering the safety zone. These entities shall notify the Coast Guard by phone; however, we did not estimate a cost for the call because the equipment already exists onboard the vessel.

The Federal government would also incur costs of this proposed rule. Government costs to implement this proposed 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 to when entering a safety zone because the COTP Honolulu conducts this review in the normal course of the COTP duties). To process the written request, 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 1,<sup>4</sup> we estimated the total cost of the proposed rule to the Federal government to be about \$378.00.

TABLE 1—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 proposed rule to lava tour-boat owners and operators and the government to be about \$972 (\$593.88 for lava tour-boat owners or operators + \$378 for the government).

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.<sup>5</sup> 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 SNPRM is to promote safe navigation, and preserve the safety of life and property. 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

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard prepared this Initial Regulatory Flexibility Analysis (IRFA) that examines the impacts of the rule on small entities (5 U.S.C. 601 *et seq.*). Due to the proposed rule’s anticipated impacts on small entities, the Coast Guard is including an analysis of the SNPRM requirements for informational purposes.

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 (5 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) per the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612.

An IRFA addresses the following:

- (1) A description of the reasons why action by the agency is being considered;
- (2) A succinct statement of the objectives of, and legal basis for, the rule;
- (3) A description of and, where feasible, an estimate of the number of

small entities to which the rule would apply;

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

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the rule; and

(6) A description of any significant alternatives to the rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.

We address each of these six elements below:

- 1. A description of the reasons why action by the agency is being considered.

Lava has been entering the ocean at Kamokuna on Kilauea volcano’s south coast since July of 2016 and will continue to do so 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

Query/find?fq=survey:[oe]=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 about \$37.12, rounded.

<sup>4</sup> We obtained the hourly wage rates from Enclosure (2) of Commandant Instruction 7310.1R (29 March 2017) using the “In Government Rate.”

<sup>5</sup> A lava delta is new land that forms when lava accumulates above sea level and extends from an existing base of a sea cliff.

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 SNPRM 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.

2. A succinct statement of the objective of, and legal basis for, the proposed rule.

This safety zone proposes to protect 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.

The Coast Guard is issuing this rule under 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. The COTP Honolulu has determined that potential hazards exist that are associated with Kilauea's active lava flow entry into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The Coast Guard considers this area to be a safety concern for anyone who transits within 300 meters (984 feet) in every direction and around all points where the lava flow enters the ocean. The objective of this proposed rule is to protect the public including mariners and passengers aboard lava tour-boat owners and operators traveling in the navigable waters inside the safety zone.

3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule would apply.

This proposed 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 owners and 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>6</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>7</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 4-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 (\$37.12 per hour × 4 hours). We estimated the total cost of the SNPRM to be about \$593.88 (\$148.47 × 4 lava tour-boat owners or operators).

As mentioned above, we only found revenue data on one of the four operators. Therefore, we estimate the initial revenue impact of this proposed 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.

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

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

<sup>6</sup> Accessed July 17, 2017 from <https://www.manta.com>.

<sup>7</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).

5. An identification, to the extent practicable, of all relevant Federal rules, which may duplicate, overlap, or conflict with the rule.

There are no relevant Federal rules that duplicate, overlap, or conflict with this SNPRM.

6. A description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

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 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.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We are interested in the potential impacts from this proposed rule on small businesses and we request public comment on these potential impacts. If you think that this proposed rule would have a significant economic impact on you, your business, or your organization, please submit a comment to the docket at the address under **ADDRESSES** in the proposed rule. In your comment, explain why, how, and to what degree you think this rule would have an economic impact on you.

### C. Collection of Information

This proposed rule would 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 proposed 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 proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 proposed 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 proposed rule would not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination 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 proposed rule involves establishing a safety zone that would prohibit persons and vessels from entry into the 300 meters (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 significant environmental impact from this proposed 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.

#### VI. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov>, and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM are available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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 lava flow at the Kamokuna lava delta.

(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).

(c) *Regulations.* The general regulations governing safety zones contained in § 165.23 apply to the safety zone created by this notice of proposed rulemaking.

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

(2) Entry into or remaining in this safety zone 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) should submit a written request to the COTP Honolulu before initial entry into the safety zone. 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 and his or her designated representatives can be contacted at telephone number listed in (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: December 13, 2017.

**M.C. Long,**

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

[FR Doc. 2017–27297 Filed 12–19–17; 8:45 am]

BILLING CODE 9110–04–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R09–OAR–2017–0140; FRL–9972–31–Region 9]

**Approval of California Air Plan Revisions, San Diego County Air Pollution Control District**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the San Diego County Air Pollution Control District (SDCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from polyester resin operations. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act (CAA or “the Act”), as well as a rule rescission. We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Any comments must arrive by January 19, 2018.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R09–OAR–2017–0140 at <http://www.regulations.gov>, or via email to Doris Lo, Rulemaking Office Chief at [lo.doris@epa.gov](mailto:lo.doris@epa.gov). For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from [Regulations.gov](http://www.regulations.gov). For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR**

**FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Arnold Lazarus, EPA Region IX, (415) 972–3024, [lazarus.arnold@epa.gov](mailto:lazarus.arnold@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us” and “our” refer to the EPA.

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**I. The State’s Submittal**

*A. What rules did the State submit?*

Table 1 lists the rules addressed by this action with the date that they were adopted and repealed by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted/ amended	Repealed/ rescinded	Submitted
SDCAPCD .....	67.12	Polyester Resin Operations .....	5/15/1996	5/11/2016	8/22/16
SDCAPCD .....	67.12.1	Polyester Resin Operations .....	5/11/2016	.....	8/22/16

On September 27, 2016, the EPA determined that the submittals for SDCAPCD Rules 67.12 and 67.12.1 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal review by the EPA.

*B. Are there other versions of these rules?*

There are no previous versions of Rule 67.12.1 in the SIP. We approved Rule 67.12 on March 27, 1997 (62 FR 14639).

*C. What is the purpose of the submitted rule and rule rescission?*

VOCs help produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. Rule 67.12.1, and the rescinded Rule 67.12, control VOCs emitted from polyester resin