

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 91**

[Docket No. 26476, Amendment No. 91-222]

RIN 2120-AD97

**Temporary Flight Restrictions in National Disaster Areas in the State of Hawaii****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

**SUMMARY:** Through this regulation, the Administrator is authorized to prohibit, or otherwise restrict, aircraft overflights of inhabited areas within a declared national disaster area in the State of Hawaii. This rule implements legislation that requires the FAA to consider safety and humanitarian reasons in the issuance of temporary flight restrictions within declared national disaster areas in the State of Hawaii.

**EFFECTIVE DATE:** June 19, 1991.

**FOR FURTHER INFORMATION CONTACT:** Melodie De Marr, Air Traffic Rules Branch, ATP-230, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8783.

**SUPPLEMENTARY INFORMATION:****Background and Need for Rulemaking**

Section 9124 of the Aviation Safety and Capacity Expansion Act of 1990, provides in relevant part, "the Administrator (of the FAA), for safety and humanitarian reasons, shall issue such regulations as may be necessary to prohibit or otherwise restrict aircraft overflights of any inhabited area which has been declared a national disaster area in the State of Hawaii" (Pub. L. 101-508, November 5, 1990). On May 18, 1990, the area around the Kilauea volcano was declared a national disaster area. The legislation was enacted in response to problems encountered in populated areas within the national disaster area. It is the agency's understanding that the presence of low flying aircraft that were not directly involved in the relief effort or associated activities operating over affected inhabited areas interfered with and endangered those involved with the collection of scientific data and/or disaster relief efforts and adversely affected the inhabitants of those areas.

Currently, § 91.137 of the Federal Aviation Regulations (14 CFR 91.137) authorizes the Administrator to designate an area within which some or all flights are prohibited for reasons of

safety. The regulation is designed to protect persons and property of the surface or in the air from a hazard associated with an incident on the surface; to provide a safe environment for the operation of disaster relief aircraft; and to prevent an unsafe congestion of sightseeing and other aircraft above an incident or event which may generate a high degree of public interest. In each case, the circumstances supporting implementation of a § 91.137 flight restriction involve issues of safety. Section 9124 of the Aviation Safety and Capacity Expansion Act of 1990 is intended to cover certain situations in the State of Hawaii that are not addressed in § 91.137. This regulation (14 CFR 91-138) is responsive to that Act and authorizes the Administrator to consider safety and humanitarian factors in the issuance of flight restrictions over inhabited areas within declared national disaster areas in the State of Hawaii.

National disaster areas are identified by Presidential declaration following a request by the Governor of the affected state. Such a request is based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments and that Federal assistance is necessary. National disaster areas have been declared on four occasions in the State of Hawaii in the ten years preceding this action:

- (1) April 22, 1982 (heavy rains and flooding);
- (2) November 27, 1982 (hurricane Iwa);
- (3) January 8, 1988 (severe storms, mudslides,) flooding); and
- (4) May 18, 1990 (Kilauea volcano—lava flow.)

Based on historical data, the FAA expects this rule to be invoked on an infrequent basis. Section 91.138 flight restrictions will be invoked only upon the FAA's determination that the affected inhabited area is within a declared national disaster area in the State of Hawaii and the Governor of the State of Hawaii, or the Governor's designee, has forwarded to the Administrator of the FAA a request for and justification of the need for the application of this regulation for humanitarian reasons.

This regulation provides for the authorization of certain flights in the affected area by the official in charge. Such authorizations may be given for those aircraft involved in collecting scientific data, carrying accredited news or media personnel, or participating in disaster relief activities. Aircraft departing from or landing at airports

with departure/approach procedures that would cause them to transit the affected area will be required to obtain an appropriate air traffic control (ATC) clearance. All other flights will be required to comply with the restrictions issued by the Administrator and described in the NOTAM.

**Discussion of the Comments**

In response to Notice 91-5, the FAA received two comments. One commenter, the Airports Administrator from the State of Hawaii Department of Transportation Airports Division, was in support of the proposed rulemaking. He stated that during the preparation of the FAR part 150 aircraft noise abatement plan for Hilo International Airport and the State Helicopter System Plan, several public meetings were held to receive public comment on the impact of aircraft noise. The majority of the complaints received at the public meetings were directed at the noise and low flights of helicopters. The Hawaii Airports Division further cited that testimony at those meetings was presented by the Director of Civil Defense for the Island of Hawaii and representatives of the National Park Service concerning the hazards created by helicopters on sightseeing tours over disaster areas resulting from the ongoing volcanic eruption. However, the Hawaii Airports Division voiced concern that the bureaucratic procedures necessary before flight restrictions can be established is too lengthy. Their recommendation is that a procedure be established for the immediate issuance of a NOTAM since sightseeing flights begin as soon as the disaster occurs when rescue operations could be seriously jeopardized. They suggest that the regulations should provide for the authorization by the Administrator of a designee located in Hawaii to act on the Administrator's behalf in such an event.

The current Federal Aviation Regulations § 91.137 gives the Administrator the authority to issue temporary flight restrictions for safety reasons. When necessary, the Administrator may issue a NOTAM under that section designating an area within which temporary flight restrictions apply in order to: Protect persons and property on the surface or in the air from a hazard associated with an incident on the surface; provide a safe environment for the operation of disaster relief aircraft; or, to prevent an unsafe congestion of sightseeing and other aircraft above an incident or event which may generate a high degree of public interest. Temporary flight restrictions could be invoked under this

section on the local level without bureaucratic involvement. However, this new regulation § 91.138 will authorize temporary flight restrictions over inhabited areas within a declared national disaster area for humanitarian reasons. The FAA believes that the determination of humanitarian needs should be identified by the local government in Hawaii. The Governor of the State of Hawaii will be instrumental in both the declaration of a national disaster area and the determination of humanitarian needs for temporary flight restrictions to protect the inhabitants within that national disaster area. Therefore, the FAA will require the involvement of the Governor and/or the Governor's designee prior to the implementation of this regulation.

One commenter from Illinois felt that there is no demonstrated need for such a potentially limiting restriction on the use of the airspace. He stated that the regulation would allow unilateral issuance of flight restrictions by the FAA. By issuing this amendment to the regulations, the FAA is complying with its mandate to implement the provisions of the Aviation Safety and Capacity Expansion Act of 1990.

#### Regulatory Evaluation Summary

This section summarizes the full regulatory evaluation prepared by the FAA that provides detailed estimates of the economic consequences of this regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimates of the costs and benefits to the private sector, consumers, and Federal, state, and local governments.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or to modify existing regulations only if potential benefits to society outweigh potential costs for each regulatory change. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly-defined exigencies. A "major" rule is one that is likely to have an annual impact on the economy of \$100 million or more, to have a major increase in consumer costs, to have a significant adverse effect on competition, or is highly controversial.

The FAA has determined that this rule is not "major" as defined in the Executive Order. Therefore, a full regulatory analysis that includes the identification and evaluation of cost-reducing alternatives has not been prepared. Instead, the Agency has prepared a more concise regulatory

evaluation that analyzes only this rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains a final regulatory flexibility determination required by the 1980 Regulatory Flexibility Act (Pub. L. 96-354) and an international trade impact assessment. The complete regulatory evaluation, which contains more detailed economic information than this summary provides, is available in the docket.

#### Cost-benefit Analysis

The primary objective of this rule is to protect victims within national disaster areas in the State of Hawaii from aircraft that are operating in the area as a result of the occurrence of a national disaster. An examination of the costs and the benefits associated with the rule are presented below.

#### Costs

The FAA believes that there will be negligible costs associated with compliance with the rule. Because the rule will be invoked only in the case of a declared national disaster in the State of Hawaii and will apply only to those inhabited areas within those declared areas that are designated by the Governor or the Governor's representative, the only economic impact will be a slight inconvenience to scenic tour operators who want to operate in the area of the temporary flight restriction. Because such occurrences are expected to be infrequent and the restricted areas are expected to be limited in size, the FAA believes that any loss of business by the tour operators will be negligible.

#### Benefits

This rule is expected to produce potential benefits in the form of relief from noise and anxiety caused by low-flying aircraft. Although these benefits cannot be quantified, the FAA believes the benefits exceed any possible cost attributed to the temporary inconvenience of the flight restriction for commercial tour operators. Also, the agency notes that the rule is required by legislation, without regard to its cost-effectiveness.

#### Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) requires Federal agencies to review rules that may have a "significant economic impact on a substantial number of small entities." The FAA has adopted criteria and guidelines (U.S. Department of Transportation, FAA Order 2100.14A) for rulemaking officials to apply when

determining whether a rule has a significant economic impact on a substantial number of small entities. The small entities that could be potentially affected by the implementation of this rule are the scenic tour operators who own nine or fewer aircraft.

Because there will be negligible costs associated with compliance with this rule, there will be no significant economic impact on a substantial number of small entities.

#### International Trade Impact Statement

This rule will neither have an effect on the sale of foreign aviation products or services in the United States, nor will it have an effect on the sale of U.S. products or services in foreign countries. The rule will not impose costs on aircraft operators or aircraft manufacturers (U.S. or foreign) that would result in a competitive disadvantage to either.

#### Federalism Implications

The regulations herein will not have substantial direct effects 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. Therefore, in accordance with Executive Order 12612, it is determined that this rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environmental Effects

This action will establish temporary flight restrictions in designated areas for safety and humanitarian reasons and will curtail or limit certain aircraft operations within the affected area. As such, this rule will not establish specific operating procedures, nor will it limit the operation of an aircraft to a specific route or procedure. The designation of temporary flight restrictions pursuant to this action will be temporary in nature and effective only for the time necessary to protect inhabitants of an affected area within a declared national disaster area in the State of Hawaii. Air traffic control (ATC) will retain the ability to direct aircraft through the affected area in accordance with normal traffic flows. Therefore, this rule will accommodate the operation of an aircraft in compliance with existing safety and environmental requirements and procedures and will not alter or supersede those requirements.

The establishment of temporary flight restrictions under the regulation will result in a reduction of aircraft operations at low altitudes over

inhabited areas within a declared national disaster area. As a result of these restrictions, the FAA believes that the number of aircraft operations in the vicinity of inhabited portions of national disaster areas will be reduced and noise levels will be lower than would have been if the temporary flight restrictions were not in place. Aircraft operators complying with the NOTAM restrictions will not be routed over any particular area or confined to operate within certain airspace. For the reasons stated above, the FAA concludes that any action taken under this rule will not significantly impact the quality of the human environment and that further environmental assessment is unnecessary.

#### The Rule

This amendment to part 91 adds a new § 91.138 which implements the provisions of the Aviation Safety and Capacity Expansion Act of 1990, that requires the FAA, through regulation, to prohibit or otherwise restrict aircraft overflights of any inhabited area that has been declared a national disaster area in the State of Hawaii, for both safety and humanitarian reasons. Except for minor editorial changes, this amendment is the same as that proposed in the notice.

#### Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation will not be major under Executive Order 12291. In addition, the FAA certifies that this regulation will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This regulation is considered significant

under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A regulatory evaluation of the regulation, including a Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "**FOR FURTHER INFORMATION CONTACT.**"

#### List of Subjects in 14 CFR Part 91

Aircraft, Airmen, Aviation safety.

#### The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 91 of the Federal Aviation Regulations (14 CFR part 91) as follows:

#### PART 91—GENERAL OPERATING AND FLIGHT RULES

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

**Authority:** 49 U.S.C. App. 1301(7), 1303, 1344, 1348, 1352, through 1355, 1401, 1421 through 1431, 1433, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

2. Part 91 is amended by adding a new § 91.138 to subpart B to read as follows:

#### § 91.138 Temporary flight restrictions in national disaster areas in the State of Hawaii.

(a) When the Administrator has determined, pursuant to a request and justification provided by the Governor of the State of Hawaii, or the Governor's designee, that an inhabited area within a declared national disaster area in the State of Hawaii is in need of protection for humanitarian reasons, the Administrator will issue a Notice to Airmen (NOTAM) designating an area

within which temporary flight restrictions apply. The Administrator will designate the extent and duration of the temporary flight restrictions necessary to provide for the protection of persons and property on the surface.

(b) When a NOTAM has been issued in accordance with this section, no person may operate an aircraft within the designated airspace unless:

(1) That person has obtained authorization from the official in charge of associated emergency or disaster relief response activities, and is operating the aircraft under the conditions of that authorization;

(2) The aircraft is carrying law enforcement officials;

(3) The aircraft is carrying persons involved in an emergency or a legitimate scientific purpose;

(4) The aircraft is carrying properly accredited newsmen, and that prior to entering the area, a flight plan is filed with the appropriate FAA or ATC facility specified in the NOTAM and the operation is conducted in compliance with the conditions and restrictions established by the official in charge of on-scene emergency response activities; or,

(5) The aircraft is operating in accordance with an ATC clearance or instruction.

(c) A NOTAM issued under this section is effective for 90 days or until the national disaster area designation is terminated, whichever comes first, unless terminated by notice or extended by the Administrator at the request of the Governor of the State of Hawaii or the Governor's designee.

Issued in Washington, DC on May 13, 1991.

**James B. Busey,**  
Administrator.

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