



7533-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 831

RIN 3147-AA01

Investigation Procedures: Marine Investigations

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

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Interim final rule; request for comments.

SUMMARY: The NTSB adds to its accident investigation procedures regulations a new subpart for marine casualty investigations.

This interim final rule adopts a number of substantive and technical changes the NTSB proposed in its August 12, 2014 Notice of Proposed Rulemaking (NPRM), as those proposals were intended to apply to marine investigations. It also sets forth several changes specific to marine casualty investigations.

DATES: This rule is effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION]. Comments must be received by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION]. Comments received after the deadline will be considered to the extent possible.

ADDRESSES: A copy of this interim final rule, published in the **Federal Register**, 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-2012-0002).

You may send comments identified by Docket ID Number NTSB-GC-2012-0002 using any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East SW., Washington, DC 20594-2003.

Facsimile: Fax comments to 202-314-6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

PRIVACY: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ann Gawalt, Deputy General Counsel, 202-314-6088.

SUPPLEMENTARY INFORMATION:

I. Background

A. Justification for Use of an Interim Final Rule

The NTSB issues this interim final rule to create a distinct set of regulations for NTSB marine casualty investigations. As explained in further detail below, marine

accident investigations involve unique factors that are not present in other NTSB investigations. To address these differences, NTSB promulgates several changes to subpart E that did not appear in the NPRM for part 831. 79 FR 47064 (Aug. 12, 2014).

The Administrative Procedure Act (APA) generally requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. 553(b) and (c). Section 553(b) of the APA provides that notice and comment requirements do not apply when the agency, for good cause, finds that notice and public comment procedure are impracticable, unnecessary, or contrary to the public interest. The NTSB will issue an interim final rule when it is in the public interest to promulgate an effective rule while keeping the rulemaking open for further refinement. 49 CFR 800.45.

The interim final rule procedure is appropriate for this new subpart involving marine casualty investigations. Many provisions of subpart E, as implemented in this interim final rule, are similar to those the NTSB proposed in the NPRM dated August 12, 2014. When the NTSB solicited comments concerning its proposed changes to part 831, it received one comment specific to marine casualty investigations, submitted by the United

States Coast Guard (USCG). As a result, utilizing the notice and comment rulemaking process anew for this subpart is unnecessary.

B. NTSB and USCG: Statutory and Regulatory Considerations

In accordance with NTSB statutory authority (49 U.S.C. 1131(a)(1)(E)) and USCG statutory authorities (46 U.S.C. Chapters 61 and 63, and 14 U.S.C. 141)), for investigations involving any major marine casualty or any casualty involving public and nonpublic vessels, the NTSB works closely with the USCG, pursuant to the joint USCG-NTSB Marine Casualty Investigation Regulations. The NTSB's version of the joint regulations is codified at 49 CFR part 850 and the USCG's version is codified at 46 CFR subpart 4.40. Also as provided in those regulations, either agency may conduct investigations of certain types of marine casualties on its own, or with assistance from the other. As a result, the NTSB's relationship with the USCG during marine casualty investigations is distinct from the NTSB's relationship with other Federal agencies for investigations of transportation accidents in other modes, as described at §831.5 of this part.

In addition, because of their separate authorities, NTSB and USCG investigations differ in some significant ways. The NTSB has the responsibility to evaluate the effectiveness of USCG regulations, policies, and practices in preventing casualties and examine the transport of hazardous materials. In

addition to reporting on the probable cause, facts and circumstances of certain types of marine casualties, the NTSB also makes safety recommendations to reduce the likelihood of future casualties. The USCG is responsible for reporting on the cause of the casualty and identifying certification and licensure issues and potential criminal conduct. Specifically, Congress charged the USCG with the responsibility of enforcing, or assisting in the enforcement of, all applicable laws on, under, and over the "high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. 2. In furtherance of this responsibility, 14 U.S.C. 89 authorizes USCG personnel to prevent, detect, and suppress violations of laws of the United States on waters subject to U.S. jurisdiction and in international waters, as well as on all vessels subject to U.S. jurisdiction. To carry out their respective missions, the NTSB and USCG closely coordinate to share evidence and information pertaining to marine casualty investigations.

In conducting marine casualty investigations, the USCG and NTSB adhere to joint regulations and the terms of a memorandum of understanding, which states the two agencies are equal partners in collecting evidence, and presumes where one of the two agencies maintains expertise, the other agency will assist in the investigative activities. Moreover, the NTSB and USCG joint regulations describe which of the two agencies will serve

as the lead during an investigation. 49 CFR 850.15 and 850.25; 46 CFR subpart 4.40.

In this interim final rule, where appropriate and necessary, the NTSB has drafted text to exclude the USCG from certain requirements and/or otherwise accommodate the USCG's role in participating in NTSB marine safety casualty investigations. More generally, the agency promulgates this subpart for the purpose of establishing requirements for party participants in NTSB marine casualty investigations. In such investigations, the NTSB invites the participation of a variety of organizations and individuals. For example, the NTSB invites vessel operators, labor unions, manufacturers, and other organizations that can provide subject matter expertise in the specific marine casualty to participate in NTSB investigations. The investigative rules promulgated herein are distinct from the USCG investigative rules, due to the agencies' distinguishable missions, and to ensure the NTSB conducts independent investigations.

We intend the following discussion to resolve the concerns the USCG expressed with regard to our NPRM's proposed changes to § 831.1 Applicability, § 831.2 Responsibility of NTSB, § 831.4 Nature of investigation, § 831.5 Priority of NTSB investigations, § 831.7 Witness interviews, § 831.8 Investigator-in-charge, § 831.9 Authority of NTSB

representatives, § 831.11 Parties to the investigation, and § 831.13 Flow and dissemination of investigative information.

A companion Final Rule that finalizes changes to part 831, subparts A through D, appears elsewhere in this issue of the **Federal Register**.

C. Section 831.50 Applicability.

This section states that subpart E will apply to marine and major marine casualties for which the NTSB leads the investigation. When the USCG leads an investigation, that agency's rules and procedures apply. The section also enumerates two situations where these rules apply when the USCG leads an investigation: (1) when the USCG requests the NTSB to conduct an investigative activity and (2) when the NTSB seeks to collect evidence outside the scope of the USCG investigation.

D. Section 831.51 Definitions.

The terms "casualty" and investigative activities are defined in § 831.51 in this Interim Final Rule. The NTSB adopts the term "casualty" as a general descriptor of marine occurrences that NTSB has the authority to investigate. In the NTSB's August 12, 2014, NPRM, the NTSB proposed using the term "event" to describe a lengthy listing of occurrences the NTSB would investigate under its rules codified at 49 CFR part 831. The USCG comment questioned the NTSB's proposed use of the term because it indicated the NTSB may investigate more than

accidents and incidents (or, in the case of marine investigations, casualties). The NTSB agrees the term "event," could cause confusion as to the types of occurrences NTSB will investigate, and therefore declines to adopt it.

Based on a USCG suggestion, the NTSB incorporates the definition of "marine casualty" in 46 CFR 4.03-1. We also add subparagraph (3) to the definition of "marine casualty," to include, other marine occurrences that the NTSB or USCG, or both, determine require investigation."

This regulatory definition of "marine casualty" does not expand or affect the NTSB's authority and responsibility; in receiving notifications from the USCG of casualties, the NTSB's actions will continue to be circumscribed by 49 U.S.C. 1131 and the agencies' joint regulations at 49 CFR part 850 and 46 CFR subpart 4.40.

Although requested by the USCG, we decline to remove the term "abandonment" from the definition of marine casualty because we have conducted investigations of vessel abandonments. For example, the NTSB investigated the abandonment of Trinity II, which personnel abandoned September 8, 2011.¹

¹ The 78.5-foot-long liftboat Trinity II sustained damage from severe weather associated with Hurricane Nate about fifteen miles offshore in the Gulf of Mexico. The four crewmembers and six contractors on board abandoned ship. All ten persons, wearing lifejackets, entered the water where they clung to a

In this subpart, we also use the term "investigative activity." Section 831.51 defines "investigative activity" as activities the NTSB directs during an investigation the USCG is leading. For example, the NTSB operates materials and recorder laboratories and employs experts who offer specialized skills and knowledge. When the USCG leads an investigation but seeks the NTSB's assistance with downloading data from a recorder or creating a transcript from an audio recording, the NTSB will create a group and supervise the actions of that particular investigative activity. In those instances, the NTSB's regulations will apply to the activity. Also, the NTSB may engage in investigative activities when the NTSB examines USCG regulations, policies, and practices. In doing so, the NTSB is fulfilling its statutory responsibility to evaluate the effectiveness of other departments responsible for transportation safety. 49 U.S.C. 1116(b)(4).

Finally, we add text to define the use of the abbreviation "IIC" throughout the subpart.

life float. By the time rescuers located the survivors three days later, three had died and another would die later at a hospital. The six survivors sustained serious injuries. See National Transportation Safety Board. 2013. *Personnel Abandonment of Weather-Damaged US Liftboat Trinity II, with Loss of Life, Bay of Campeche, Gulf of Mexico, September 8, 2011*, NTSB/MAR-13/01. Washington, DC. NTSB, available at <http://www.nts.gov/investigations/AccidentReports/Reports/MAR1301.pdf>.

E. Section 831.52 Responsibility of NTSB in marine investigations.

This section describes the authority of the NTSB to investigate marine and major marine casualties. This section also recognizes that while the NTSB may conduct separate investigative activities from the USCG, the two agencies will coordinate to avoid duplicative efforts.

F. Section 831.53 Authority of Director, Office of Marine Safety.

The majority of text of § 831.53 derives from the final language adopted in § 831.3 of the final rule to subpart A of this part, but replaces the term "accident" with the phrase "major marine casualty or marine casualty."

G. Section 831.54 Nature of investigation.

Section 831.54, also includes language similar to that found in § 831.4 of the final rule. This regulatory text describes the general nature of NTSB investigations, including language confirming that our investigations are not for the purpose of assigning blame and are not subject to the APA. The NTSB agrees with the USCG's concern that the use of the proposed term "preliminary" investigation would not accurately reflect the process codified in our joint regulations at 49 CFR part 850 and 46 CFR 4.40-10. Specifically, these joint regulations call for the USCG to conduct preliminary investigations to assess

whether a casualty constitutes a major marine casualty or if the occurrence appears to meet any other criteria outlined in the joint regulations.

H. Section 831.55 Relationship with other agencies.

Section 831.55 describes the NTSB's relationship with the USCG and other Federal agencies during a marine casualty investigation. With respect to the USCG, we note the NTSB's authorizing legislation, at 49 U.S.C. 1131(a)(1)(E), specifies the NTSB and USCG will maintain a joint-working relationship in conducting investigations, and must prescribe joint regulations to do so. The NTSB joint regulations are codified at part 850 of this chapter.

As the regulatory text makes clear, the NTSB will inform the USCG and coordinate with it, as necessary, in activities relating to the collection of evidence. This will ensure both agencies have the information and evidence they need.

This section also describes how the NTSB interacts with other Federal agencies in marine casualty investigations. We have codified in this section the principle that the NTSB maintains priority in marine safety investigations over agencies other than the USCG. For example, for certain investigations, the Environmental Protection Agency, the Occupational Safety and Health Administration, the National Oceanic and Atmospheric Administration, the Navy, and the Army Corps of Engineers may

need information. The NTSB will exchange such information in a timely manner, while maintaining its priority to work first with the USCG in achieving a robust, comprehensive collection of evidence and information. Similarly, the NTSB will require other Federal agencies coordinate with the NTSB to ensure their activities do not interfere with the safety investigation for the reasons explained in the preamble to subpart A of part 831 (as published elsewhere in this issue of the **Federal Register**).

The USCG also raised a concern about the NTSB's exclusive authority to decide the time and manner to extract data from evidence. The NTSB retains this proposed language now found in § 831.55(c). The complete discussion of the USCG comments can be found in the preamble discussion for § 831.59.

As requested by the USCG, the NTSB adopts language that clarifies that Federal agencies are not prohibited from conducting investigations under their own statutory authorities. To avoid duplicative efforts, we have also adopted language stating that those Federal agencies that conduct separate investigations are expected to coordinate with the NTSB.

By this interim final rule, the NTSB clarifies regulatory text proposed in the part 831 NPRM as it relates to evidence collection from USCG incident command systems. The revised text defines the role of the NTSB in the incident command system which is to identify investigative needs and request

preservation of evidence. The text makes clear that the NTSB will coordinate these requests with the USCG investigative officer. The text also states that the NTSB will collect casualty information in a manner so as not to interfere with the operations of the incident command.

In the comment, the USCG questioned whether the NTSB is authorized to compel the production of information from incident or unified command systems during an ongoing marine casualty response. We note our authorizing legislation specifically tasks us with developing and issuing reports to "propose corrective action to make the transportation of individuals as safe and free from risk of injury as possible, including action to minimize personal injuries that occur in transportation accidents." 49 U.S.C. 1116(a)(2). Moreover, the legislation requires us to "examine techniques and methods of accident investigation and periodically publish recommended procedures for accident investigations," and "evaluate, examine the effectiveness of, and publish the findings of the Board about the transportation safety consciousness of other departments, agencies, and instrumentalities of the Government and their effectiveness in preventing accidents." Id. § 1116(b)(2), (4). Also, when transportation of hazardous materials is a subject of an investigation, Congress has charged the NTSB with "[evaluating] the adequacy of safeguards and procedures for the

transportation of hazardous material and the performance of other departments, agencies, and instrumentalities of the Government responsible for the safe transportation of that material.” Id. § 1116(b)(5). The NTSB cannot accomplish these mandated objectives without collecting evidence from incident command systems. The NTSB does not intend the regulatory text to lead to an interpretation that the NTSB could impede on-going USCG activities in an incident command system.

In recent years, the NTSB was a part of the Federal, state, and local incident command structures in certain accidents. These include the NTSB’s investigation into transportation accidents in Paulsboro, New Jersey; Marshall, Michigan; Port Arthur, Texas; Cherry Valley, Illinois; Casselton, North Dakota; Graniteville, South Carolina; and San Bruno, California. Based on these investigations, the NTSB has issued dozens of safety recommendations in the interest of improving safety of various modes of transportation.

Furthermore, the NTSB’s authority to participate in the incident command structure during an investigation is consistent with the Department of Homeland Security’s National Incident Management System: Intelligence/Investigations Function Guidance

and Field Operations Guide (Oct. 2013).² The Guide specifically describes the NTSB's participation in the Intelligence/Investigation element at the site of investigations as part of the unified command system structure. Id. at 3, 5, 11.

I. Section 831.56 Request to withhold information.

We adopt the same language in this section as set forth in the final rule § 831.6. For a discussion of the comments, see the discussion in the preamble to the final rule for that section.

J. Section 831.57 Representation during an interview.

We agree with the USCG comment that the proposed phrase "an investigator working on behalf of the NTSB" could be problematic and we decline to include such language. We adopt the same language in this section as set forth in the final rule § 831.7. For a discussion of the comments, see the discussion in the preamble to the final rule for that section.

K. Section 831.58 Investigator-in-charge.

Section 831.58 largely parallels the language we codified in § 831.8. The section provides IICs the authority to sign and issue subpoenas, administer oaths and affirmations, and take depositions (or cause them to be taken) in furtherance of an

² Available at <https://publicintelligence.net/dhs-nims-intel-guide/>.

investigation. In addition, the NTSB removes the word "considerable" from the final sentence in § 831.8, because it is unnecessary.

The USCG requested we add language that investigations be conducted in accordance with the joint regulations instead of adopting the language from § 831.8. The USCG suggests its personnel could be subject to the direction of the NTSB's IIC and such an interpretation is contrary to the current memorandum of understanding to which the USCG and the NTSB have agreed. We respectfully disagree that describing the authority of the IIC would be contrary to the NTSB-USCG memorandum of understanding. Rather, the memorandum of understanding recognizes the importance of designating one agency to lead during the on-scene portion of the investigation, while the agencies work together as equal partners in the collection of evidence. This designation serves to avoid confusion and duplication. When the NTSB leads a marine casualty investigation, the rules of part 831, subpart E, will apply. In this regard, accurately describing the IIC's role is critical.

We add paragraphs (c) and (d), which specifically state the NTSB IIC is responsible for ensuring that Federal agencies have the information they need. The newly added paragraphs also make clear that the IIC is responsible for coordinating with the USCG during the investigation.

L. Section 831.59 Authority during investigations.

The NTSB adopts the language of § 831.9 of this part. Consistent with that section, we remove the term "authorized representative." We retain the text concerning our exclusive authority to conduct testing. This text closely follows the statutory text found in 49 U.S.C. 1134(d).

The USCG expressed concern that potential conflicts between NTSB and USCG investigators could arise during the course of an investigation, due to our proposed language concerning the NTSB's exclusive authority to test and/or extract data. We note that § 831.9 has long contained similar language and the USCG did not identify any specific investigation where a conflict regarding testing and extraction of data arose between the NTSB and USCG. Nor are we aware of any instances where the USCG investigation was impeded as a result of this text. The operational history between the agencies shows that the NTSB consults with the USCG when testing evidence or extracting data. This authority primarily functions to ensure private-sector parties do not conduct independent testing in the absence of NTSB approval. Courts have recognized the NTSB's authority in this regard. See U.S. v. Pizzitola, No. 4:14-CV-2335 (S.D. Tex. Dec. 4, 2014) (order to comply with subpoena).

M. Section 831.60 Autopsies and postmortem testing.

This section was redrafted to more clearly state the content. No substantive changes were made from the proposed text. The regulation is adopted with these changes.

N. Section 831.61 Parties to the investigation.

The USCG requested that we revise our proposed statement indicating no entity maintains a right to party status. In its comment, the USCG stated this provision does not recognize its "independent statutory investigative authority to conduct marine casualty investigations," nor does the rule recognize the USCG's authority to partner with the NTSB in marine casualty investigations. The USCG stated this partnership is outlined in the agencies' memorandum of understanding. The USCG recommended we add the following sentence to the section concerning parties: "With regard to the investigation of marine casualties, the USCG has the right to participate as an equal partner in gathering evidence and establishing facts."

In this interim final Rule, the NTSB has added text that the NTSB will provide the USCG the opportunity to participate as a party in all NTSB marine casualty investigations and investigative activities. In paragraph (a)(2) of the section, the NTSB specifically exempts the USCG from the statement that no entity shall automatically have the right to participate in an NTSB investigation as a party. These edits are intended to

ensure the public is aware the two agencies function as investigative partners.

All other changes are consistent with § 831.11 and the preamble for that section sets forth the agency's reasons for the changes.

O. Section 831.62 Access to and release of wreckage, records, mail, and cargo.

This section adopts the text of § 831.12. For a discussion of the comments, please see the preamble to the final rule for that section.

P. Section 831.63 Provision and dissemination of investigative information.

For the regulatory text pertaining to release of information, the USCG requested we include text stating we will coordinate with its personnel prior to public release of investigative information. We include regulatory text that states we will inform the USCG concerning releases and decisions to disseminate information, as long as such coordination would not affect the investigation. Because we understand the USCG needs to be aware of a planned release of information from an investigation by the NTSB, we will coordinate to the maximum extent practicable.

The USCG also stated our proposed text for § 831.13 "does not consider the privacy protection laws and requirements to

which the Coast Guard must adhere." In addition, as with its comments on other proposed regulatory sections, the USCG states the section does not consider "the Coast Guard's role as a joint-investigating agency (or, in some circumstances, the lead investigating agency) and its policies and discretion on the release of information." Based on these concerns, the USCG recommends we explicitly recognize, in the regulatory text of § 831.13, "other agencies' responsibilities to protect privacy information under applicable Federal laws."

The NTSB takes seriously its obligations under Federal privacy and information laws. Regulatory text, however, stating our practices for complying with applicable Federal law is unnecessary. For example, if information would be exempt from public disclosure under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6), and that record originated from the USCG, we would refer the document to the USCG for any redactions. Analysis under FOIA Exemption 6 requires a balancing of the privacy interest and the public interest in the information. If such information is related to the probable or contributory cause of a casualty, we limit the release to only that information required to explain a finding or a recommendation.

We note the practice the NTSB and USCG have agreed to follow with respect to Privacy Act protected information from

USCG system of records. If the NTSB determines it needs to disclose information for safety purposes in a final NTSB report or supporting factual material, and the USCG has already redacted the information on privacy grounds, the NTSB will provide the USCG notice of, and an opportunity to comment on, the proposed release and rationale. The NTSB will also comply with the USCG's requested redaction. The NTSB and the USCG have been successfully using this practice.

Q. Section 831.64 Proposed findings.

This section adopts the text of § 831.14. For a discussion of the comments, please see the preamble to the final rule for that section.

II. Regulatory Analysis

This interim final 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 interim final rule under Executive Order 12866. Likewise, this interim final 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 interim final 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 interim final 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 interim final rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this interim final rule does not have implications for Federalism under Executive Order 13132, Federalism. This interim 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 interim final 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 interim final 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 831

Aircraft accidents, Aircraft incidents, Aviation safety, Hazardous materials transportation, Highway safety, Investigations, Marine safety, Pipeline safety, Railroad safety.

For the reasons discussed in the preamble, the NTSB adds 49 CFR part 831, subpart E, to read as follows:

PART 831--ACCIDENT/INCIDENT INVESTIGATION PROCEDURES

1. The authority citation for part 831 continues to read as follows:

Authority: 49 U.S.C. 1113(F).

2. Add subpart E to read as follows:

Subpart E--Marine Investigations

Sec.

831.50 Applicability of this subpart.

831.51 Definitions.

831.52 Responsibility of NTSB in marine investigations.

831.53 Authority of Director, Office of Marine Safety.

831.54 Nature of investigation.

831.55 Relationships with other agencies.

831.56 Request to withhold information.

831.57 Representation during an interview.

831.58 Investigator-in-charge.

831.59 Authority during investigations.

831.60 Autopsies and postmortem testing.

831.61 Parties to the investigation.

831.62 Access to and release of wreckage, records, mail, and cargo.
831.63 Provision and dissemination of investigative information.
831.64 Proposed findings.

Authority: 49 U.S.C. 1113(f), 1116, 1131, 1134, unless otherwise noted.

Subpart E Marine Investigations

§ 831.50 Applicability of this subpart.

(a) The regulations in this subpart apply when the NTSB is leading a marine or major marine casualty investigation.

(b) In a marine or major marine casualty investigation led by the United States Coast Guard (USCG), this subpart applies if:

(1) Upon USCG's request for assistance, the NTSB is leading an associated investigative activity; or

(2) Upon coordination with the USCG, the NTSB elects to collect, test or analyze additional evidence beyond the scope of the USCG's investigation.

§ 831.51 Definitions.

The following definitions apply throughout this subpart.

IIC means the NTSB investigator-in-charge.

Investigative activity means an activity performed by or under the direction of the NTSB during a casualty investigation led by the USCG.

Major marine casualty is defined in joint regulations of the NTSB and USCG at 49 CFR 850.5(e) and 46 CFR 4.40-5(d), respectively.

Marine casualty means--

(1) Any casualty, accident or event described in 46 CFR 4.03-1

(2) An occurrence that results in an abandonment of a vessel

(3) Other marine occurrences that the NTSB or USCG, or both, determine require investigation.

§ 831.52 Responsibility of NTSB in marine investigations.

(a) The NTSB may conduct an investigation of a major marine casualty or a marine casualty of a vessel (including, but not limited to, collisions, abandonments, and accidents) alone or jointly with the USCG pursuant to the joint regulations in part 850 of this chapter.

(b) Nothing in this part may be construed to conflict with the regulations in part 850 of this chapter, which were prescribed jointly by the NTSB and USCG under the authority of 49 U.S.C. 1131(a)(1)(E).

(c) In an investigation led by the USCG, the NTSB may perform separate activities in furtherance of its own analysis or at the request of the USCG. The NTSB and USCG will coordinate

to ensure the agencies do not duplicate work or hinder the progress of the investigation.

(d) Pursuant to 49 U.S.C. 1131(a)(1)(F), the NTSB is responsible for the investigation of other accidents that may include marine and boating accidents not covered by part 850 of this chapter, and certain accidents involving transportation and/or release of hazardous materials.

§ 831.53 Authority of Director, Office of Marine Safety.

The Director, Office of Marine Safety, subject to the provisions of § 831.52 of this part and part 800 of this chapter, may order an investigation into any major marine casualty or marine casualty.

§ 831.54 Nature of investigation.

(a) General. The NTSB conducts investigations, or has them conducted, to determine the facts, conditions, and circumstances relating to a major marine casualty or a marine casualty. The NTSB uses these results to determine one or more probable causes of a major marine casualty or a marine casualty, and to issue safety recommendations to prevent or mitigate the effects of a similar major marine casualty or a marine casualty. The NTSB is required to report on the facts and circumstances of major marine casualties or marine casualties it investigates. The NTSB begins an investigation by monitoring casualty situations and assessing available facts to determine the appropriate

investigative response. Following an initial assessment, the NTSB notifies persons and organizations it anticipates will be affected as to the extent of its expected investigative response.

(b) NTSB products. An investigation may result in a report or brief of the NTSB's conclusions and other products designed to improve transportation safety. Other products may include factual records, safety recommendations, and other safety information.

(c) NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

§ 831.55 Relationships with other agencies.

(a) Relationship with the USCG. (1) The NTSB conducts marine casualty and major marine casualty investigations, in accordance with 49 U.S.C. 1131(a)(1)(E) and (F), and part 850 of this chapter. The NTSB and USCG work together to collect evidence related to marine casualties and major marine causalities.

(2) The NTSB and USCG coordinate to avoid duplicative efforts to the maximum extent practicable.

(3) The NTSB independently analyzes the evidence and determines the probable cause of marine casualties and major marine causalities.

(b) Relationships with other Federal agencies. (1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.

(2) The NTSB will provide for appropriate participation by other Federal agencies in any NTSB investigation. Such agencies may not participate in the NTSB's probable cause determination.

(3) The NTSB has first right to access wreckage, information, and resources, and to interview witnesses the NTSB deems pertinent to its investigation.

(4) The NTSB and other Federal agencies will exchange information obtained or developed in the course of their investigations in a timely manner. Nothing in this section prohibits the NTSB from sharing factual information with other agencies.

(c) As indicated in § 831.59(c) of this part, the NTSB has exclusive authority to determine when and how the testing and examination of evidence will occur.

(d) The NTSB may take possession of records, wreckage, or information if it determines such possession is necessary for an investigation.

(e) Investigations by Federal agencies. (1) Nothing in this section impairs the authority of any other Federal agency to conduct an investigation of a marine casualty or major marine casualty.

(f) Incident command system. (1) The NTSB recognizes the role of incident command systems to address emergencies. The NTSB does not assume the role of a first responder agency.

(2) The NTSB IIC or his designee will participate in the incident command system to identify and coordinate investigative needs as it relates to the preservation and collection of information and evidence.

(3) The NTSB IIC or his designee will coordinate with the Coast Guard Investigation Officer to identify and coordinate investigative needs as it relates to the preservation and collection of information and evidence.

(4) The NTSB may collect information and evidence from an incident command in a timely and reasonable manner so as not to interfere with its operations.

§ 831.56 Request to withhold information.

(a) Applicability. This section applies to information the NTSB receives from any source that may be subject to the Trade

Secrets Act (18 U.S.C. 1905) or the Freedom of Information Act (FOIA, 5 U.S.C. 552).

(b) Disclosure. The NTSB is authorized by 49 U.S.C. 1114(b) to disclose, under certain circumstances, confidential commercial information that would otherwise be subject to penalties for disclosure under the Trade Secrets Act, or excepted from disclosure under FOIA. The NTSB may exercise this authority when disclosure is necessary to support a key finding, a safety recommendation, or the NTSB's statement of probable cause of a major marine casualty or a marine casualty.

(c) Disclosure procedures. Information submitted to the NTSB that the submitter believes qualifies as a trade secret or as confidential commercial information subject either to the Trade Secrets Act or Exemption 4 of FOIA must be so identified by the submitter on each page that contains such information. In accordance with 48 U.S.C. 1114(b), the NTSB will provide the submitter of identified information (or information the NTSB has reason to believe qualifies as subject to the Trade Secrets Act or Exemption 4 of FOIA) the opportunity to comment on any disclosure contemplated by the NTSB. In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) or 5 U.S.C. 552, the NTSB will provide at least 10 days' notice to the submitter.

(d) Voluntarily provided safety information. (1) The NTSB will not disclose safety-related information voluntarily submitted to the NTSB if the information is not related to the exercise of the NTSB's investigation authority, and if the NTSB finds disclosure of the information might inhibit the voluntary provision of that type of information.

(2) The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.

(e) Other. Any person may make written objection to the public disclosure of any other information, such as interview summaries or transcripts, contained in any report or document filed, or otherwise obtained by the Board, stating the grounds for such objection. The Board, on its own initiative or if such objection is made, may order such information withheld from public disclosure when, in its judgment, the information may be withheld under the provisions of an exemption to the Freedom of Information Act (5 U.S.C. 552, see part 801 of this chapter), and its release is found not to be in the public interest.

§ 831.57 Representation during an interview.

(a) Any person interviewed in any manner by the NTSB has the right to be accompanied during the interview by no more than one representative of the witness's choosing. The representative

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- (1) May be an attorney;
- (2) May provide support and counsel to the witness;
- (3) May not supplement the witness's testimony; and
- (4) May not advocate for the interests of a witness's other affiliations.

(b) An investigator conducting the interview may take any necessary action (including removal of the representative from the interview) to ensure a witness's representative acts in accordance with the provisions of paragraph (a) of this section during the interview, and to prevent conduct that may be disruptive to the interview.

§ 831.58 Investigator-in-charge.

(a) In addition to the subpoena and deposition authority delegated to investigative officers under this chapter, a person designated as IIC for an investigation is authorized to—

- (1) Organize, conduct, control, and manage the field phase of an investigation, even when a Board Member is present.

- (2) Coordinate all resources and provide direction to all persons (including persons not employed by the NTSB) involved in an on-site investigation.

- (3) Work with other Federal agencies in the investigation of a marine casualty or major marine casualty when other agencies are participating, to ensure all agencies will obtain

the information, evidence, and resources needed for the investigation(s) or investigative activities.

(4) Work with the USCG to ensure the agencies do not duplicate work to the maximum extent practicable.

(5) Continue his or her organizational and management responsibilities through all phases of the investigation, including consideration and adoption of a report or brief determining one or more probable causes of a marine casualty or major marine casualty.

§ 831.59 Authority during investigations.

(a) General authority of investigators. To carry out the statutory responsibilities of the agency, an NTSB investigator may—

(1) Conduct hearings;

(2) Administer oaths;

(3) Require, by subpoena or other means, the production of evidence and witnesses;

(4) Enter any property where a major marine casualty or marine casualty subject to the NTSB's jurisdiction has occurred, or wreckage from any such major marine casualty or marine casualty is located, and take all actions necessary to conduct a complete investigation;

(5) Inspect, photograph, or copy any records or information (including medical records pursuant to paragraph (b) (2) of this

section), and correspondence regardless of the date of its creation or modification, for the purpose of investigating an accident;

(6) Question any person having knowledge relevant to a marine casualty or major marine casualty.

(b) Subpoenas. The NTSB may issue a subpoena, enforceable in Federal District Court, to obtain testimony or evidence related to its investigation of a marine casualty or major marine casualty, including but not limited to personal electronic devices.

(1) The NTSB's authority to issue subpoenas includes access to medical records and specimens.

(2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the regulations promulgated by the Department of Health and Human Services, 45 CFR 164.501 et seq., the NTSB is a "public health authority" to which protected health information may be disclosed by a HIPAA "covered entity" without the prior written authorization of the subject of the records. In addition, the NTSB may issue a subpoena to gain access to such information.

(c) Examination of evidence. In accordance with 49 U.S.C. 1134(d), the NTSB has exclusive authority to decide when, and in what manner, testing, extraction of data, and examination of evidence will occur.

§ 831.60 Autopsies and postmortem testing.

When a person dies as a result of having been involved in a marine casualty or major marine casualty within the jurisdiction of the NTSB—

(a) The NTSB is authorized to obtain, with or without reimbursement, a copy of a report of autopsy performed by a State or local authority on such person.

(b) The NTSB may order an autopsy or other postmortem tests of any person as may be related to its investigation of a marine casualty or major marine casualty. The IIC may direct that an autopsy or other test be performed if necessary for an investigation. Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation.

§ 831.61 Parties to the investigation.

(a) Participants. (1) The IIC may designate one or more entities to serve as parties in an investigation. The NTSB will provide to the USCG the opportunity to participate in all NTSB investigations and investigative activities the NTSB conducts under this subpart. For all other organizations, party status is limited to those persons, government agencies (Federal, state, or local), companies, and organizations whose employees, functions, activities, or products were involved in the marine casualty or major marine casualty and that can provide suitable

qualified technical personnel actively to assist in an investigation. To the extent practicable, a representative proposed by party organizations to participate in the investigation may not be a person who had direct involvement in the major marine casualty or marine casualty under investigation.

(2) Except the USCG, no entity has a right to participate in an NTSB marine investigation as a party.

(3) Participants in an investigation (e.g., party representatives, party coordinators, and the larger party organization) must respond to direction from NTSB representatives.

(4) No party representative may -

(i) Occupy a legal position; or

(ii) Be a person who also represents claimants or insurers.

(5) Party status may be revoked or suspended if a party fails to comply with either paragraph (a) (3) or (a) (4) of this section. Sanctions may also be imposed if a party withholds information or acts in a manner prejudicial or disruptive to an investigation.

(b) Disclosures. (1) The name of a party or its representative may be disclosed in documents the NTSB places in the public docket for the investigation.

(2) The NTSB may share information considered proprietary or confidential by one party with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible.

(3) Section 831.6(c) of this part describes how the NTSB will handle voluntarily submitted safety information, and the NTSB's determination whether to share any such information. The NTSB will de-identify the source of such information when deciding to share it.

(c) Party agreement. All party representatives must sign the "Statement of Party Representatives to NTSB Investigation" (Statement) upon acceptance of party status. Failure to timely sign the Statement may result in sanctions, including loss of party status. Representatives of Federal agencies are not required to sign the Statement, but must comply with the responsibilities and limitations set forth in the agreement.

(d) Internal review by a party. (1) To assure coordination of concurrent efforts, a party to an investigation that conducts or authorizes a review of its own processes and procedures as a result of a major marine casualty or a marine casualty the NTSB is investigating must inform the IIC in a timely manner of the nature of its review. A party performing such review must provide the IIC with the findings from this review.

(2) If the findings from a review contain privileged information-

(i) The submitting party must inform the IIC that the review contains privileged information;

(ii) The submitting party must identify the privileged content at the time of submission to the IIC;

(iii) The NTSB must, when informed that such information is being submitted, review the information for relevancy to the investigation, and determine whether the information is needed for the investigation or may be excluded from the party's response.

(3) The NTSB may use the protections described in § 831.56 of this part, as applicable, to protect certain findings from public disclosure.

(4) Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.55 of this part.

§ 831.62 Access to and release of wreckage, records, mail, and cargo.

(a) Only persons authorized by the NTSB to participate in any particular investigation, examination or testing may be permitted access to wreckage, records, mail, or cargo.

(b) Wreckage, records, mail, and cargo in the NTSB's custody will be released when the NTSB determines it has no further need

for such items. Prior to release, the NTSB will inform the USCG of the upcoming release of wreckage or evidence. Recipients of released wreckage must sign an acknowledgement of release provided by the NTSB.

§ 831.63 Provision and dissemination of investigative information.

(a) Applicability. This section applies to:

(1) Any information related to a marine casualty or major marine casualty;

(2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the major marine casualty or the marine casualty, interview statements, wreckage documentation, voyage data recorder information, and surveillance video;

(3) Any information regarding the status of an investigation, or activities conducted as part of the investigation.

(b) Provision of information. All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be provided to the NTSB, except for information the NTSB authorizes the party to retain.

(c) Release of information. Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

(1) Information released at the scene of a marine casualty or major marine casualty:

(i) Is limited to factual developments concerning the accident and the investigation released in coordination with the IIC; and

(ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. If no Board Member is present, information will be released by a representative of the NTSB's Office of Media Relations or the IIC. To the maximum extent practicable, the NTSB will inform the USCG of its planned releases of information before the release occurs.

(2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of a marine casualty or major marine casualty does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.

(3) A party may disseminate information related to an investigation to those individuals within its organization who

have a need to know for the purpose of addressing a safety issue, including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.

(4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:

(i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;

(ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party; and

(iii) Information related to the investigation released to an organization or person that is not a party to the investigation.

(d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c), 1114(d), and 1154(a).

§ 831.64 Proposed findings.

(a) General. Any party to an investigation designated under § 831.61 may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety

recommendation(s) designed to prevent future major marine casualties and marine casualties.

(b) Timing of submissions. The IIC will inform parties when submissions are due. All written submissions must be received by the due date. If there is a Board meeting, the due date will be set prior to the date the matter is published in the Federal Register.

Robert L. Sunwalt, III,
Acting Chairman.

[FR Doc. 2017-12983 Filed: 6/28/2017 8:45 am; Publication Date: 6/29/2017]