



9110-04-P

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: Notice of proposed rulemaking.

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**SUMMARY:** The Coast Guard proposes to establish a permanent safety zone for the navigable waters surrounding the entry of lava from Kilauea volcano into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The safety zone will encompass all waters extending 300 meters (984 feet) in all directions around all entry points of lava flow into the ocean. The entry points of the lava vary, and the safety zone will vary accordingly. The safety zone is needed to protect persons and vessels from the potential hazards associated with molten lava entering the ocean resulting in explosions of large chunks of hot rock and debris upon impact, collapses of the sea cliff into the ocean, hot lava arching out and falling into the ocean, and the release of toxic gases. Entry of persons or vessels into this safety zone is prohibited unless specifically authorized by the Captain of the Port (COTP) Honolulu or his designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before

[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** You may submit 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 Nicolas Jarboe, Waterways Management Division, U.S. Coast Guard; telephone 808-541-4359, email D14-SMB-SecHono-MarineEventPermits@uscg.mil.

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	<b>Federal Register</b>
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

**II. Background, Purpose, and Legal Basis**

Lava has been entering the ocean at Kamokuna on Kīlauea Volcano’s south coast since July of 2016. As with all ocean entries during this long-lived Kīlauea eruption, hazards to people nearby on land and sea include: a plume of corrosive seawater laden with hydrochloric acid and fine volcanic particles that can irritate the skin, eyes, and lungs; explosions of debris and scalding water as hot rock interacts with the ocean; sudden collapse of lava deltas (new land formed as lava accumulates above sea level extending out from the base of the existing sea cliff);

waves associated with explosions, collapses; plumes of hot water. For more information, please see: <https://pubs.usgs.gov/fs/2000/fs152-00/>.

On New Year's Eve 2016, a large portion of the new lava delta collapsed into the ocean producing waves and explosions of debris. Following this collapse, portions of the adjacent sea cliff continued to collapse into the ocean producing localized ocean waves and showers of debris. As of late March 2017, a new delta has begun to form at the Kamokuna ocean entry. Additionally, cracks parallel to the sea cliff in the surrounding area persist, indicating further collapses with very little or no warning are possible.

Based on a review of nearly 30 years of delta collapse and ejecta distance observations in the Hawaii Volcano Observatory records, a radius of 300 meters was determined as a reasonable minimum high hazard zone around a point of ocean entry.

The purpose of this proposed rulemaking is to protect persons and vessels from the potential hazards associated with molten lava entering the ocean resulting in explosions of large chunks of hot rock and debris upon impact, collapses of the sea cliff into the ocean, hot lava arching out and falling into the ocean, and the release of toxic gases. The safety zone's intended objectives include but not limited to protection of the public, mitigation of potential lava flow entry hazards to nearby vessels, and enhancing public safety. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231, which gives the Coast Guard, under a delegation from the Secretary of the Department of Homeland Security, regulatory authority to enforce the Ports and Waterways Safety Act.

On March 28, 2017 the COTP issued a temporary final rule, published elsewhere in this issue of the Federal Register, without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) [5 U.S.C. 553 (b)]. The

temporary final rule established a temporary safety zone to immediately protect persons and vessels from the potential hazards associated with Kilauea's active lava flow entry into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The safety zone encompassed all waters extending 300 meters (984 feet) in all directions around all entry points of lava flow into the ocean. The entry points of the lava vary, and the safety zone will vary accordingly. The temporary final rule will remain in effect throughout this notice of proposed rulemaking unless otherwise canceled or modified by the COTP.

### **III. Discussion of Proposed Rule**

The COTP Honolulu proposes to establish a permanent safety zone around the lava flow entry point on the Kamokuna lava delta. The entry point of the lava does change based on flow, however the safety zone will encompass all waters extending 300 meters (984 feet) in all directions around the entry point of lava flow into the ocean associated with the lava flow at the Kamokuna lava delta. The safety zone is needed to protect persons and vessels from potential hazards associated with molten lava entering the ocean resulting in explosions of large chunks of hot rock and debris upon impact, hot lava arching out and falling into the ocean, and the release of toxic gases. No persons or vessels will be permitted to enter the safety zone without express authorization from the COTP Honolulu or his designated representative.

The regulatory text we are proposing appears at the end of this document.

### **IV. Regulatory Analyses**

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

#### **A. Regulatory Planning and Review**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of the southeast side of the Island of Hawaii, HI. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 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 for reasons stated in section IV. A. above.

Some owners or operators of vessels, which may be small entities, conduct tours in the vicinity of the proposed safety zone where lava flow enters the ocean. Some of these owners or operators reportedly navigate closer than 300 meters from the lava entry into the ocean. This rule

may affect their operations. The safety zone does not prohibit ocean tours; the safety zone simply requires operators and vessel owners to navigate at a safe distance. It also allows vessels to seek permission of the COTP Honolulu to get closer.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

#### 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 an 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 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have 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 permanent safety zone that would prohibit entry within 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 34(g) of Figure 2-1 of Commandant Instruction M16475.ID. A preliminary environmental analysis checklist and Categorical Exclusion Determination are 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.

#### **V. 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 as being 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.

We plan to hold one public meeting on May 08, 2017 at 5 P.M. at the East Hawaii County Building (Hilo) Aupuni Center Conference Room located at 101 Pauahi St. #7, Hilo, Hawaii 96720. For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact the person named in the FOR FURTHER INFORMATION CONTACT section, above.

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

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

For the reasons discussed in the preamble, the Coast Guard 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 COTP Zone (See 33 CFR 3.70-10) and encompasses one primary area 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 does change based on flow, however the safety zone will encompass all waters extending 300 meters (984 feet) in all directions around the entry point of lava flow into the ocean associated with the lava flow at the Kamokuna lava delta.

(b) Enforcement period. The COTP Honolulu will establish the enforcement dates that will be announced with a notice of enforcement of regulations published in the **Federal Register**. The enforcement dates will also be announced with a Broadcast Notice to Mariners, Local Notice to Mariners, and Outreach.

(c) Regulations. The general regulations governing safety zones contained in §165.23 apply to the safety zone created by this rule.

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

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

(3) Persons or vessels desiring to transit the safety zone identified in paragraph (a) of this section may contact the COTP of 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. 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 in the safety zone.

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

(d) Notice of enforcement. 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.

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

Dated: March 28, 2017.

M.C. Long,

Captain, U.S. Coast Guard,

Captain of the Port Honolulu.

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