Comments in
Coast Guard Docket Number USCG–2007–29153
Submitted by Lanny Sinkin

EMERGENCY PETITION TO REPEAL
SUPERFERRY SECURITY ZONE RULE

INTRODUCTION

On September 5, 2007, the Federal Register published a rule adopted by the United States Department of Homeland Security Coast Guard on August 31, 2007. Federal Register / Vol. 72, No. 171 / Wednesday, September 5, 2007 / Rules and Regulations 50877.

This rule amended 33 CFR Part 165 to add "**§ 165.T14–160 Security Zone; Nawiliili [sic] Harbor, Kauai, HI."** This rule created a security zone specifically for the Hawaii Superferry's entrance into, docking, and exit from Nawiliwili Harbor on the Island of Kaua'i, Hawaiian Islands.

There is no legal basis for the adoption of this rule and the findings supporting the adoption are erroneous. In addition, the implementation of this rule will create serious hazards to the public. The creation of such hazards is imminent. This petition is, therefore, filed as an emergency petition.

The petitioners identified below hereby petition the Department of Homeland Security Coast Guard to repeal the rule. Other petitioners will be joining the petitioner group subsequent to this filing.

REASONS FOR REPEAL

Reason 1. There is no emergency sufficient to warrant failure to follow proper procedures in adopting the rule.

The rule contains the following:

"We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Though operation of the Hawaii Super Ferry from Oahu to Kauai has been voluntarily suspended by the operating company, operations could resume at any time. Delay in implementing this rule would expose protesters in the water and ashore, and ferry passengers and crew to undue hazards due to protesters' tactics of

entering the water from land and waterfront facilities adjacent to the harbor and using themselves as human barriers to the Hawaii Super Ferry's movement into Nawiliwili Harbor. For the same reason, under 5 U.S.C. 533(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**."

Fed. Reg., Ibid. at 50877.

The status quo is that Superferry can resume service to Kaua'i; Superferry knows that such resumption of service will create an outpouring of opposition, including protesters in the water; and Superferry has no intention of entering the Nawiliwili Harbor, if protesters are present. So in the status quo, there is no emergency. All parties appear to be waiting for the courts to resolve the issues raised.

It is precisely the publication of the rule at issue in this proceeding that creates a possible emergency. Without the rule, there would be no confrontation between Superferry and protesters. With the promise of Coast Guard protection, Superferry is encouraged to resume service to Kaua'i and provoke such a confrontation.

The Coast Guard created an emergency and then used that emergency as an excuse to bypass legal requirements in violation of the Administrative Procedures Act, 5 U.S.C. § 701.

To end the emergency simply requires the repeal of the rule and restoration of the status quo.

It is worth noting that the Homeland Security Coast Guard demonstrates a clear bias in the above quoted statement. The statement characterized the emergency as "undue hazards due to protesters' tactics of entering the water from land and waterfront facilities adjacent to the harbor and using themselves as human barriers to the Hawaii Super Ferry's movement into Nawiliwili Harbor."

The characterization could just as easily have been "hazards created by Superferry's insistence on continuing to operate despite court decisions finding operation of the Superferry to be in violation of the law and despite massive public opposition." Those court rulings will be discussed further below.

Apparently this bias is playing out in Homeland Security Coast Guard's creation of an emergency to justify draconian action as an accomplice to Superferry's lawlessness.

Reason 2: The Superferry Security Zone does not fit within the regulatory scheme for creating a security zone.

The regulations establishing security zones state the following:

"(b) The purpose of a security zone is to safeguard from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature:
(1) Vessels,
(2) Harbors,
(3) Ports, and
(4) Waterfront facilities:
in the United States and all territory and water, continental or insular, that is subject to the jurisdiction of the United States."

33 § 165.30 Subpart D Security zones.

The purpose for the Superferry Security Zone established to encompass Nawiliwili Harbor and surrounding lands is stated as follows:

"This zone is intended to enable the Coast Guard and its law enforcement partners to better protect people, vessels, and facilities in and around Nawiliwili Harbor in the face of non-compliant protesters who have impeded passage of the Hawaii Superferry to its dock in the harbor."

Fed. Reg., Ibid. at 50877**.**

The "non-compliant protesters" have demonstrated no intent to destroy, cause the loss of, or cause injury to the Superferry or to any other vessel, harbor, port, or waterfront facility. The "non-compliant protesters" have not demonstrated any intent to commit sabotage or other subversive acts, cause an accident, or otherwise cause any harm at all.

Paddling out on a surf board to a place in the path of the Superferry is not "similar" to "sabotage or other subversive acts."

The "non-compliant protesters" are engaging in non-violent civil disobedience to protect the security of their homeland.

There is nothing in 33 § 165.30 Subpart D that authorizes the creation of a security zone to stop non-violent civil disobedience or to ensure a private enterprise realizes its profit-making goals.

Reason 3: The Superferry Security Zone violates the First Amendment rights of those who seek to communicate their opposition to the Superferry and its impacts.

The rule seeks to prevent those wishing to protest from entering the water. That goal is pursued by making Nawiliwili Jetty and the access road to that jetty part of the security zone. Fed. Reg. Ibid. at 50877.

The rule acknowledges that most of the hundreds of people who stood witness to what was happening in the water during the last protest were located on Nawiliwili Jetty. Id. The rule placing this area within the security zone denies those wishing to witness what is happening on the water the most appropriate place to stand witness. Id.

The Homeland Security Coast Guard and other law enforcement personnel met with protesters at a post-demonstration meeting. The law enforcement personnel excluded the press from the post-demonstration meeting with the protesters – an exclusion with no basis in law and a violation of the media's First Amendment rights. The Homeland Security Coast Guard can be expected to exclude the press from the Nawiliwili Jetty security zone as part of the continuing policy of violating the First Amendment.

The rule, therefore, seeks to impede people wishing to exercise their First Amendment rights.

The creation of what one observer has called a Constitution-Free Zone is even more disturbing when the potential for the use of lethal force is present.

While responding to the protest against Superferry's entrance into Nawiliwili Harbor, at least one Coast Guard boat de-tarped and manned what appeared to be a 50mm heavy caliber swivel-mounted machine gun.

The de-tarped, manned machine gun is captured on video and available at http://www.youtube.com/watch?v=atlXIFaOkRo or go to www.youtube.com and search "Superferry". The video "Superferry Resistance" shows the detarped and manned machine gun beginning at 4:51 on the tape and clearly at 5:33. There are numerous other videos available on You Tube of that same event, which may well contain further documentation.

The removal of the tarp and the manning of the gun demonstrated that the Homeland Security Coast Guard is prepared to use lethal force to gain admission for Superferry into

Nawiliwili Harbor.

Keeping all water borne observers at a great distance and excluding observers from the land area of the Superferry Security Zone makes it more likely that someone will be foolish enough to use excessive force precisely because there is less likelihood of being observed and documented. Actions tend to be more restrained and appropriate when the whole world is watching.

Watching the video, "Superferry Resistance," you will see in the first part that the citizens of Kaua'i are thrilled that their protectors are able to stop the Superferry.

The energy changes dramatically when the Coast Guard starts to arrest those protectors. The gathered citizens start to curse the Coast Guard.

The rule contains the following statement: "Some of these onlookers threw rocks and bottles at Coast Guard personnel who were conveying detained protesters to shore on August 26." Fed. Reg. Ibid. at 50877. That is the energy that the adopted rule may create once again.

Again, the Homeland Security Coast Guard would be best served by repealing the rule and letting this matter be settled firmly in the courts before encouraging another such confrontation.

Reason 4. The protesters who took to the water to block the Superferry's entrance into Nawiliwili Harbor acted to prevent a greater harm.

Kaua'i Homeland Security aka "non-compliant protesters" acted, and are likely to continue acting, to protect their homeland in the face of a failure on the part of government officials to do so.

The Hawaii Supreme Court had determined that the environmental impacts of Superferry were sufficient to require the preparation of an environmental assessment (EA). The Supreme Court remanded the case to a judge in Mau'i. The Supreme Court left little room for the judge to do anything other than issue a restraining order stopping the Superferry from entering Mau'i harbor. (Shortly thereafter the judge did issue such an order.)

Superferry chose to ignore the obvious implication of the Supreme Court ruling. The

environmental law in Hawaii requires the preparation of an EA "at the earliest practicable time to determine whether an environmental impact statement shall be required." HRS 343-5(c). Obviously, the "earliest practicable time" was well before Superferry began operations. The most like legal outcome of further litigation would be a decision that Superferry had to prepare an EA before going forward with further operation. Superferry chose to ignore this obvious implication of the Supreme Court ruling.

Superferry also dropped its fares to $5 to jam the ships with as many people and vehicles as possible, putting those passengers and their vehicles at risk of being stranded. Some vehicles and passengers ended up stranded on Mau'i. Superferry acted with complete disregard for the well being of its customers. Superferry also acted in non-compliance with the law as stated by the Supreme Court.

If the Coast Guard wishes to concern itself about "non-compliance," the Coast Guard need look no further than the Superferry. The failure to prepare an EA began the non-compliance with the law. The decision to accelerate the initiation of service in the face of the Supreme Court ruling continued the same attitude of defying the law.

With a bully on the loose, the Governor and the Hawaii Department of Transportation (DOT) took no action to prevent the Superferry from entering into operation, despite the Supreme Court ruling. The Public Utility Commission (PUC) did not move to revoke Superferry's certificate to operate after the Supreme Court ruling requiring an EA, despite the fact that the certificate requires compliance with all environmental laws prior to issuance. The Governor, the DOT, and the PUC chose to stand aside and let Superferry go into operation.

In these circumstances, the protestors had no recourse to stop the Superferry's imminent potential harm to Kaua'i's environment other than to take direct action. The prevention of environmental harm outweighs any economic loss that Superferry may have suffered. The actions of the protesters had a greater element of legality than did those of Superferry. Those arrested have a legitimate necessity defense.

The subsequent entry of a judicial order in Mau'i prohibiting the Superferry from entering the Mau'i harbor confirmed the legitimacy of the Kaua'i citizens' actions.

A member of the State Legislature representing the people of Kaua'i has now filed a petition with the Public Utility Commission to revoke the operating permit for Superferry based on the lack of a completed EA. This petition further illustrates that those seeking to prevent Superferry from entering Nawiliwili Harbor are acting in harmony with the law and to enforce the law, equivalent to a citizen's arrest when no law

enforcement personnel are available.

A judge denied a temporary restraining order to stop Superferry from entering Nawiliwili Harbor, so there is a window of time in which the Superferry and the "non-compliant protesters" may meet again because key state officials are comatose, apparently from the shock of the Supreme Court ruling.

At the same time, the Kaua'i judge scheduled a hearing on September 17 on whether to grant a preliminary injunction. Should the injunction be entered, Superferry will not be allowed to enter Nawiliwili Harbor.

Superferry should await a decision in that case before attempting to enter Nawiliwili Harbor again. If Superferry again attempts to ignore the courts in Hawaii, whatever happens will be their responsibility. Superferry will not make that attempt without the protection of the Homeland Security Coast Guard.

The Homeland Security Coast Guard has chosen to place itself on the side of Superferry in this dispute, basically taking the position that business interests trump homeland security interests and that declaring martial law to protect the lawless pursuit of private profits is appropriate. By doing so, the Homeland Security Coast Guard demonstrates a lack of respect for the law, brings itself into disrepute with the public, and sets the stage for a highly divisive confrontation with a potential for injury and loss of life.

Reason 5. The analysis of impacts from the rule is based on an improperly narrowed definition of those impacts.

In analyzing the application of various requirements applicable to the adoption of the Superferry Security Zone, the Homeland Security Coast Guard makes that same mistake that the Hawaii Department of Transportation made.

The DOT looked only at the impacts of the harbor improvements that DOT was going to make for the Superferry. The DOT did not look at the environmental effects that such improvements would create by permitting the Superferry to operate. The DOT is now going to do a statewide environmental assessment of the impacts of Superferry itself.

In adopting the Superferry Security Zone, the Homeland Security Coast Guard looked only at the environmental impacts of creating the Superferry Security Zone, not the environmental impacts attributable to the creation of that zone. The Superferry would not attempt to enter the harbor without the security zone. The security zone, therefore, makes it possible for the Superferry to have the environmental impacts of concern to the

people and the courts. But for the creation of the Superferry Security Zone, those impacts would not occur because Superferry would not seek to enter the harbor again in the face of public opposition.

Perhaps it would be helpful to the Coast Guard to read the opinion of the Hawaii Supreme Court. The entire ruling is found at:

http://www.state.hi.us/jud/opinions/sct/2007/27407.pdf

Below is an excerpt from that ruling in which "Coast Guard" could be substituted easily for "DOT," "Nawiliwili Harbor" for "Kahului Harbor," and "security zone" for "harbor improvements." The emphasized portions of the opinion illuminate the error committed by the Homeland Security Department Coast Guard.

"DOT's written **exemption determination is restricted to the harbor improvements and does not consider the secondary impacts that may result from the use of Hawaii Superferry** in conjunction with Kahului Harbor. Rather, DOT treats the physical improvements in isolation, fitting them into two exemption classes related to "security and safety equipment," (exemption class 3 item 3) and "alteration or addition of improvements with associated utilities, which are incidental to existing harbor and boat ramp operations, in accordance with master plans [that comply with HEPA]" (exemption class 6 item 8) … Although DOT, in its exemption determination letter, does reference the Hawaii Superferry ("we have determined that operation of Hawaii Superferry at Kahului Harbor conforms with the intended use and purpose of the harbor and meets conditions that permit exemption from environmental review at such location based on the method of operation planned"), it **restricts its analysis to the harbor equipment that will be employed in order to facilitate the Superferry's operation** ("ferry activity at Kahalui Harbor will use equipment appropriate for a harbor, include only minor facilities improvements and will be conducted at an existing pier facility that is consistent with the purpose and reason for which it was originally developed"). … The exemption letter **does not consider whether Superferry operation independent of the harbor will have any significant effects on the environment**. Rather, DOT appears to **studiously restrict its consideration of environmental impact** to the physical harbor improvements themselves. Although DOT does say that "[t]he installation and result of the minor improvements noted will not produce or create any adverse air quality, noise or water quality impact," which could imply a reference to the Superferry itself, as the "result" of the harbor improvements, this statement is oblique and does not indicate that secondary impacts were considered.

…

The applicable standard of review requires that this court determine, as a matter of

law, whether or not DOT has followed the correct procedures and considered the appropriate factors in making its determination that **the harbor improvements made to Kahului harbor to facilitate the Superferry project** should be exempted from the requirements of HRS chapter 343. ….

Stated simply, the record in this case shows that **DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment**. Therefore, based on this record, we can only conclude that DOT's determination that the improvements to Kahului Harbor are exempt from the requirements of HEPA was **erroneous as a matter of law**. The exemption being invalid, the EA requirement of HRS § 342-5 is applicable. **This issue being dispositive, we need not consider Appellants' other arguments**."

http://www.state.hi.us/jud/opinions/sct/2007/27407.pdf, pages 99-101 [hereinafter "Opinion"].

The sole purpose of the rule at issue is to facilitate the Superferry. The rule states:

> This rule creates a security zone in most of the waters of Nawiliwili Harbor, and on Nawiliwili Jetty in Nawiliwili Harbor. The security zone will be activated for enforcement 60 minutes before the Hawaii Super Ferry's arrival into the zone, and will remain activated for 10 minutes after the Hawaii Super Ferry's departure from the zone.

Fed. Reg., Ibid. at 50877.

To petitioners' knowledge, this rule is the only rule creating a security zone solely to facilitate the passage of a single identified ship.

The central consideration required by the Hawaii Supreme Court – "primary and secondary" impacts on the environment – means that the consideration required of the Coast Guard (NEPA having similar requirements) is the primary impacts of the security zone itself and the secondary impacts of "facilitat[ing] the Superferry project." Opinion at 101.

The same rational for requiring consideration of primary and secondary effects applies to all the other considerations found in the rule, as will be discussed below.

The failure of the rule to consider secondary impacts is legally fatal. The rule should be repealed on this basis alone.

Reason 6: The Homeland Security Coast Guard improperly ignored its own regulations that require the agency to prepare an Environmental Assessment for the Superferry Security Zone.

The most ironic instance of the narrow focus is the finding on environmental impacts. The rule states:

"We have analyzed this temporary rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 [sic] of the Instruction. Therefore, under figure 2–1, paragraph (34)(g) of the Commandant Instruction M16475.1D, this temporary rule is categorically excluded from further environmental documentation because this rule creates a security zone."
Fed. Reg., Ibid. at 50879.

If all the rule did was to create a security zone, the environmental analysis might be correct. The rule, however, creates a security zone to permit the Superferry and its cargo of people and vehicles to enter, dock, and unload at Nawiliwili Harbor and to take on people and vehicles.

While the Supreme Court did not address the particular environmental impacts on Nawiliwili Harbor, the Supreme Court did rule that an environmental assessment is necessary. The environmental assessment ordered will be required by law to look at the entire project and determine whether an environmental impact statement is necessary.
The Mau'i court followed the Supreme Court's direction entered a restraining order barring the Superferry from Kahului Harbor.

There is no significant difference between Superferry entering the Mau'i harbor and Superferry entering Nawiliwili Harbor.

The Supreme Court ruling is prima facie evidence that the Superferry environmental impacts will not be negligible. The rule's conclusion that a categorical exemption exists is clearly erroneous.

Commandant Instruction M16475.1D, section B.2.b, taking its guidance from the National Environmental Policy Act, provides a number of considerations that would make a categorical exclusion inappropriate, including: "(3) The quality of the human environment that is likely to be highly controversial in terms of scientific validity or public opinion; (4) An effect on the human environment that is highly uncertain or involves unique or unknown risks; (5) Future precedent setting actions with significant effects or a decision in principle about a future consideration; and (6) An individually insignificant, but cumulatively significant, impact when considered along with other past, present, and reasonably foreseeable future actions."

The finding of categorical exclusion would require the Homeland Security Coast Guard to find, among other things, that there is no controversy related to Superferry entering Nawiliwili Harbor; that the environmental impacts on Kaua'i of Superferry are not unique and are clearly known; that permitting Superferry to enter Nawiliwili Harbor would not set any precedents; and that Superferry would have no cumulative effects on Kaua'i, considering the current conditions on Kaua'i.

Obviously, the current circumstances would not permit the Homeland Security Coast Guard to reach any of these conclusions. To the contrary, the current situation supports a finding that all four of these considerations exist. Other conditions related to the categorical exclusion decision may also exist.

As the Commandant Instruction states: "If a [Categorical Exclusion] is not appropriate, an EA or an EIS must be prepared." Section B.2.b. Based on the existence of multiple circumstances that make a categorical exclusion inappropriate, the Homeland Security Coast Guard is required by its own regulations to prepare an Environmental Assessment for the Superferry Security Zone. The adoption of the rule violated the National Environmental Policy Act, 41 U.S.C. § 4321 and Commandant Instruction M16475.1D.

For the Homeland Security Coast Guard to step into this situation and conclude that making it possible for Superferry to pursue its operations in Kaua'i has no environmental implications appears to be an almost deliberate case of denial. As a paraphrase of what the Hawaii Supreme Court observed about the DOT, the Coast Guard appears to studiously restrict its consideration of environmental impact to solely the creation of the Superferry Security Zone.

Reason 7. The creation of the Superferry Security Zone to permit the Superferry to continue operating in Nawiliwili Harbor shows disrespect for the state legal processes to date and those now underway.

Another example of the narrow focus is the discussion of federalism. The rule states:

"Federalism
A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a subtantial direct cost of compliance on them. We have analyzed this temporary rule under that Order and have determined that it does not have implications for federalism."

Fed. Reg., Ibid. at 50878.

That assessment ignores the existing situation.

The Hawaii Supreme Court has stated that Superferry needs an environmental assessment. The law in Hawaii is that such an assessment has to be made before any significant commitments are made to a project. The law does not provide for a project to be pursued while the EA is prepared. That would defeat the whole purpose of having environmental impacts determined in a public process and considered by those proposing an action before a decision is made to pursue the action.

Superferry proponents are trying to get a special session of the State Legislature called to amend the environmental laws of Hawaii in order to allow Superferry to operate while preparing an EA. These proponents obviously understand the implications of the Supreme Court ruling, i.e. that Superferry is stopped until an EA is prepared. The Coast Guard should have that same understanding.

With the Supreme Court having spoken and the Mau'i court having followed the Supreme Court's guidance by issuing a restraining order against Superferry entering the Mau'i harbor, the Homeland Security Coast Guard actions to force open Nawiliwili Harbor for Superferry trample on the comity that federalism dictates. At the very least, the Homeland Security Coast Guard should tell Superferry that the security zone will not be enforced until such time as the litigation filed in Kaua'i reaches a final determination on whether an injunction will prohibit Superferry's entrance into Nawiliwili Harbor and the PUC decides on whether to revoke Superferry's certificate of operation.

That respect for state processes is what federalism is all about.

Reason 8: The analysis inadequately addresses the potential for burdening the courts.

The rule contains the following:

"Civil Justice Reform
This temporary rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden."

The publication of this rule in the current situation immediately forced those trying to protect Kaua'i to consider filing litigation challenging the rule. This petition is filed as a precursor to such litigation. Litigation was clearly a foreseeable result of adopting this rule at this particular time.

Furthermore, the likelihood is that the enforcement of the rule will produce many arrests and prosecutions. Both litigation and criminal arrests contribute to burdening the justice system.

The removal of the tarp and the manning of the machine gun in August demonstrated that the Homeland Security Coast Guard is prepared to use lethal force to gain admission for Superferry into Nawiliwili Harbor.

The use of lethal force would undoubtedly lead to numerous official investigations, possible prosecutions, wrongful death suits, and other legal proceedings that would further burden the Judicial system.

Reason 9: The analysis incorrectly found that this rule will not have special effects on children.

The rule contains the following:

"Protection of Children
We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This temporary rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children."

Fed. Reg., Ibid. at 50878.

The economic significance of the rule is noted in Reasons 10 and 11.

This analysis is yet another example of taking too narrow a view of the impacts attributable to the rule. Again, the impacts are those caused directly by implementing the rule and those caused by the Superferry entering, docking, unloading, and reloading in Nawiliwili Harbor.

The latter impacts are not clearly known because an environmental assessment was never done. Given that the Hawaii Supreme Court found that an absence of an environmental assessment violated the law, the appropriate assumption for purposes of analysis here is that the environmental impacts could be significant.

As a general rule, adverse environmental impacts fall heaviest on those who inherit the mess. Introduction of invasive species now means that the children will have to deal with the damage later. Increased depletion of the ‘aina increases the likelihood of ecological damage or collapse. The children today will have to learn how to live in the depleted world of tomorrow.

There are potential psychological effects of implementing the rule. Children watch as hundreds of people in their ‘ohana mobilize to prevent something that is not considered pono. Then they see military and police forces brought in to suppress the ‘ohana. The seeds of cynicism, anti-social behavior, depression, and other results of psychological trauma will be planted.

The blithe conclusion that the Superferry Security Zone will have no adverse impacts on children is not supported by the reality.

Reason 10: The analysis of impacts on small entities is incomplete.

Another example of the narrow focus of the Homeland Security Coast Guard is the “small entities” discussion. The rule states: “we anticipate that there will be little or no impact to these small entities due to the narrowly tailored scope of these changes, and to the fact that such entities can request permission from the Captain of the Port to enter the security zone when it is activated.”

Fed. Reg. Ibid. 50878.

The only impact to small entities acknowledged is the impact of creating the security zone when the Superferry is using the harbor; there is no discussion of impacts from Superferry itself.

Yet many of the objections to the Superferry are from local small businesses that would

be adversely affected by the Superferry. Imported competition from Honolulu for everything from construction jobs to fish can adversely impact small entities on Kaua'i. The introduction of still more cars to a car-jammed island will cause economic harm to small businesses. All of these impacts are attributable to the creation of the security zone because but for the creation of that zone the Superferry impacts would not materialize.

Reason 11: The analysis of the private property impacts is inadequate and contradictory.

The rule states:

"Taking of Private Property
This temporary rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights."

Fed. Reg. Ibid at 50878.

Yet the rule contains the following provision:

"(c) *Regulations.*

(1) Under 33 CFR 165.33, entry by persons or vessels into the security zones created by this section and activated as described in paragraph (b) of this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. Operation of any type of vessel, including every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, within the security zone is prohibited. Under authority of 50 U.S.C. 192, if a vessel is found to be operating within the security zone without permission of the Captain of the Port, Honolulu, and refuses to leave, the vessel is subject to seizure and forfeiture."

Fed Reg Ibid. at 50879 (emphasis added).

The rule envisions enforcement to include the seizure and forfeiture of private property and simultaneously claims that the rule will not involve the taking of private property.

Reason 12: The analysis incorrectly found that this rule is not a significant regulatory action.

The rule contains the following:

"Regulatory Evaluation
This rule is not a 'significant regulatory action' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The Coast Guard expects the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation is unnecessary. This expectation is based on the short activation and enforcement duration of the security zone created by this temporary rule, as well as the limited geographic area affected the security zone."

Fed. Reg., Ibid. at 50878.

This determination is another example of how the improperly narrow definition of impacts led to incorrect determinations of impact.

Because the establishment of the Superferry Security Zone permits the entry of Superferry into Nawiliwili Harbor, the economic impacts will be whatever economic impacts are caused by the enforcement of the rule and by the Superferry. Examples of the latter impacts are provided in Reasons 9 and 10. These impacts are not "minimal."

Reason 13: Lack of Native Hawaiian involvement

The rule contains the following:

"Indian Tribal Governments
This temporary 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."

Executive Order 13175 does limit the definition of tribes to those Native Americans located within the United States prior to the illegal annexation of Hawai'i. See Public Law 103-150, 103rd Congress Joint Resolution 19, November 23, 1993. There are no federally-recognized tribes within the State of Hawai'i because Native Hawaiians were an indigenous people within the Kingdom of Hawai'i, not the United States. That debate is

playing out around the Akaka Bill pending in the United States Congress.

Nevertheless, many laws in the United States include Native Hawaiians in the definition of Native Americans. For example, the American Indian Religious Freedom Act, 42 U.S.C. § 1996 includes the following:

"Section 1
On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for **American Indians** their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and **Native Hawaiians**, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Section 2
The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after August 11, 1978, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action."

Failing to acknowledge Native Hawaiians as having an identified interest, the Coast Guard could not have consulted with Native Hawaiians about seizing Nawiliwili Harbor for purposes of permitting Superferry to dock in the harbor. While such consultation may not be required under Executive Order 13175, such consultation could have been pursued voluntarily, as an act of respect. The "nope, don't see any indigenous people here" attitude is disrespectful.

To avoid possible injury and death, avoid seriously disrupting Hawaiian society, protect the environment, demonstrate respect for state laws and courts, safeguard the Coast Guard's reputation, avoid litigation, and otherwise behave in a pono (righteous) manner, the Homeland Security Department Coast Guard should repeal the rule, zero out its involvement with Superferry until matters are clarified, and reflect on its reaction and approach to the whole Superferry issue to prepare a "lessons learned" report.

Submitted by

Lanny Sinkin
17 5

P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com

Attorney at Law
Admitted to Texas Bar #18438675, Hawaii Federal Bar

on behalf of the following petitioners:

Residents of the Island of Kaua'i
[name, address, telephone, email]

Ohana (the broader family that supports the people of Kaua'i)
[name, address, telephone, email]