State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Loch Lynn Heights, Town of, Garrett County.	240037	May 23, 1975, Emerg; August 15, 1979, Reg; October 2, 2013, Susp.	.....do	Do.
Mountain Lake Park, Town of, Garrett County.	240038	May 6, 1975, Emerg; October 16, 1984, Reg; October 2, 2013, Susp.	.....do	Do.
Oakland, Town of, Garrett County	240039	April 18, 1975, Emerg; July 16, 1979, Reg; October 2, 2013, Susp.	.....do	Do.
Region IV				
Mississippi:				
Coldwater, Town of, Tate County	280265	May 9, 1975, Emerg; August 1, 1986, Reg; October 2, 2013, Susp.	.....do	Do.
Senatobia, City of, Tate County	280171	March 4, 1974, Emerg; September 29, 1978, Reg; October 2, 2013, Susp.	.....do	Do.
Tate County, Unincorporated Areas	280235	May 6, 1975, Emerg; September 27, 1985, Reg; October 2, 2013, Susp.	.....do	Do.
Region V				
Illinois:				
Broadlands, Village of, Champaign County.	170025	April 28, 1975, Emerg; March 9, 1984, Reg; October 2, 2013, Susp.	.....do	Do.
Champaign, City of, Champaign County	170026	June 6, 1975, Emerg; January 16, 1981, Reg; October 2, 2013, Susp.	.....do	Do.
Champaign County, Unincorporated Areas.	170894	January 14, 1975, Emerg; March 1, 1984, Reg; October 2, 2013, Susp.	.....do	Do.
Fisher, Village of, Champaign County ..	170027	August 13, 1974, Emerg; April 3, 1984, Reg; October 2, 2013, Susp.	.....do	Do.
Mahomet, Village of, Champaign County.	170029	April 10, 1975, Emerg; June 15, 1983, Reg; October 2, 2013, Susp.	.....do	Do.
Rantoul, Village of, Champaign County	170031	N/A, Emerg; July 8, 1994, Reg; October 2, 2013, Susp.	.....do	Do.
Sadorus, Village of, Champaign County	170855	N/A, Emerg; March 13, 2013, Reg; October 2, 2013, Susp.	.....do	Do.
Sidney, Village of, Champaign County	170033	July 10, 1975, Emerg; January 17, 1986, Reg; October 2, 2013, Susp.	.....do	Do.
Saint Joseph, Village of, Champaign County.	170032	August 1, 1975, Emerg; November 16, 1983, Reg; October 2, 2013, Susp.	.....do	Do.
Urbana, City of, Champaign County	170035	February 3, 1975, Emerg; January 16, 1981, Reg; October 2, 2013, Susp.	.....do	Do.
Indiana: Allen County, Unincorporated Areas	180302	February 14, 1974, Emerg; September 28, 1990, Reg; October 2, 2013, Susp.	.....do	Do.
Region VIII				
Colorado: Broomfield, City and County of, Broomfield County	085073	February 18, 1972, Emerg; September 7, 1973, Reg; October 2, 2013, Susp.	.....do	Do.

*do = Ditto.
Code for reading third column: Emerg. —Emergency; Reg. —Regular; Susp. —Susp.ension.

Dated: August 19, 2013.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2013–22837 Filed 9–18–13; 8:45 am]

BILLING CODE 9110–12–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Final rule.

SUMMARY: The NTSB finalizes its amendments to portions of its rules of practice for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA), as a result of the enactment of the Pilot's Bill of Rights.

DATES: This rule is effective September 19, 2013.

ADDRESSES: A copy of this final rule, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza, SW., Washington, DC 20594–2003. Alternatively, a copy is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2011–0001).

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legislative and Regulatory History

The NTSB issued an advance notice of proposed rulemaking (ANPRM), 75 FR 80452 (Dec. 22, 2010) and a notice of proposed rulemaking (NPRM), 77 FR 6760 (Feb. 9, 2012), which the NTSB finalized in a final rule, 77 FR 63245 (Oct. 16, 2012) for 49 CFR parts 821 and 826. (Part 826 sets forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980.) In a

separate publication, the NTSB issued an interim final rule, 77 FR 63242 (Oct. 16, 2012), which also set forth changes to 49 CFR part 821. The interim final rule contained necessary amendments required by the enactment of the Pilot's Bill of Rights, Pub. L. No. 112–53, 126 Stat. 1159 (August 3, 2012). As noted in the interim final rule, the Pilot's Bill of Rights established statutory changes that, among other things: (1) Require the FAA to disclose its enforcement investigative report (EIR) to each respondent in an aviation certificate enforcement case; (2) require the NTSB to apply the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE) to each case, to the extent practicable; and (3) provide litigants the option of appealing the Board's orders to either a Federal district court or a Federal court of appeals.

B. Comments Received

In response to the October 16, 2012, interim final rule, the NTSB received ten comments. The NTSB received a comment dated December 17, 2012, from the FAA, which followed two letters the FAA's Chief Counsel submitted. As described more fully below, these letters stated the interim final rule's requirement to release the EIR ''with'' the ''required notification'' was an incorrect interpretation of the Pilot's Bill of Rights, and caused immediate hardship for the FAA. The NTSB placed both letters (dated October 26 and December 4, 2012), as well as the FAA comment in the public docket for this rulemaking. The NTSB General Counsel held discussions with staff from the FAA Chief Counsel's office, as well as with counsel for the Aircraft Owners and Pilots Association (AOPA). The NTSB placed summaries of both conversations in the public docket for this rulemaking.

In addition to feedback from the FAA, the NTSB received comments from nine other organizations, including AOPA, Aerolaw Offices, the Aviation Law Firm, Dixon and Snow, GeoVelo, Hays Hettinger of Carstens & Cahoon, LLP, National Air Transportation Association (NATA), National Business Aviation Association (NBAA), and Smith Amundsen Aerospace. The comments discussed the following issues: (1) Applicability of the FRCP; (2) applicability of the FRE; (3) disclosure of the EIR;

(4) judicial review of Board orders; (5) disclosure of air traffic data; and (6) emergency review determinations.

II. Responses to Comments

A. Applicability of the FRCP

1. Section 821.5

In the interim final rule, the NTSB set forth the following final language to § 821.5: ''In proceedings under subparts C, D, and F of this part, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice.'' Subpart C contains rules applicable to proceedings under 49 U.S.C. 44703, which governs denials of issuance or renewal of airman certificates. Subpart D includes rules applicable to proceedings under 49 U.S.C. 44709, which governs amendments, modifications, suspensions, and revocations of certificates. Finally, subpart F contains rules applicable to hearings conducted under 49 CFR part 821.

In the preamble of the NTSB's interim final rule, the agency explained it considered the phrase, ''to the extent they are consistent with sound administrative practice,'' to preclude the application of the FRCP that would be obviously inapplicable. The NTSB further explained it would apply the FRCP in conjunction with the Rules of Practice codified in 49 CFR part 821; in this regard, the NTSB analogized part 821 to ''local rules'' a Federal court would apply.

The NTSB received five comments discussing this amendment to § 821.5. Comments from AOPA and GeoVelo both suggest the NTSB replicate the language of the Pilot's Bill of Rights, which requires the NTSB to apply the FRCP ''to the extent practicable.'' The GeoVelo comment includes the suggestion the NTSB clarify that when the rules of part 821 conflict with the FRCP, the FRCP should apply.

The FAA's comment discusses the amendment to § 821.5, and the overall applicability of the FRCP to all NTSB cases. Concerning the applicability of the FRCP, the FAA states the new language of § 821.5 goes beyond the scope of the Pilot's Bill of Rights, because the statute does not require applying the FRCP to cases the FAA commences under 49 U.S.C. 44710, regarding revocation of an airmen's certificate for violating a Federal or state law related to a controlled substance, and 44726, regarding denial or revocation of an airman's certificate for a conviction of a Federal law related to the installation, production, repair, or sale of a counterfeit or fraudulently-represented aviation part or material, as well as civil penalty proceedings. The FAA also urges the NTSB to clarify whether the FRCP will apply to emergency cases under 49 CFR part 821, subpart I. The Pilot's Bill of Rights only specifically required application of the FRCP to subparts C, D, and F of part 821, and the NTSB did not include subpart I in the new text of § 821.5.

2. Section 821.19

The NTSB received two comments discussing paragraphs (a), (b), and (c) of § 821.19. (A discussion concerning paragraph (d) of § 821.19, regarding mandatory disclosure of the EIR, is included in the EIR section below.)

AOPA suggests the NTSB amend § 821.19 to state the FRCP would apply ''to the extent practicable,'' and provide the NTSB's administrative law judges the discretion to determine how to apply the FRCP.

The FAA suggests several amendments to paragraphs (a) (''depositions''), (b) (''exchange of information by the parties''), and (c) (''use of the [FRCP]'') of § 821.19. The FAA states the NTSB should amend § 821.19(a) concerning depositions, because FRCP 30(a) and 31(a) specify when a party ''may'' take a deposition ''without leave,'' and when a party ''must obtain leave'' before taking a deposition. The FAA encourages the NTSB to compare these requirements to those within § 821.19(a), which allows parties to take depositions without first obtaining approval to do so. The FAA suggests the NTSB clarify in § 821.19(a) that the taking of a deposition with or without leave of the Board must be in accord with FRCP 30(a) and 31(a).

The FAA also states § 821.19(b) does not provide a ''sufficient framework to effectuate compliance'' with the FRCP. As amended, § 821.19(b) states parties must exchange information in accordance with the FRCP. The FAA contends § 821.19(b) should address whether parties must attend a scheduling conference, because FRCP 26(a)(1)(C) requires initial disclosures occur ''within 14 days after the parties' Rule 26(f) conference.'' The FAA further notes FRCP 26(f) requires parties establish a ''discovery plan'' after the judge issues a scheduling order, but the NTSB rules provide judges with the discretion to issue prehearing orders. The FAA comment states the NTSB's ''wholesale adoption'' of the FRCP in 821.19(b) is impractical. The FAA suggests the NTSB choose which of the FRCP will apply, and proposes changes to § 821.19(b) in an NPRM requesting comments. The FAA's comment cites *Richardson* v. *Perales,* 402 U.S. 389, 400–01 (1971), in which the Supreme Court recognized application of the

FRCP in administrative cases is impractical. The FAA's comment also disputes a statement the NTSB made in the preamble explaining § 821.19(c), wherein the NTSB indicated it would apply FRCP 11 (Signing pleadings, motions, and other papers; representations to the court; sanctions) to NTSB cases. The FAA states the FRCP provides for a broad range of sanctions, including monetary penalties, but is inapplicable to discovery because FRCP 26(g)(3), 30(d)(2), and 37 provide for monetary penalties in certain circumstances. The FAA states the Pilot's Bill of Rights did not give the NTSB authority to impose monetary penalties. Therefore, the FAA suggests the NTSB add the statement ''and as authorized by law'' to the end of § 821.19(c).

3. Other Issues Concerning Application of the FRCP

The comment the NTSB received from Hays Hettinger of Carstens & Cahoon, LLP, indicated the firm agrees with the NTSB's amendments to its rules concerning the FRCP. Similarly, the Aviation Law Firm stated it supports the NTSB's amendments indicating applicability of the FRCP, especially FRCP 26, which concerns mandatory disclosures and general rules concerning discovery. The firm specifically suggests the NTSB adopt scheduling orders in all cases pursuant to FRCP 16, and attached a sample scheduling order to its comment; the firm did not recommend a section within part 821 in which such a requirement should appear.

AOPA's comment includes a general suggestion: The comment acknowledges many of the FRCP would be inapplicable to NTSB cases, but states it is ''premature to conclude all of the procedural rules beyond pre-hearing discovery are impractical.''

In addition to offering input concerning §§ 821.5 and 821.19, the FAA's comment also suggests the NTSB incorporate FRCP 26(b)(2)(C), which limits all discovery when the discovery request is unreasonably cumulative or duplicative; when the person seeking discovery has already had ample opportunity to obtain the information; or when the burden or expense of the discovery outweighs its benefit. The FAA suggests the NTSB specifically reference the discovery limitations of FRCP 26(b) within the rules of practice.

4. NTSB's Response to Comments

Section 821.5 (General Applicability of FRCP)

The NTSB appreciates commenters' feedback concerning the applicability of the FRCP. First, concerning § 821.5, the NTSB herein changes the language to provide as follows: ''In proceedings under subparts C, D, F, and I, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent practicable.'' Although the Pilot's Bill of Rights does not mandate this inclusion of subpart I (which contains rules applicable to emergency cases), the NTSB maintains it has the discretion to apply the FRCP to all cases, to the extent practicable. In this regard, the NTSB notes it does not have separate rules within part 821 that apply to civil penalty cases or cases involving air carriers; the NTSB has always applied the rules of part 821 to any appeal within the NTSB's jurisdiction. The NTSB plans to continue to apply the rules of part 821 to all such cases, including those the FAA commences under 49 U.S.C. 44710 and 44726. Therefore, in the interest of consistency, the NTSB will enact the amendment noted above.

In addition, the NTSB is removing the language ''to the extent . . . consistent with sound administrative practice,'' and instead inserting the language from the Pilot's Bill of Rights, which requires application of the FRCP ''to the extent practicable.'' The NTSB believes it beneficial to maintain consistency with the statutory language.

The NTSB acknowledges Congress did not define the phrase ''to the extent practicable'' in its consideration and passage of the Pilot's Bill of Rights. Courts have recognized this phrase in the context of agencies' application of the FRE,[1] but have not provided a definition or description of how agencies should interpret the phrase.

Section 821.19(a) (Depositions)

The NTSB believes its current version of § 821.19(a) conveys the NTSB will apply the FRCP and is not in conflict with FRCP provisions regarding taking of depositions; therefore, the NTSB declines to change the text of § 821.19(a). As noted, for situations not covered by a specific Board rule, NTSB administrative law judges will follow the FRCP to the extent practicable. When a party disagrees with the issuance of a notice of deposition, the party may seek relief from the law judge. FRCP 30(a) and 31(a) require parties to seek leave from the court when (1) parties do not stipulate to a deposition, and (2) certain circumstances are present. For example, the FRCP require leave when a party seeks to depose the same person twice, depose a person outside the United States, or take more than ten depositions. In cases before NTSB administrative law judges, parties file motions when they do not stipulate to a deposition, in an effort to persuade the administrative law judge to compel the deposition. Therefore, FRCP 30(a) and 31(a), which require the absence of parties' stipulation as a preliminary requirement for seeking leave, are consistent with practice before the NTSB, which involves notifying the presiding law judge to resolve disputes concerning whether a deposition will occur. In its comment, the FAA stated this rule is inconsistent with the requirements of FRCP 30(a) and 31(a), which require leave of the court prior to noticing a deposition in certain circumstances. The NTSB disagrees with this viewpoint, because parties will seek resolution from an NTSB law judge whenever an opposing party refuses to comply with a deposition request. Therefore, the NTSB will continue to apply § 821.19(a) in conjunction with FRCP 30(a) and 31(a), as set forth in the interim final rule.

Section 821.19(b) (Parties' Exchange of Information)

The NTSB declines to alter the language of § 821.19(b); rather, the NTSB will apply its rules codified in 49 CFR part 821 as ''local rules'' that supplement and provide additional details concerning overall compliance with the FRCP.

The NTSB recognizes the comments suggesting the NTSB mandate scheduling orders in all cases, in conjunction with a formal discovery plan and scheduling conference. The NTSB notes the Board's rules authorize its law judges to issue pre-hearing orders and conduct pre-hearing conferences to regulate the conduct of hearings, including for discovery matters. Consistent with that authority, all NTSB administrative law judges now issue pre-hearing orders setting forth timelines for discovery matters, consistent with the FRCP and the local rules.

The NTSB maintains the prehearing orders issued, and any pre-hearing

[1] *Federal Maritime Comm'n* v. *South Carolina Ports Authority,* 535 U.S. 743, 758–59 (2002) (application of FRCP ''to the extent practicable''); *Nat'l Labor Relations Bd.* v. *Interbake Foods, LLC* 637 F.3d 492 (4th Cir. 2011) (application of FRE ''to the extent practicable); *accord New Life Bakery* v. *Nat'l Labor Relations Bd.,* 980 F.2d 738 (9th Cir. 1992).

conferences conducted, by its administrative law judges will suffice to regulate the discovery process consistent with the FRCP. The NTSB does not believe its application of FRCP 26(f)(1) and (2), to the extent these provisions require discovery conferences and discovery plans, is practicable. Given the NTSB's limited number of administrative law judges and staff, conducting discovery conferences in all cases would be unduly burdensome. As a result, although NTSB administrative law judges will not prohibit parties from requesting discovery conferences by telephone and may hold such conferences when needed, the NTSB will not require judges to order discovery conferences in all cases.

Section 821.19(c) (Use of the Federal Rules of Civil Procedure)

The NTSB declines to make changes to § 821.19(c). The NTSB recognizes the FAA's comment raises concerns with a specific reference to FRCP 11 and states the NTSB would not be permitted to issue monetary sanctions against practitioners. The NTSB notes the regulatory language of § 821.19(c), as amended, does not reference such sanctions; this mention of sanctions in accordance with FRCP 11 appeared only in the NTSB's preamble of the interim final rule. 77 FR 63244.

The FAA suggests the NTSB include ''as authorized by law'' at the end of § 821.19(c). The NTSB believes it is self-evident that it would only sanction a party ''as authorized by law,'' and therefore does not believe it necessary to include such a phrase in the text of the rule.

B. Applicability of the FRE

In the interim final rule, the NTSB amended § 821.38 to provide that in any proceeding under the rules in part 821, all evidence that is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. Section 821.38 of the interim final rule also stated all other evidence would be excluded, and that the NTSB would apply the FRE to all proceedings, unless such application would be inconsistent with the requirements of the APA.

The NTSB's preamble explaining this change stated the amendment was consistent with section 2(a) of the Pilot's Bill of Rights, which mandates the FRE be applied to NTSB proceedings under part 821, subparts C, D, and F ''to the extent practicable.'' The NTSB modeled the final sentence of the paragraph, which referred to the Administrative Procedure Act (APA), on other agencies' procedural rules concerning the application of the FRE.[2]

1. Comments Received

The NTSB received five comments addressing this change. The comments from AOPA, Dixon and Snow, and the FAA suggest the NTSB amend the final sentence of the paragraph, to remove or change the reference to the APA. The FAA's comment asserts the statement concerning the APA is inconsistent with the FRE, because the FRE requires the exclusion of hearsay evidence unless an exception applies to permit the evidence. Both the FAA and the comment from Dixon and Snow recommend the NTSB strike the phrase concerning the APA, and expressly state in the text of the rule that hearsay is inadmissible, unless a hearsay exception under the FRE applies.

The FAA also suggests the NTSB clarify whether the FRE will apply only to proceedings conducted under subparts C, D, and F of part 821, or whether the rules will apply to *all* proceedings (in particular, subpart I, governing emergency cases).

As stated above, AOPA's comment asserts the NTSB erred in making the FRE ''subordinate'' to the APA's rule on evidence; AOPA contends the result of this statement concerning the APA is the NTSB's practices in admitting evidence will not significantly change. AOPA points out the APA provides, ''[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.'' 5 U.S.C. 556(d) Section 821.38, however, states such evidence *shall* be admissible. AOPA contends this distinction amounts to a conflict between the rules.

The comment from GeoVelo recommends the NTSB repeal § 821.21 because it is now ''surplus.'' Section 821.21, titled ''Official notice,'' states that where a law judge or the Board intends to take official notice of a material fact not appearing in the evidence in the record, notice must be given to all parties, who may file a petition disputing that fact within 10 days.

In particular, GeoVelo states that Rule 201 of the Federal Rules of Evidence (FRE 201) already addresses this circumstance. FRE 201, titled, ''Judicial notice of adjudicative facts,'' includes the following language:

(b) *Kinds of Facts That May Be Judicially Noticed.* The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) *Taking Notice.* The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

The comment from Hays Hettinger disagrees with the language in the Pilot's Bill of Rights requiring application of the FRE to NTSB proceedings. The commenter cites authority indicating the FRE should not apply to administrative adjudications. Nevertheless, the commenter agrees with the NTSB's approach in applying the FRE to all proceedings, by enacting the change to § 821.38.

2. The NTSB's Response to Comments Concerning the FRE

The NTSB carefully has considered all comments regarding the application of the FRE. In the interest of ensuring the public fully understands the NTSB's intent to apply the FRE, and to confirm the NTSB's compliance with the statutory language, the NTSB herein changes the final sentence of § 821.38 to state as follows: ''To the extent practicable, the Federal Rules of Evidence will be applied in these proceedings.'' The NTSB is hopeful this language will assist in avoiding conflicts between the APA and the statutory requirement to apply the FRE. The NTSB is aware the APA allows administrative law judges considerable discretion in overseeing the admission of evidence at hearings, and permits hearsay evidence. However, the FRE clearly excludes such evidence, unless an exception applies. In the interest of ensuring all parties are aware the NTSB will apply the FRE in all cases, the NTSB is removing the reference to the APA, which it had included in the interim final rule.

The NTSB declines to include any specific language in its rules concerning hearsay. The NTSB believes referencing specific portions of the FRE is unnecessary, and could cause confusion if the NTSB included indications that some, but not all, of the FRE would apply. The FRE already contain detailed provisions concerning the exclusion of hearsay evidence;[3] therefore, the NTSB believes discussing hearsay evidence in its rules is repetitious.

Furthermore, the NTSB declines to reference the subparts of the NTSB rules to which the FRE will apply. Section

[2] *See, e.g.,* 46 CFR 502.156 (Federal Maritime Commission rules); 49 CFR 386.56 (Federal Motor Carrier Safety Administration rules).

[3] See Fed. R. Evid. 801–807.

821.38 is codified within subpart F of the NTSB Rules of Practice, which addresses administrative hearings. The subpart does not contain any language indicating its sections will only apply to certain types of cases. Therefore, the NTSB has always applied the provisions within subpart F to all types of hearings over which the NTSB presides. The NTSB does not now believe a need exists to identify that § 821.38 applies to certain types of cases; the NTSB's intent is to apply the section to all cases in which the NTSB holds a hearing.

The NTSB appreciates the suggestion concerning judicial notice of documents; however, the NTSB does not believe § 821.21 conflicts with FRE 201. The NTSB's administrative law judges, in their discretion, take judicial notice of certain documents and other evidence, and their act of doing so does not contravene any portion of FRE 201.

C. Disclosure of the EIR

In the interim final rule, the NTSB included a requirement concerning the FAA's disclosure of its EIR, within § 821.19(d). The paragraph stated a respondent could move to dismiss the FAA's complaint when the FAA failed to provide the releasable portion of its EIR ''with its required notification to the respondent.'' The paragraph included a description of what the NTSB would consider to be the releasable portion of the EIR; this description excluded several items, such as any information that prohibited from disclosure by law, is privileged, internal, would disclose the identity of a confidential source, not relevant, or sensitive security information.

The NTSB explained in the preamble of the interim final rule that this requirement was based on section 2(b) of the Pilot's Bill of Rights, which requires the FAA provide ''timely, written notification'' to certificate holders who are the subject of an FAA enforcement action regarding the ''nature of the investigation.'' In the notification, the FAA must indicate the certificate holder need not respond to an FAA letter of investigation and will not be adversely affected if he or she elects not to respond. The statute requires the Administrator of the FAA to make available the releasable portions of the EIR to each affected certificate holder and provide certain air traffic data. The statute further provides that the Administrator may delay this notification if the FAA determines the notification would threaten the integrity of the investigation.

1. Correspondence and Comments Received

On October 26, 2012, the FAA sent the NTSB's General Counsel a letter stating this requirement was contrary to the language of the Pilot's Bill of Rights. The FAA stated the Pilot's Bill of Rights does not require the FAA to release the EIR to a certificate holder at the time it transmits its letter of investigation, wherein the FAA typically informs the certificate holder that the FAA is investigating a potential violation. The FAA's letter further stated the NTSB misunderstood an FAA Order (''FAA Compliance and Enforcement Program,'' available at *http://www.faa.gov/documentLibrary/media/Order/2150.3%20B%20W-Chg%204.pdf*), describing the FAA's enforcement process and general procedural matters. The FAA also emphasized the statute only required the FAA to ''make [the EIR] available'' to certificate holders, rather than automatically disclose it. The FAA requested the NTSB immediately clarify the rule. The NTSB placed this letter in the docket for this rulemaking. The NTSB General Counsel requested via a telephone call that FAA counsel provide more information concerning the FAA's letter; the NTSB summarized this conversation in a memorandum, which it also placed in the rulemaking docket.[4] Following the conversation, the NTSB General Counsel sent a letter to the FAA indicating the NTSB believed the FAA's concern originated only in a sentence in the preamble of the interim final rule, in which the NTSB stated it understood the FAA intended to release the EIR in conjunction with its transmission of the letter of investigation in each case. The language of § 821.19(d), however, only indicated the FAA needed to ''provide the releasable portion of its EIR *with its required notification* to the respondent.'' The NTSB derived this language from section 2(b) of the Pilot's Bill of Rights. The FAA subsequently sent another letter to the NTSB General Counsel, again reiterating its concern that the rule would require the FAA to provide the EIR at the same time it issued its letter of investigation.

The NTSB received six comments—including the FAA's comment, which the FAA submitted in addition to its letters—discussing the language the NTSB set forth in § 821.19(d). The Aviation Law Firm suggests the NTSB require disclosure of the EIR contemporaneously with either the FAA's Notice of Proposed Certificate Action (NOPCA) or, in emergency cases, with the emergency order. The firm states requiring issuance of the EIR with the FAA's complaint would be ''ineffective'' and would increase delay. The firm also recommends the NTSB add a statement in § 821.19(d) indicating dismissals for failure to release the EIR in a timely manner would occur with prejudice.

AOPA's comment identifies two issues concerning the language of § 821.19(d): the releasable portions (and exclusions listed in § 821.19(d)(2)(i)–(vi) of the rule) and the timing of the required release of the EIR. Concerning the releasable portions, AOPA states it is ''extreme'' that the rule allows the FAA to determine ''unilaterally'' the information it may withhold without oversight from an administrative law judge. AOPA suggests the term ''releasable portions of the EIR'' in the Pilot's Bill of Rights suffices, and the interim rule ''now [limits] what we have always experienced to be available to respondents when asking for 'the releasable portions of the EIR.' '' AOPA contends a better overall rule would be to ''allow the law judge to rule on all of the other requested information, if an FAA claim is disputed by respondent.'' Concerning the timing of the FAA's provision of the EIR, AOPA urges the NTSB to keep the language in the interim rule as-is for the near future, to determine how it works in practice. AOPA states the NTSB's interpretation in requiring the EIR at the time the FAA provides its ''timely, written notification'' is consistent with Congressional intent to provide respondents with the information at the earliest possible time. AOPA also asserts this practice will benefit the FAA by allowing the agency to work with certificate holders more effectively in discussing the charges at issue.

Some comments focus on the sanction of dismissal on motion the NTSB set forth in § 821.19(d). Aerolaw Offices suggests the NTSB ''strengthen'' § 821.19(d) to provide for sanctions (dismissal or otherwise) for FAA's partial failure to release the EIR. The firm states that, as written, the rule only assumes total failure, but it should set forth consequences for partial failures to release the EIR. Aerolaw Offices also emphasizes this rule is important because critical information may be lost if FAA does not provide the EIR in a timely manner. Similarly, the comment from GeoVelo recommends the NTSB provide all dismissals for failure to release the EIR occur with prejudice.

[4] The NTSB also contacted counsel for AOPA, to offer the opportunity for AOPA to provide an opinion concerning the timing of the release of the EIR. A copy of a summary of the conversation with AOPA counsel is also in the docket for this rulemaking.

The comments from GeoVelo and Dixon and Snow also address the preservation of evidence and the exemptions from disclosure listed in § 821.19(d). GeoVelo suggests the NTSB require the FAA immediately to preserve all relevant information and notify all contractors once FAA determines an EIR ''is warranted.'' GeoVelo further urges the NTSB to require the FAA to include information about the time, manner and which agency official made the notification to the contractor(s) in its EIR notice to the certificate holder; in this regard, GeoVelo states the NTSB should expand § 821.19 to apply to more information than EIRs, to include ''all material evidence in its possession which may serve to exonerate the airman as charged.'' Similarly, Dixon and Snow requests the NTSB remove from the list of exemptions ''(ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency'' because nothing stops the FAA from asserting every document is an ''internal memorandum,'' and because the ''intent of discovery is to find out not only the evidence obtained by the FAA but the process by which it was obtained.'' In this regard, Dixon and Snow contends exemption (ii) within paragraph (d)(2) of § 821.19 is an overly-broad exclusion.

Finally, following the letters from the FAA described above, the FAA also submitted a comment, which again addresses the NTSB's addition of § 821.19(d). Rather than focusing on the timing of the disclosure, as its letters discussed, the FAA's comment focuses on its assertion that the NTSB does not have jurisdiction to enforce the EIR availability requirement the Pilot's Bill of Rights set forth. Specifically, in its comment, the FAA states section 2(b)(2)(E) of the Pilot's Bill of Rights ''is addressed solely to the FAA'' to provide timely, written notification that the EIR will be available. The FAA states it has added a sentence in the new letters of investigation it now issues, advising the certificate holder that the EIR will be available. The FAA contends § 821.19(d), as currently written, undermines the authority of the FAA to investigate violations, and is contrary to the ''expressed intent of Congress.'' The FAA states the Pilot's Bill of Rights only requires the NTSB to ''figure out the extent to which it is practicable to apply the [FRCP] and [FRE] in any proceeding under . . . subpart[s] C, D, and F.'' The FAA asserts the FRCP do not discuss pre-complaint discovery; therefore, the FAA recommends the NTSB remove § 821.19(d).

2. Response to Comments

The NTSB carefully has considered all discussion within the comments concerning § 821.19(d). In particular, the NTSB recognizes Congress determined certificate holders must obtain access to the EIR in a timely fashion, in order to understand the FAA's cases and prepare their defenses. The NTSB, however, notes the plain language of the Pilot's Bill of Rights does not state the NTSB must provide an enforcement mechanism for release of the EIR. In addition, the NTSB is reluctant to insert itself in matters relating to obligations imposed on the FAA prior to the time the NTSB obtains jurisdiction in these cases. The NTSB always has interpreted its authority to oversee and decide airman appeals commences once the appeal is filed. The Pilot's Bill of Rights did not change the NTSB's authority in this regard.

As a result, the NTSB herein updates the language of § 821.19(d) to provide for relief on motion if the FAA does not provide a copy of the EIR in conjunction with its issuance of the complaint. The new text will read as set forth in the regulatory text of this rule. Specifically, it provides the respondent may move to dismiss the complaint when the respondent requests the EIR, but the Administrator fails to provide its releasable portions by the time the Administrator serves the complaint on the respondent.

The NTSB also has updated § 821.19(d)(2)(ii), to clarify it will consider the FAA's work product exempt from disclosure when it reflects the internal deliberative process undertaken in the enforcement investigation. In this regard, the NTSB administrative law judges will apply the work product doctrine as described in FRCP 26(b)(3). As practitioners know, the work product doctrine generally applies to documents created in anticipation of litigation. The NTSB expects the FAA to apply the work product exemption to the portions of the EIR that reflect the internal deliberations relevant to the enforcement investigation; the NTSB anticipates documents that fall within the work product exemption would reflect internal deliberations.

The NTSB recognizes some comments urged the NTSB to remove exemption (ii). However, the NTSB believes it only fair to allow the FAA to protect its internal deliberations, as respondents' attorneys consider their documents containing work product and internal deliberations to be exempt from disclosure. The basis for the work product doctrine—to promote the adversary process by insulating an attorney's litigation preparation from discovery—also applies to FAA certificate enforcement actions.

As summarized above, AOPA's comment included the suggestion that the NTSB merely rely on the phrase ''releasable portions of the EIR,'' from the Pilot's Bill of Rights, in lieu of listing any exemptions. AOPA suggests the NTSB simply allow its administrative law judges to make releasability determinations on any disputed portions of the EIR. The NTSB declines to adopt such general language for § 821.19(d). Without some guidance, parties would not know what portions of the EIR are releasable, as neither the Pilot's Bill of Rights, nor any supporting information from Congress, provides such information. As a result, parties would not be able to anticipate the disclosure requirement, and NTSB administrative law judges would be placed in the position of having to resolve disputes concerning the releasable portions in a piecemeal manner.

The NTSB also recognizes some commenters suggest the NTSB strengthen the sanction it set forth in § 821.19(d); in particular, Aerolaw Offices recommends the NTSB provide for consequences for the FAA's ''partial'' failure to release the EIR. The NTSB believes its administrative law judges are best equipped to address any such ''partial'' failures. Also with regard to sanction, the Aviation Law Firm suggests the NTSB provide for dismissal *with prejudice* when the FAA fails to release the EIR as required. Again, the NTSB declines to adopt a generally applicable rule concerning whether a dismissal will occur with or without prejudice; instead, the NTSB believes its administrative law judges are best suited to make such a determination.

3. Section 821.55(d)

The updated language of § 821.19(d) clearly applies to non-emergency cases. In an NPRM published elsewhere in today's issue of the **Federal Register**, the NTSB proposes incorporating a similar requirement at paragraph (d) of § 821.55, regarding the release of the EIR in emergency cases proceeding under subpart I of the NTSB's rules.

D. Judicial Review of Board Orders

The NTSB received two comments discussing its change to § 821.64, which provides ''[j]udicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review

with the appropriate United States Court of Appeals or United States District Court. . .'' The sole change the interim final rule included was the addition of ''United States District Court.'' This addition is the result of subsection 3(d)(1) of the Pilot's Bill of Rights, which provides for judicial review in either a Federal district court or a Federal court of appeals. Previously, only a United States Court of Appeals had jurisdiction to review a final action by the Board.

Smith Amundsen Aerospace submitted a comment that includes a discussion of the NTSB's change to § 821.64. The firm suggests the NTSB review the section ''to recognize that review at the District Court level affords the respondent a [*de novo*] trial on the merits, whereas an appeal to the appropriate Court of Appeals (from either the District Court, or directly from the Board's decision) should be confined to the record compiled (by the District Court or Board, respectively).'' The NTSB does not believe it prudent to change its regulation to inform a reviewing court what type of review the court has. The court overseeing review of an NTSB decision will review the language of the Pilot's Bill of Rights to determine the appropriate type of review.

The FAA's comment also addresses the NTSB's addition to § 821.64. The FAA states the option to appeal a Board order to Federal District Court is only available in certain cases. The FAA notes § 821.64(a) ''does not accurately describe the subset of NTSB final orders subject . . . to appeal to [District Court],'' nor does it cite statutory authority. The FAA suggests § 821.64(a) add a reference to 49 U.S.C. 44703, and clarify judicial review is only available in the cases described in section 2(d)(1) of the Pilot's Bill of Rights. Otherwise, the FAA asserts judicial review is only available in a Federal Court of Appeals under 49 U.S.C. 1153 and 46110. The NTSB has determined it will include a reference in § 821.64 to the Pilot's Bill of Rights, and believes this inclusion will suffice to inform parties of their appeal rights. The NTSB declines to include any specific information concerning courts' jurisdiction or review authority. In this regard, the NTSB would expect the parties to make jurisdictional arguments before the reviewing court.

E. Disclosure of Air Traffic Data

The NTSB received two comments in response to the interim final rule requesting the NTSB implement a rule to enforce the FAA's requirement to release air traffic data. Section 2(b)(4) of the Pilot's Bill of Rights requires the FAA to provide an airman with ''timely access to any air traffic data in the possession of the Federal Aviation Administration that would facilitate the individual's ability to productively participate in a proceeding relating to an investigation described in such paragraph.'' The FAA's implementation of this requirement includes instructions on how an airman may submit a request for such data, which, due to its nature and volume, is on a rapid destruction schedule. Certificate holders must request the data as soon as possible, as the data may exist in contractor records and may be destroyed if the certificate holder waits too long to make the request.

AOPA's comment includes the general suggestion that the NTSB require in § 821.19 the FAA to disclose air traffic data in accordance with the Pilot's Bill of Rights. GeoVelo's comment states FRCP 26(a) requires the FAA to disclose such data. GeoVelo states the FAA must do more than simply post a Web site address at which a pilot may request preservation of the data. GeoVelo suggests the FAA may ''run out the clock'' to arrange for disposal of the data before the certificate holder can obtain it. As a result, GeoVelo also suggests the NTSB modify § 821.19(d) to require the FAA to provide the data as soon as the FAA decides ''an EIR is warranted.''

The NTSB declines to implement any requirement concerning air traffic data. Given the NTSB's determination that its jurisdiction over an FAA certificate enforcement case on appeal does not commence until the certificate holder files an appeal, the NTSB cannot enforce a requirement that the FAA release air traffic data as soon as it begins its investigation into an alleged violation. The Pilot's Bill of Rights does not include any changes in the NTSB's authority to enable the NTSB to oversee any pre-appeal matters. Neither of the comments the NTSB received on the issue of air traffic data addresses this jurisdictional issue.

F. Emergency Review Determinations

Finally, the NTSB recognizes three of the comments it received in response to the interim final rule once again request the NTSB amend § 821.54(e) of its rules. This section sets forth the standard of review of the FAA's decision to pursue a case as an emergency.

The NTSB received two duplicative comments from National Air Transportation Association (NATA) and National Business Aviation Association (NBAA). These comments contain the same text as those comments NATA and NBAA submitted in response to the NTSB's ANPRM and NPRM concerning changes to parts 821 and 826. GeoVelo's comment raised the same argument concerning an airman's ability to challenge the facts on which the FAA's emergency action is based.

The NTSB responded to the issues raised in these comments in its NPRM and Final Rule on that subject.[5] This interim final rule did not consider or implement changes to § 821.54(e). As a result, the NTSB refers commenters to its previous responses, and declines to address again the arguments raised in the comments concerning § 821.54(e).

III. Regulatory Analysis

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 the potential costs and benefits under section 6(a)(3) of that Order. As such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601–612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

The NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under Executive Order 13132, Federalism. This rule also complies with all 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. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety

[5] 77 FR 6761, 6765–6766 (Feb. 9, 2012); 77 FR 63247–63248 (Oct. 16, 2012).

Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

List of Subjects for 49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

For the reasons discussed in the preamble, the NTSB amends 49 CFR part 821 as follows:

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

■ 1. The authority citation for 49 CFR part 821 continues to read as follows:

Authority: 49 U.S.C. 1101–1155, 44701–44723, 46301, Pub. L. 112–153, unless otherwise noted.

■ 2. Revise § 821.5 to read as follows:

§ 821.5 Procedural rules.

In proceedings under subparts C, D, F, and I, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent practicable.

■ 3. In § 821.19, revise paragraph (d) to read as follows:

§ 821.19 Depositions and other discovery.

* * * * *

(d) *Failure to provide copy of releasable portion of Enforcement Investigative Report (EIR).* (1) Except as provided in § 821.55 with respect to emergency proceedings, where the respondent requests the EIR and the Administrator fails to provide the releasable portion of the EIR to the respondent by the time it serves the complaint on the respondent, the respondent may move to dismiss the complaint or for other relief and, unless the Administrator establishes good cause for that failure, the law judge shall order such relief as he or she deems appropriate, after considering the parties' arguments.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

(i) Information that is privileged;

(ii) Information that constitutes work product or reflects internal deliberative process;

(iii) Information that would disclose the identity of a confidential source;

(iv) Information of which applicable law prohibits disclosure;

(v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or

(vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

■ 4. Revise § 821.38 to read as follows:

§ 821.38 Evidence.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. The Federal Rules of Evidence will be applied in these proceedings to the extent practicable.

■ 5. In § 821.64, revise paragraph (a) to read as follows:

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals or United States District Court, pursuant to the provisions of Pub. L. 112–53, 126 Stat. 1159 (August 3, 2012), 49 U.S.C. 44703 note. Such petition is due within 60 days of the date of entry (*i.e.,* service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

* * * * *

Deborah A.P. Hersman,

Acting Chairman.

[FR Doc. 2013–22634 Filed 9–18–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 622 and 640

[Docket No. 120403251–3787–02]

RIN 0648–BB70

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS adopts as final with some changes an interim final rule published April 17, 2013, which reorganized the regulations implementing the fishery management plans (FMPs) for the Southeast Region, NMFS, and amended references to the Paperwork Reduction Act (PRA) information-collection requirements. The new part 622 contains regulations implementing management measures contained in the FMPs for the following domestic fisheries in the Caribbean, Gulf of Mexico, and South Atlantic: Caribbean coral, Caribbean reef fish, Caribbean spiny lobster, Caribbean queen conch, Gulf red drum, Gulf reef fish, Gulf shrimp, Gulf coral, Gulf and South Atlantic coastal migratory pelagics, Gulf and South Atlantic spiny lobster, South Atlantic coral, South Atlantic snapper-grouper, South Atlantic shrimp, Atlantic dolphin and wahoo, South Atlantic golden crab, and South Atlantic pelagic sargassum. The intended effect of this final rule is to improve the organization of these regulations and simplify their use.

DATES: This final rule is effective September 19, 2013. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 17, 2013.

ADDRESSES: Electronic copies of documents supporting this final rule may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Scott Sandorf, telephone: 727–824–5305 or email: *Scott.Sandorf@noaa.gov.*

SUPPLEMENTARY INFORMATION: Domestic fisheries in the Caribbean, Gulf of Mexico, and South Atlantic are managed under the FMPs prepared by the Caribbean, Gulf of Mexico, and/or