

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 91 and 135**

[Docket No. 27919; Special Federal Aviation Regulation (SFAR 71)]

RIN 2120-AG-44

Air Tour Operators in the State of Hawaii

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: On August 21, 2000, the FAA proposed to extend for 3 years Special Federal Aviation Regulation (SFAR) 71, which established certain procedural, operational, and equipment requirements for air tour operators in the State of Hawaii. This final rule, which adopts the proposals, will provide additional time for the agency to complete and issue a notice of proposed rulemaking for a national rule that would apply to all air tour operators. The FAA anticipates that the national rule, when finalized, would replace SFAR 71, which would then be rescinded. Thus the FAA is extending SFAR 71 for another 3 years to maintain the current requirements for the safe operation of air tours in the airspace over the State of Hawaii and provide the additional time necessary to issue the national rule.

DATES: This final rule is effective on October 26, 2000.

FOR FURTHER INFORMATION CONTACT: Gary Davis, Air Transportation Division, AFS-200, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; Telephone (202) 267-8166.

SUPPLEMENTARY INFORMATION:**Availability of the Final Rule**

You may obtain an electronic copy of this document using a modem and suitable communications software from the FAA regulations section of the FedWorld electronic bulletin board service (telephone: (703) 321-3339).

Internet users may reach the FAA's web page at <http://www.faa.gov/avr.arm.nprm/nprm/.htm> or the GPO's web page at <http://www.access.gpo.gov/nara> to access recently published documents.

You may also obtain a copy of this rule by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-9677. Requests should be

identified by the docket number of this rule.

Small Entity Inquires

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to comply with small entities requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official.

Internet users can find additional information on SBREFA on the FAA's web page at <http://www.faa.gov/avr/arm/sbrefa.htm>.

Background

Since 1980, the air tour industry in the State of Hawaii has grown rapidly, particularly on the islands of Oahu, Kauai, Maui, and Hawaii. The growth of the tourist industry, the beauty of the islands, and the inaccessibility of some areas on the islands generated significant growth in the number of air tour flights. In 1982, there were approximately 63,000 helicopter and 11,000 airplane tour flights. By 1991, these numbers had increased to approximately 101,000 for helicopters and 18,000 for airplanes.

The growth of the air tour sightseeing industry in Hawaii has been associated with an escalation of accidents. During the 9 years between 1982 and 1991, there were 11 air tour accidents with 24 fatalities. The accident data shows an escalation of accidents in the 3-year period between 1991 and 1994, during which time there were 20 air tour accidents with 24 fatalities. The apparent causes of the accidents ranged from engine power loss to encounters with adverse weather. Contributing factors to the causes and seriousness of accidents were: Operation beyond the demonstrated performance envelope of the aircraft, inadequate preflight planning for weather and routes, lack of survival equipment, and flying at low altitudes (which does not allow time for recovery or forced landing preparation in the event of a power failure). Despite voluntary measures taken by some Hawaii air tour operators and an increase in FAA's inspections, a rise in the number of accidents occurred, indicating a need for additional measures to ensure safe air tour operations in Hawaii.

On September 26, 1994, the FAA published the emergency final rule, SFAR No. 71 (59 FR 49138). This action was taken because of the increase in the number of fatal accidents involving air tour aircraft during the period 1991-

1994 and the causes of those accidents. The emergency regulatory action established additional operating procedures, including minimum safe altitudes (and associated increases in visual flight rules (VFR) weather minimums), minimum equipment requirements, and operational limitations for air tour aircraft in the state of Hawaii. On October 30, 1997, SFAR 71 was extended until October 26, 2000.

Since the FAA believes that SFAR 71 has been successful in preventing further accidents, the FAA is developing a national air tour safety rule that would address similar issues identified in SFAR 71. This proposal for a national rule will also be responsive to NTSB comments and will consider issues raised by commenters who responded to SFAR 71 in 1994. The FAA still anticipates that the national rule would replace SFAR 71. This final rule extends SFAR 71 for an additional 3 years, which will allow time to issue the national rule, applicable to all air tour operators concerning air tour safety.

Comments on the Extension of SFAR 71

As stated above, SFAR was extended in October 1997 until October 2000. The FAA published that extension as an interim final rule and asked for comments on the extension. The FAA received four comments on the interim final rule; all four supported the extension of SFAR 71. Commenters included two individuals, a National Park Service Superintendent, and the Director of Transportation for the State of Hawaii.

On August 21, 2000, the FAA issued and subsequently published at 65 FR 51511 (August 23, 2000), a notice of proposed rulemaking to extend SFAR 71 until October 26, 2003. One comment was received on the proposal.

Blue Hawaiian Helicopters comments that although there has been ample time for the FAA to receive input from Hawaii air tour operators and pilots, effective communication has not occurred. This commenter also states that some air tour pilots believe the altitude restrictions of SFAR 71 may have contributed to the three accidents that have occurred since the SFAR was adopted in 1994. Blue Hawaiian Helicopters also reports that at a recent meeting with the FAA in Hawaii the decision was made to form an air tour safety working group comprised of FAA representatives and an operator and pilot from each of the Hawaiian islands. The commenter applauds this decision as it will provide a forum leading to a safer tour environment for the flying public.

FAA Response: The FAA justified its promulgation of the emergency final rule, SFAR 71, based on the large number of accidents that occurred in Hawaii between 1982 and 1991. Following the publication of that emergency final rule, the FAA determined that rulemaking was needed to ensure the safety of all air tour operations. Thus the FAA dedicated rulemaking resources to the development of a national air tour safety rule. By definition, SFAR's are not permanent regulations. The FAA intends to replace SFAR 71 with a national rule. The interim final rule that extended SFAR 71 until October 26, 2000, received 4 comments; all of the commenters supported the extension of SFAR 71.

A final report on the causes of the three accidents that have occurred in Hawaii since 1994—June 28, 1998, September 28, 1999, and July 21, 2000—has not been issued by the National Transportation Safety Board. Therefore, it would be premature for the FAA to comment on the causes of these accidents. Nevertheless, the complete accident history of tour operations in Hawaii supports the extension of SFAR 71.

The FAA welcomes the suggestion of an air tour safety working group and expects that the group will maintain a balanced representation of the interested parties.

Environmental Review

In accordance with FAA Order 1050.1D, the FAA has determined that this proposed rule is categorically excluded from environmental review under section 102(2)(C) of the National Environmental Policy Act (NEPA). The original SFAR 71 established operating procedures, including minimum safe altitudes, minimum equipment requirements and operational limitations for air tour aircraft in the State of Hawaii. The proposed rule would extend SFAR 71 for 3 years, thereby maintaining the same requirements. The extension of SFAR 71 will not involve any significant impacts to the human environment and the FAA has determined that there are no extraordinary circumstances.

Regulatory Evaluation Summary

SFAR 71 established certain procedural, operational, and equipment requirements for air tour operators operating in the State of Hawaii. Compliance with SFAR 71 was estimated to increase total costs approximately \$2.1 million, in 1994 dollars, over the three year period, 1994 to 1997. Most of the increase in costs

was associated with lost revenue that resulted from tour cancellations when the new minimum flight altitudes could not be achieved. Based on data identified during the promulgation of SFAR 71, the FAA estimated that the cost associated with revenue loss totaled approximately \$1.9 million. Additional costs associated with SFAR 71 included \$201,000 to provide life vests on subject helicopters and \$10,000 for the development of a helicopter performance plan. The estimated potential safety benefits associated with SFAR 71 totaled approximately \$33.7 million over three years. A copy of the Final Regulatory Evaluation, Final Regulatory Flexibility Determination, and Trade Impact Assessment completed for the original SFAR was placed in the docket.

Because this final rule extends SFAR 71, there is no additional annual cost associated with it. The FAA believes that the extension of SFAR 71 would continue to prevent accidents and provide additional benefits.

SFAR 71 was considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) because it was issued originally as an emergency final rule. However, this final rule extending SFAR 71 is not considered significant.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes “as principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.” To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their action. The Act covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 Act provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis

for this determination, and the reasoning should be clear.

The FAA's original regulatory flexibility analysis indicated that SFAR 71 would impose a “significant economic impact on a substantial number of small entities.” (See the copy of the original Regulatory Flexibility Determination included in the docket.)

Although the FAA has issued a number of “deviations” since the issuance of the SFAR, the overall impact on small entities remains significant. Although this final rule only extends the current rule, the effect of the extension of SFAR 71 is still significant for small entities. Accordingly, the FAA certifies that this extension has a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or to diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule and has determined that it will have only a domestic impact and therefore no effect on any trade-sensitive activity.

Paperwork Reduction Act

SFAR 71 contains information collection requirements, specifically in Section 6, Minimum flight altitudes, and Section 7, Passenger briefing. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted these requirements to OMB. As a result, an emergency clearance of the information collection requirement (No. 2120-0620) has been approved through February 28, 2001.

The original accounting for the paperwork burden was as follows. SFAR 71, effective on October 26, 1994, applies to air tour operators in the state of Hawaii. Under the SFAR, both Part 91 and Part 135 operators are required to

provide a passenger safety briefing on water ditching procedures, use of required flotation equipment, and emergency egress from the aircraft in event of a water landing. The FAA estimates that 100,000 air tour operations are conducted annually by 35 operators, that each safety briefing takes 3–4 minutes, and that the cost of the briefing is \$10.00 an hour. Using these numbers, 400,000 minutes=6,667 × \$10.00 equals \$66,667.00, or approximately \$.70 per flight.

To account for the deviation information collection requirement, two calculations must be performed. First, operators requested deviations to 1,000 feet, and second to 500 feet. The FAA granted, 1,000 ft. deviations to approximately 35 operators. It is estimated that the preparation of a deviation request took each operator 2 hours at \$15.00 an hour for a total of approximately \$1,050.00. The cost for the government to review the deviations is estimated to be 1 hour of review and operations preparation using 35 hours of inspector time or approximately \$1,750.00 in costs. The 500 feet deviation requests cost the operators 35 × 1 hour at \$15.00 per hour or \$525.00. Cost of an inspector's review is estimated at 35 × ½ hour or \$875.00. In addition, it is necessary to include the costs for FAA inspectors checking pilots on specific sites for the 500 feet deviation, and the cost for operators' check pilots to check line pilots. The former is estimated to be 35 × 3 hours at an operator/aircraft cost of \$250.00 or \$26,250.00. The cost to check line pilots is estimated to be 100 × 1 hour × \$250.00 or \$25,000.00. The cost to the government (inspectors' times) for all deviations is estimated to be 35 × 3 hours × \$50.00 or \$5,250.00.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any

Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 240(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed "significant intergovernmental mandate." A "significant intergovernmental mandate" under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

The FAA has determined that this rule does not contain any Federal intergovernmental mandates, but does contain a private sector mandate. However, because expenditures by the private sector will not exceed \$100 million annually, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Federalism Implications

The regulations herein will not have substantial direct effects of 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. Therefore, in accordance with Executive Order 12612, the FAA certifies that the regulation will not have sufficient federalism

implications to warrant the preparation of a Federalism Assessment.

List of Subjects

14 CFR Part 91

Aircraft, Airmen, Aviation safety.

14 CFR Part 135

Air taxi, Aircraft, Airmen, Aviation safety.

The Amendment

The Federal Aviation Administration amends 14 CFR parts 91 and 135 as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46502, 46504, 46506–46507, 47122, 47508, 47528–47531.

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON-DEMAND OPERATIONS

2. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44715–44717, 44722.

3. In parts 91 and 135, SFAR No. 71, Special Operating Rules For Air Tour Operators In The State Of Hawaii, Section 8 is revised to read as follows:

SFAR NO. 71—Special Operating Rules for Air Tour Operators in The State of Hawaii

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Section 8. Termination date. This Special Federal Aviation Regulation expires on October 26, 2003.

Issued in Washington, DC, on September 26, 2000.

Jane F. Garvey,

Administrator.

[FR Doc. 00–25139 Filed 9–27–00; 11:26 am]

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