

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 845

RIN 3147-AA02

[Docket No. NTSB-GC-2012-0002]

Rules of Practice in Transportation: Investigative Hearings, Meetings, Reports, and Petitions for Reconsideration

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

ACTION: Final rule.

SUMMARY: The NTSB amends its regulations which contain the NTSB's procedures for holding investigative hearings, various types of meetings, issuing reports, and responding to petitions for reconsideration. The NTSB introduced a number of substantive and technical changes in its notice of proposed rulemaking (NPRM). In the preamble to this final rule NTSB responds to the five comments the agency received, and explains the adopted changes, including reorganizing the regulation into different subparts to ensure the entire part is easy to follow.

DATES: Effective January 25, 2016.

ADDRESSES: A copy of the 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 of the NPRM is available on the government-wide Web site on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2012-0002).

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

SUPPLEMENTARY INFORMATION:

I. Notice of Proposed Rulemaking

On March 19, 2015, the NTSB published an NPRM inviting public comments concerning the NTSB's procedural rules for investigative hearings, Board meetings, agency reports, and petitions for reconsideration, codified at 49 CFR part 845. 80 FR 14339. In addition to various technical changes, the NTSB proposed reorganizing the part into subparts and including descriptions of Board products.

The NTSB issued its NPRM in accordance with its June 25, 2012 notice indicating the agency's intent to undertake a review of all NTSB regulations to ensure they are updated. 77 FR 37865. Executive Order 13579,

"Regulation and Independent Regulatory Agencies" (76 FR 41587, July 14, 2011), prompted the NTSB to conduct its review of all NTSB regulations. The purpose of Executive Order 13579 is to ensure all agencies adhere to the key principles found in Executive Order 13563, "Improving Regulation and Regulatory Review" (76 FR 3821, January 21, 2011), which include promoting public participation in rulemaking, improving integration and innovation, promoting flexibility and freedom of choice, and ensuring scientific integrity during the rulemaking process in order to create a regulatory system that protects public health, welfare, safety, and the environment while promoting economic growth, innovation, competitiveness, and job creation. The NTSB explained in its June 25, 2012, notice that it is committed to ensuring its regulations remain updated and comply with these principles. The NTSB published an additional notice in the **Federal Register** on January 8, 2013, describing the NTSB's plan for updating all regulations. 78 FR 1193. In accordance with these two notices published in the **Federal Register**, the NTSB reviewed all sections within 49 CFR part 845, in the interest of ensuring they accomplish the objectives stated in Executive Order 13563. The NTSB published the NPRM pursuant to the agency's plan of retrospective review.

II. Comments Received and Responses Thereto

The NTSB received five comments in response to the March 19, 2015 NPRM. Two of the comments addressed proposed changes to 49 CFR part 845, as well as the changes and additions we proposed in our August 12, 2014 NPRM to reorganize and change 49 CFR part 831 ("Investigation Procedures"). 79 FR 47064. In this regard, Airlines for America (A4A) submitted a comment reiterating its concerns about our proposed use of the term "event" in our NPRM for part 831, and recommended we expand our protections of voluntarily submitted information in § 831.6. In addition, The Boeing Company (Boeing) included a copy of its comment in response to our part 831 NPRM. Boeing also reiterated its recommendation that we adopt a practice of sharing draft Board reports with parties.

The Air Line Pilots Association, International (ALPA) urged us to change the terms "probable cause" to "probable cause(s)" throughout the part. Similarly, the United States Coast Guard (USCG) submitted a comment requesting we remove the term "event" from part 845;

in particular, the USCG mentioned § 845.2 ("Investigative hearings") in this suggestion. In addition, ALPA encouraged the NTSB to continue to use the terms "accident" and "incident" for aviation-specific investigations rather than the term "event."

We understand commenters' concerns regarding use of the term "event" throughout this part. Several commenters expressed similar concerns in response to our part 831 NPRM. In our forthcoming final rule to finalize the changes to part 831, we will explain our responses to such comments concerning the term "event." For this final rule to finalize changes to part 845, we simply note we understand the concerns with the term, and we have removed it from the regulatory text appearing in this final rule.

The commenters also submitted recommendations for specific sections, to which we respond below.

A. Section 845.9, "Prehearing Conference"

1. Comments Received

Regarding § 845.9, in which the NTSB proposed retaining most of the text of § 845.23 describing prehearing conferences, ALPA recommends retaining the existing language in § 845.23(b) and adding the following text to § 845.9(b): "copies of all exhibits proposed for admission by the board of inquiry and the parties shall be furnished to the board and to all the parties, *insofar as available at the time.*" The text the NTSB proposed would require all parties be advised of the witnesses to be called, the areas in which the witnesses would be examined, and the evidence to be offered. The proposed text would also require parties to the hearing to submit, at the prehearing conference, copies of any additional documentary exhibits they desire to offer for admission at the hearing. The proposed text did not include the phrase, "insofar as available at the time."

2. Response to Comments

The NTSB believes it is unnecessary to include the phrase, "insofar as available at the time [of the prehearing conference]," as ALPA suggests. As proposed, the sentence requiring submission of copies of exhibits expected to be offered at hearings is sufficient to connote the exhibits would be available when offered. As ALPA noted, this requirement already exists in the current version of § 845.23(b). In addition, paragraph (c) of § 845.9 addresses the issue of a party to a hearing holding information the party

knows it intends to produce at the hearing.

B. Section 845.13, "Proposed Findings"

1. Comments Received

Boeing recommends we adopt the International Civil Aviation Organization (ICAO) protocol of sharing draft reports with all parties to an NTSB investigation. Boeing contends not sharing draft reports can be detrimental to the quality of Board reports. In its submission, Boeing also attached a copy of its comment to our NPRM for part 831 regarding this issue.¹

A4A generally supports all the changes we proposed in part 845. A4A does not object to our proposed text in § 845.13 ("Proposed findings"), but asks us to remain cognizant that partial releases of information could cause "unproductive speculation." In the comment A4A submitted in response to our NPRM proposing changes to part 831, A4A stated it strongly supports the practice of sharing draft reports for parties' review prior to the Board's review of the draft, in accordance with the ICAO practice.

2. Response to Comments

The NTSB understands parties' interest in reviewing draft reports prior to the Board's review of them. In this regard, the agency has considered carefully the feedback we received in response to the part 831 NPRM. The agency appreciates the candor and recommendations commenters offered concerning this issue, and we are mindful that our practice differs from that of ICAO. At present, the agency believes changing its practice of the review process for draft reports is best left to internal agency procedures and need not be the subject of a rulemaking exercise. As a result, the NTSB will not change the proposed text of § 845.13 to address the sharing of draft reports.

C. Sections 845.20 ("Meetings") and 845.21, "Symposiums, Forums, and Conferences"

1. Comments Received

The Association of American Railroads (AAR) stated it believes the NTSB is attempting impermissibly to expand our authority. AAR opines our description of our practice for holding forums, symposiums, and conferences in § 845.21 is improper because these proceedings are "not within the scope of the NTSB's mandate or authority." In addition, AAR challenges our process

for choosing which investigations are worthy of Board meetings. In the NPRM, the agency proposed § 845.20 to state the Board may hold a meeting whenever "the Board determines holding a meeting is in the public interest." AAR believes "the 'public interest' standard is not in the current regulation at 49 CFR 804.3, and it essentially presumes an unrestricted ability to hold public meetings about any topic."

ALPA supports our proposed language in § 845.21(b) stating symposiums, forums, and conferences are not intended to obtain evidence or establish facts for a particular NTSB investigation.

Regarding § 845.21, the USCG cautions, to the extent a proceeding may have a relationship to ongoing investigation(s) and the proceeding occurs prior to the completion of an investigation, holding the proceeding could result in premature or incomplete findings and recommendations. The USCG also states our proposed language "does not consider other investigations that are conducted concurrently, such as internal agency investigations, and the facts and conclusions that may result from those efforts." The USCG recommends we remove the term "ongoing" from the regulatory text.

2. Response to Comments

We disagree with AAR's contention that we lack the authority to hold forums, symposiums, and conferences. Under 49 U.S.C. 1116, we have held such proceedings for purposes of educating the agency and the public on transportation trends or aspects of transportation that could benefit from safety improvements. Section 1116(b) provides broad authority to the NTSB to accomplish this purpose.

Given this statutory language, it is axiomatic that the NTSB's responsibility is not limited to the requirements of 49 U.S.C. 1131 and 1132 regarding investigations, or section 1133 regarding the review of aviation and mariner certificate and license appeals. The NTSB is also required to conduct special studies and investigations concerning transportation safety in general. The NTSB is best situated to exercise this mandate, given the expertise of its staff and the experiences the agency gains in investigations of accidents and incidents that safety improvements could prevent.

In light of this responsibility, the NTSB holds forums, symposiums, and conferences concerning transportation issues the agency determines warrant further interest or research. The NTSB's proposed regulatory text for § 845.21 reflects this objective, as it includes a

statement that the agency does not hold such proceedings for purposes of obtaining evidence for a specific investigation of an accident or incident.

We also appreciate the USCG's comment regarding § 845.21(b). Specifically, our proposed text stated forums, symposiums, and conferences "may have a relationship to previous or ongoing investigative activities; however, their purpose is not to obtain evidence for a specific investigation."

The clear purpose of NTSB forums, symposiums, and conferences is to focus attention on and educate the public, transportation regulators, and the NTSB itself on key transportation safety issues. Taking advantage of the educational opportunities these proceedings provide helps to ensure comprehensive NTSB investigations. Our acknowledgement in the regulatory text that such proceedings are not held for obtaining evidence, but for focusing attention, raising awareness, encouraging dialogue, educating the agency, or generally advancing or developing safety recommendations, is consistent with our past practices and our statutory responsibility, pursuant to 49 U.S.C. 1116. Given the purpose of these proceedings, as described in the proposed text for § 845.21, we decline to alter the text, as we do not believe the proceedings could result in premature or incomplete findings and recommendations.

D. Sections 845.30, "Board Products," and 845.31, "Public Docket"

1. Comments Received

Regarding our proposed text describing public dockets, which contain information pertinent to an investigation, the USCG recommends we include text stating we will coordinate with the USCG concerning public release of information in marine investigations.

In its comment, AAR mentions § 845.31 in reiterating its position that the changes the NTSB proposed in part 845 are beyond the scope of the agency's authority. Regarding the text of § 845.31, AAR states the language would allow the NTSB to open a public docket "concerning a safety study or report, special investigation report, or other agency product" in addition to doing so for an actual investigation.

AAR also mentions § 845.30(b) in the context of whether the section encompasses documents beyond the scope of the NTSB's authority. AAR states § 845.30(b) "covers 'Board Products' and now includes (a) NTSB studies and reports 'of more than one event that share commonalities', (b)

¹ While Boeing's comment is also applicable to § 845.30(a), the organization discussed sharing of draft reports only within the context of § 845.13.

safety studies and reports, and (c) safety recommendations ‘as a stand-alone Board product.’” With regard to all the sections AAR identified as containing language that exceeds the scope of the NTSB’s authorization, AAR states, “NTSB occupying itself with these types of activities will divert resources from the critical mission given to NTSB by Congress at 49 U.S.C. 1131.” AAR, however, mentions the railroads support public education and involvement, “particularly in matters related to safety,” but contends the NTSB’s proposed text describes activities beyond the scope of NTSB’s statutory authority.

2. Response to Comments

Regarding the USCG’s comment recommending we include text stating for marine investigations, we will coordinate release of public dockets in advance with the USCG, although we decline to adopt this change in § 845.31. Section 845.31, which is largely duplicative of the existing version of § 845.50, describes public dockets in general terms, and provides information concerning how the public may obtain a copy of a public docket. The NTSB believes specific protocols concerning coordination with other agencies is more suitable for an interagency agreement or discussion.

The NTSB disagrees with AAR’s opinion that the NTSB should not conduct safety studies and issue reports. As discussed above, Congress specifically directed the NTSB to conduct safety studies on a variety of issues. In addition, the NTSB’s responsibility to issue safety recommendations is clear, both in the agency’s authorizing legislation and legislative history. 49 U.S.C. 1135; H.R. Rep. No. 103–239(I) at 1 (1993) (emphasizing the importance of the NTSB’s safety recommendations and stating that such recommendations “have saved countless human lives”). As a result of this statutory direction, the NTSB will not alter its practice of conducting safety studies, issuing safety recommendations, and creating and issuing other types of documents that will improve transportation safety. The agency can only achieve its broad mandate by issuing such documents. The NTSB’s choice of the term “Board products” will ensure adequate flexibility in the future, to encompass a variety of documents the agency determines will aid in achieving the ultimate goal of improving transportation safety.

E. Section 845.32, “Petitions for Reconsideration or Modification of Report”

Although no comments addressed the issue of whether the NTSB’s disposition of a petition for reconsideration or modification should be subject to judicial review, the agency notes a recent judicial order denying a petition for review. On June 19, 2015, the Court of Appeals for the District of Columbia Circuit held the NTSB’s disposition of a petition for reconsideration was not subject to a federal court’s review. *Joshi v. Nat’l Transp. Safety Bd.*, 791 F.3d 8 (D.C. Cir. 2015), pet. for cert. filed, 2015 WL 7593160 (Nov. 17, 2015). The *Joshi* case arose out of an aircraft accident in which the pilot and four passengers died in Indiana in April 2006.

The agency denied the petition for reconsideration, and the petitioner sought review of both the NTSB’s reports of its investigation and the response to his petition for reconsideration. The appellate court held that, because neither the reports nor the response can be considered a final order subject to judicial review, the court lacked jurisdiction to hear the case.

In reaching its conclusion, the court cited 49 CFR 831.4 (“Nature of investigation”), which states the NTSB uses its investigations “to ascertain measures that would best tend to prevent similar accidents or incidents in the future.” 49 CFR 831.4. The court went on to quote the regulation further, which states NTSB investigations are considered “fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act and are not conducted for the purpose of determining the rights or liabilities of any person.” *Id.*; *Joshi*, 791 F.3d at 12.

The court stated it lacked jurisdiction to consider not only the agency’s reports and conclusions, but it also could not review the NTSB’s denial of the petition for reconsideration. The court based this conclusion on the fact that the reconsideration procedure the petitioner used was not created by any statute, but was a process set forth in the NTSB’s regulations. The court described the process as one that allows the agency to receive new evidence after it completes an accident investigation and noted this procedure functions to ensure the NTSB “develops safety recommendations based on the most complete record possible.” 791 F.3d at 12. As a result, the court characterized petitions for reconsideration as “simply another stage of the accident investigation

procedure.” *Id.* Therefore, the NTSB’s disposition of petitions are not subject to review in federal court. The NTSB believes it is worthwhile to mention the *Joshi* decision in this rulemaking document, due to its relevance to the NTSB’s disposition of petitions for reconsideration.

F. Additional Edits

In this final rule, the NTSB re-inserts the phrase “in the event of a catastrophic accident” within § 845.4 (“Determination to hold hearing”). The regulatory text of the NPRM did not include this phrase, even though the phrase currently exists in the regulatory text of § 845.10. Upon further evaluation of the regulation, the NTSB has determined it is prudent to retain the phrase.

The NTSB’s NPRM proposed two sections that both described the procedure of providing notice of the time and place of the investigative hearing. Section 845.5(c)(1) proposed text stating the “NTSB” would provide notice of the time and place of the investigative hearing to all known interested persons. Section 845.7 proposed text stating the investigative hearing officer, upon designation by the NTSB Chairman, would have the authority to give notice concerning the time and place of investigative hearing. While the text of these sections is not inconsistent, and is identical to the language that exists in the current versions of §§ 845.12 and 845.21, the NTSB nevertheless believes, as an administrative matter, it is appropriate to remove from § 845.5(c)(1) the statement that, “[t]he NTSB will provide notice of the time and place of the investigative hearing. . . .” The NTSB provides such notice by way of delegating to the hearing officer the responsibility and the authority to do so. In the interest of providing regulations that are concise and abundantly clear, the NTSB removes the aforementioned statement from § 845.5(c)(1). In addition, in § 845.7, the NTSB herein adds the phrase, “or a Board Member designated by the Chairman” to the introductory text stating the investigative hearing officer, upon designation by the NTSB Chairman or a Board Member designated by the Chairman will have the list of “powers” that follows within the section. This addition will ensure the designation of a hearing officer can occur at times the NTSB Chairman has delegated his or her authority.

III. Regulatory Analysis

In the NPRM, the NTSB included a regulatory analysis section concerning

various Executive Orders and statutory provisions. 80 FR 14341 (Mar. 19, 2015). The NTSB did not receive any comments concerning the results of the analysis. The NTSB again notes the following concerning such Executive Orders and statutory provisions.

This final rule is not a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review.” Therefore, Executive Order 12866 does not require a Regulatory Assessment, and the Office of Management and Budget (OMB) has not reviewed this proposed rule under Executive Order 12866. In addition, on July 11, 2011, the President issued Executive Order 13579, “Regulation and Independent Regulatory Agencies,” 76 FR 41587, July 14, 2011). Section 2(a) of the Executive Order states:

Independent regulatory agencies “should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

76 FR at 41587. Consistent with Executive Order 13579, the NTSB’s amendments to 49 CFR part 845 reflect its judgment that this part should be updated and streamlined.

This rule does not require an analysis under the Unfunded Mandates Reform Act, 2 United States Code (U.S.C.) 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

The NTSB has also analyzed these amendments in accordance with the principles and criteria contained in Executive Order 13132, “Federalism.” This final rule does not contain any regulations that would: (1) Have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The NTSB is also aware that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB certifies this final rule will not have a significant economic impact on a substantial number of small entities.

Regarding other Executive Orders and statutory provisions, this final 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 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 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 in 49 CFR Part 845

Administrative practice and procedure, Investigations, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons discussed in the preamble, the NTSB revises 49 CFR part 845 to read as follows:

PART 845—RULES OF PRACTICE IN TRANSPORTATION: INVESTIGATIVE HEARINGS; MEETINGS, REPORTS, AND PETITIONS FOR RECONSIDERATION

Sec.

845.1 Applicability.

Subpart A—Investigative Hearings

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- 845.14 Transcript.
- 845.15 Payment of witnesses.

Subpart B—Meetings

- 845.20 Meetings.
- 845.21 Symposia, forums, and conferences.

Subpart C—Miscellaneous Provisions

- 845.30 Board products.
- 845.31 Public docket.
- 845.32 Petitions for reconsideration or modification of report.

845.33 Investigation to remain open.

Authority: Sec. 515, Pub. L. 106–554, App. C, 114 Stat. 2763, 2763A–153 (44 U.S.C. 3516 note); 49 U.S.C. 1112, 1113(f), 1116, 1131, unless otherwise noted.

§ 845.1 Applicability.

Unless otherwise specifically ordered by the National Transportation Safety Board (NTSB), the provisions of this part shall govern all NTSB proceedings conducted under the authority of 49 U.S.C. 1113 and 1131, and reports issued by the Board.

Subpart A—Investigative Hearings

§ 845.2 Investigative hearings.

Investigative hearings are convened to assist the NTSB in further developing the facts, conditions, and circumstances of the transportation accident or incident, which will ultimately assist the Board in determining the cause or probable cause of the accident or incident, and in ascertaining measures that will tend to prevent such accidents or incidents and promote transportation safety. Investigative hearings are fact-finding proceedings with no adverse parties. They are not subject to the provisions of the Administrative Procedure Act (5 U.S.C. 554) and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity.

§ 845.3 Sessions open to the public.

(a) All investigative hearings shall normally be open to the public. However, no person shall be allowed at any time to interfere with the proper and orderly functioning of the hearing.

(b) Sessions shall not be open to the public when evidence of a classified nature or which affects national security is to be received.

§ 845.4 Determination to hold hearing.

(a) The Board may order an investigative hearing as part of an investigation whenever a hearing is deemed necessary in the public interest.

(b) If a quorum of the Board is not immediately available in the event of a catastrophic accident, the determination to hold an investigative hearing may be made by the Chairman of the Board.

§ 845.5 Board of inquiry.

(a) *Composition of board of inquiry.* The board of inquiry shall consist of a chairman of the board of inquiry, as specified in paragraph (c) of this section, and other members in accordance with Board policy.

(b) *Duties of board of inquiry.* The board of inquiry shall examine witnesses and secure, in the form of a public record, facts pertaining to the

accident or incident under investigation and surrounding circumstances and conditions from which the Board may determine probable cause and may formulate recommendations and/or other documents for corrective or preventative action.

(c) *Chairman of board of inquiry.* The chairman of the board of inquiry, or his or her designee, shall have the following powers:

- (1) To designate parties to the investigative hearing and revoke such designations;
- (2) To open, continue, or adjourn the investigative hearing;
- (3) To determine the admissibility of and to receive evidence and to regulate the course of the investigative hearing;
- (4) To dispose of procedural requests or similar matters; and
- (5) To take any other appropriate action to ensure the orderly conduct of the investigative hearing.

§ 845.6 Designation of parties.

(a) The chairman of the board of inquiry shall designate as parties to the investigative hearing those persons and organizations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence. Parties to the investigative hearing shall be represented by suitable representatives who do not occupy legal positions.

(b) No party to the investigation and/or investigative hearing shall be represented by any person who also represents claimants or insurers. Failure to comply with this provision shall result in loss of status as a party to the investigative hearing.

§ 845.7 Hearing officer.

The investigative hearing officer, upon designation by the NTSB Chairman or a Board Member designated by the Chairman, shall have the following powers:

- (a) To give notice concerning the time and place of investigative hearing;
- (b) To administer oaths and affirmations to witnesses; and
- (c) To issue subpoenas requiring the attendance and testimony of witnesses and production of documents. The investigative hearing officer may, in consultation with the chairman of the board of inquiry and the NTSB Managing Director, add witnesses until the time of the prehearing conference.

§ 845.8 Technical panel.

The appropriate office director(s) and/or the hearing officer, in consultation with the NTSB Managing Director, shall

determine if a technical panel is needed and, if so, shall designate members of the NTSB technical staff to participate in the investigative hearing. Members of the technical panel may conduct pre-screening of witnesses through interviews, and may take other actions to prepare for the hearing. At the hearing, the technical panel will initially examine the witnesses through questioning. The technical panel shall examine witnesses and secure, in the form of a public record, facts pertaining to the accident or incident under investigation and surrounding circumstances and conditions.

§ 845.9 Prehearing conference.

(a) Except as provided in paragraph (d) of this section, the chairman of the board of inquiry, or his/her designee, shall hold a prehearing conference with the parties to the investigative hearing at a convenient time and place prior to the hearing. At the prehearing conference, the parties shall be advised of the witnesses to be called at the investigative hearing, the topics about which they will be examined, and the exhibits that will be offered in evidence.

(b) At the prehearing conference, parties to the investigative hearing shall submit copies of any additional documentary exhibits they desire to offer for admission at the hearing.

(c) A party to the investigative hearing who, at the time of the prehearing conference, fails to advise the chairman of the board of inquiry of additional exhibits he or she intends to submit, or additional witnesses he or she desires to examine, shall be prohibited from introducing such evidence unless the chairman of the board of inquiry determines for good cause shown that such evidence should be admitted.

(d) The board of inquiry may hold an investigative hearing on an expedited schedule. The chairman of the board of inquiry may hold a prehearing conference for an expedited investigative hearing. When an expedited investigative hearing is held, the chairman of the board of inquiry may waive the requirements in paragraphs (b) and (c) of this section concerning the identification of witnesses, exhibits or other evidence.

§ 845.10 Right of representation.

Any person who appears to testify at an investigative hearing has the right to be accompanied, represented, or advised by counsel or by any other representative.

§ 845.11 Examination of witnesses.

(a) *Examination.* In general, the technical panel shall initially examine

witnesses. Following such examination, parties to the investigative hearing shall be given the opportunity to examine such witnesses. The board of inquiry shall then conclude the examination following the parties' questions.

(b) *Objections.* (1) Materiality, relevancy, and competency of witness testimony, exhibits, or physical evidence shall not be the subject of objections in the legal sense by a party to the investigative hearing or any other person.

(2) Such matters shall be controlled by rulings of the chairman of the board of inquiry on his or her own motion. If the examination of a witness by a party to the investigative hearing is interrupted by a ruling of the chairman of the board of inquiry, the party shall have the opportunity to show materiality, relevancy, or competency of the testimony or evidence sought to be elicited from the witness.

§ 845.12 Evidence.

In accordance with § 845.2, the chairman of the board of inquiry shall receive all testimony and evidence that may be of aid in determining the probable cause of the transportation accident or incident. He or she may exclude any testimony or exhibits that are not pertinent to the investigation or are merely cumulative.

§ 845.13 Proposed findings.

Following the investigative hearing, any party to the hearing may submit proposed findings to be drawn from the testimony and exhibits, a proposed probable cause, and proposed safety recommendations designed to prevent future accidents or incidents. The proposals shall be submitted within the time specified by the investigative hearing officer at the close of the hearing, and shall be made a part of the public docket. Parties to the investigative hearing shall serve copies of their proposals on all other parties to the hearing.

§ 845.14 Transcript.

A verbatim report of the investigative hearing shall be taken. Any interested person may obtain copies of the transcript from the NTSB or from the court reporting firm preparing the transcript upon payment of the fees fixed therefor. (See part 801, subpart G, Fee schedule.)

§ 845.15 Payment of witnesses.

Any witness subpoenaed to attend the investigative hearing under this part shall be paid such fees for travel and attendance for which the hearing officer shall certify.

Subpart B—Meetings**§ 845.20 Meetings.**

The Board may hold a meeting concerning an investigation or Board product, as described in § 804.3 of this chapter or any other circumstance, when the Board determines holding a meeting is in the public interest.

§ 845.21 Symposiums, forums, and conferences.

(a)(1) *Definitions.* (i) A symposium is a public proceeding focused on a specific topic, where invited participants provide presentations of their research, views or expertise on the topic and are available for questions.

(ii) A forum is a public proceeding generally organized in a question-and-answer format with various invited participants who may make presentation and are available for questioning by the Board or designated NTSB staff as individuals in a panel format.

(iii) A conference is a large, organized proceeding where individuals present materials, and a moderator or chairperson facilitates group discussions.

(2) These proceedings are related to transportation safety matters and will be convened for the purpose of focusing attention, raising awareness, encouraging dialogue, educating the NTSB, or generally advancing or developing safety recommendations. The goals of the proceeding will be clearly articulated and outlined, and will be consistent with the mission of the NTSB.

(b) A quorum of Board Members is not required to attend a forum, symposium, or conference. All three types of proceedings described in paragraph (a) of this section may have a relationship to previous or ongoing investigative activities; however, their purpose is not to obtain evidence for a specific investigation.

(c) Symposiums, forums, and conferences are voluntary for all invited participants.

Subpart C—Miscellaneous Provisions**§ 845.30 Board products.**

(a) *Reports of investigations.* (1) The Board will adopt a report on the investigation. The report will set forth the relevant facts, conditions, and circumstances relating to the accident or incident and the probable cause thereof, along with any appropriate safety recommendations and/or safety alerts formulated on the basis of the investigation. The scope and format of the report will be determined in accordance with Board procedures.

(2) The probable cause and facts, conditions, and circumstances of other accidents or incidents will be reported in a manner and form prescribed by the Board. The NTSB allows the appropriate office director, under his or her delegated authority as described in § 800.25 of this chapter, to issue a “brief,” which includes the probable cause and relevant facts, conditions, and circumstances concerning the accident or incident. Such briefs do not include recommendations. In particular circumstances, the Board in its discretion may choose to approve a brief.

(b) *Studies and reports—(1) NTSB studies and reports.* The NTSB may issue reports describing investigations of more than one accident or incident that share commonalities. Such reports are similar to accident or incident investigation reports, as described in paragraph (a)(1) of this section. Such reports often include safety recommendations and/or safety alerts, which the Board adopts.

(2) *Safety studies and reports.* The NTSB issues safety studies and reports, which usually examine safety concerns that require the investigation of a number of related accidents or incidents to determine the extent and severity of the safety issues. Such studies and reports often include safety recommendations and/or safety alerts, which the Board adopts.

(c) *Safety recommendations.* The Board may adopt and issue safety recommendations, either as part of a Board report or as a stand-alone Board product.

§ 845.31 Public docket.

(a) *Investigations.* (1) As described in § 801.3 of this chapter, the public docket shall include factual information concerning the accident or incident. Proposed findings submitted pursuant to § 831.14 or § 845.13 and petitions for reconsideration and modification submitted pursuant to § 845.32, comments thereon by other parties, and the Board’s rulings on proposed findings and petitions shall also be placed in the public docket.

(2) The NTSB shall establish the public docket following the accident or incident, and material shall be added thereto as it becomes available. Where an investigative hearing is held, the exhibits will be introduced into the record at the hearing and will be included in the public docket.

(b) *Other Board reports and documents.* The NTSB may elect to open and place materials in a public docket concerning a safety study or report, special investigation report, or

other agency product. The NTSB will establish the public docket following its issuance of the study or report.

(c) *Availability.* The public docket shall be made available to any person for review, as described in § 801.30 of this chapter. Records within the public docket are available at www.nts.gov.

§ 845.32 Petitions for reconsideration or modification of report.

(a) *Requirements.* (1) The Board will only consider petitions for reconsideration or modification of findings and determination of probable cause from a party or other person having a direct interest in an investigation.

(2) Petitions must be in writing and addressed to the NTSB Chairman. Please send your petition via email to correspondence@ntsb.gov. In the alternative, you may send your petition via postal mail to: NTSB Headquarters at 490 L’Enfant Plaza SW., Washington, DC 20594.

(3) Petitions must be based on the discovery of new evidence or on a showing that the Board’s findings are erroneous. (i) Petitions based on the discovery of new matter shall: Identify the new matter; contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board’s adoption of its findings.

(ii) Petitions based on a claim of erroneous findings shall set forth in detail the grounds upon which the claim is based.

(b) *Acceptance of petitions.* The Board will not consider petitions that are repetitious of proposed findings submitted pursuant to § 845.13, or of positions previously advanced.

(c) *Proof of service.* (1) When a petition for reconsideration or modification is filed with the Board, copies of the petition and any supporting documentation shall be served on all other parties to the investigation or investigative hearing and proof of service shall be attached to the petition.

(2) Any party served with a copy of the petition may file comments no later than 90 days after service of the petition.

(d) *Oral presentation.* Oral presentation normally will not form a part of proceedings under this section. However, oral presentation may be permitted where a party or interested person specifically shows the written petition for reconsideration or modification is an insufficient means by

which to present the party's or person's position.

§ 845.33 Investigation to remain open.

The Board never officially closes an investigation, but provides for the submission of new and pertinent evidence by any interested person. If the Board finds such evidence is relevant and probative, the evidence shall be made a part of the public docket and, where appropriate, the Board will provide parties an opportunity to examine such evidence and to comment thereon.

Christopher A. Hart,
Chairman.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 141021887-5172-02]

RIN 0648-XE368

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod from catcher vessels greater than or equal to 60 feet (18.3 meters (m)) length overall (LOA) using pot gear and catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear to catcher/processors (C/Ps) using hook-and-line gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2015 total allowable catch of Pacific cod to be harvested.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), December 21, 2015, through 2400 hours, Alaska local time (A.l.t.), December 31, 2015.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2015 Pacific cod TAC specified for catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI is 13,641 metric tons (mt) as established by the final 2015 and 2016 harvest specifications for groundfish in the BSAI (80 FR 11919, March 5, 2015) and reallocations (80 FR 57105, September 22, 2015, 80 FR 65971, October 28, 2015, and 80 FR 76250, December 8, 2015). The Regional Administrator has determined that catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI will not be able to harvest 1,750 mt of the remaining 2015 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(5).

The 2015 Pacific cod TAC specified for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI is 12,380 metric tons (mt) as established by the final 2015 and 2016 harvest specifications for groundfish in the BSAI (80 FR 11919, March 5, 2015) and reallocations (80 FR 51757, August 26, 2015, and 80 FR 57105, September 22, 2015). The Regional Administrator has determined that catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI will not be able to harvest 1,750 mt of the remaining 2015 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(2).

Therefore, in accordance with § 679.20(a)(7)(iii)(A) and § 679.20(a)(7)(iii)(C), NMFS reallocates 3,500 mt of Pacific cod to C/Ps using hook-and-line gear in the Bering Sea and Aleutian Islands management area.

The harvest specifications for Pacific cod included in the final 2015 harvest specifications for groundfish in the BSAI (80 FR 11919, March 5, 2015, 80 FR 51757, August 26, 2015, 80 FR 57105, September 22, 2015 and 80 FR 65971, October 28, 2015, and 80 FR

76250, December 8, 2015) are revised as follows: 11,891 mt for catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear, 10,630 mt for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear, and 118,871 mt for C/Ps using hook-and-line gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from multiple sectors to C/Ps using hook-and-line gear in the Bering Sea and Aleutian Islands management area. Since these fisheries are currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 15, 2015.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 21, 2015.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
National Marine Fisheries Service.

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