

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR WASTE TECHNICAL REVIEW BOARD

10 CFR Part 1303

Rule Implementing the Freedom of Information Act

AGENCY: U.S. Nuclear Waste Technical Review Board.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Waste Technical Review Board (Board) is proposing to implement a set of procedural regulations under the Freedom of Information Act (FOIA) in accordance with 5 U.S.C. 552, the Freedom of Information Act, and Public Law 104-231, the Electronic Freedom of Information Act Amendments of 1996. These proposed regulations have been written to conform to the statutory provisions in the Acts, to expedite the processing of FOIA requests received by the Board, and to ensure the proper dissemination of information to the public.

DATES: Comments on the proposed rule should be submitted no later than February 11, 2005.

ADDRESSES: Comments on this proposed rule may be submitted:

By Mail or Hand Delivery: Joyce M. Dory, Director of Administration, U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Blvd., Suite 1300, Arlington, VA 22201;

By Fax: 703-235-4495;

To the Federal eRulemaking Portal: <http://www.regulations.gov>; or

By E-mail to the Board.

foia@nwtrb.gov.

All comments on this proposed FOIA rule should be clearly identified as such.

FOR FURTHER INFORMATION CONTACT: Victoria Reich, 703-235-4473.

SUPPLEMENTARY INFORMATION: This proposed rule is intended to set forth the procedures for members of the public to request records from the U.S. Nuclear Waste Technical Review Board under both the Freedom of Information

Act and the Electronic Freedom of Information Act amendments of 1996. The rule also sets forth the procedures that the Board will use when responding to such requests. It sets up the time frames for responses and the current fee schedule for any applicable charges for information. The rule also supplies information about Board materials available to the public through both the Board's reading room and its Web site.

Executive Order No. 12866

These proposed regulations do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, review by the Office of Management and Budget is not required.

Regulatory Flexibility Act

These proposed regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided by the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed regulations impose no additional reporting and recordkeeping requirements. Therefore, clearance by the Office of Management and Budget is not required.

List of Subjects in 10 CFR Part 1303

Administrative practice and procedure; Freedom of Information; Reporting and recordkeeping requirements.

Therefore, the Board proposes to add part 1303 to Title 10 of the Code of Federal Regulations, to read as follows:

PART 1303—PUBLIC INFORMATION AND REQUESTS

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- 1303.114 Appeals.
- 1303.115 Preservation of records.
- 1303.116 Other rights and services.

Authority: 5 U.S.C. 301, 5 U.S.C. 552 as amended; Executive Order 12600, 3 CFR, 1988 Comp., p. 235.

§ 1303.101 Scope.

This part sets forth the policies and procedures of the U.S. Nuclear Waste Technical Review Board (Board) regarding public access to documents under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The provisions in the Act shall take precedence over any part of the Board's regulations in conflict with the Act. This part gives the procedures the public may use to inspect and obtain copies of Board records under the FOIA, including administrative procedures which must be exhausted before a requestor invokes the jurisdiction of an appropriate United States District Court for the Board's failure to respond to a proper request within the statutory time limits, for a denial of Board records or challenges to the adequacy of a search, or for denial of fee waiver.

§ 1303.102 Definitions.

For words used in this document, unless the context indicates otherwise, singular includes the plural, plural includes the singular, present tense includes the future tense, and words of one gender include the other gender.

(a)(1) *Agency records*—Include materials that are in the control of the Board and associated with Board business, as follows:

(i) Materials produced by the Board.

(ii) Materials produced by a consultant for the Board.

(iii) Materials distributed by presenters at a Board meeting.

(2) All references to records, include both the entire record, or any part of the record.

(b) *Board*—The U.S. Nuclear Waste Technical review Board.

(c) *Chairman*—The Chairman of the Board as designated by the President.

(d) *Designated FOIA Officer*—The person named by the Board to administer the Board's activities in regard to the regulations in this part. The FOIA Officer also shall be:

(1) The Board officer having custody of, or responsibility for, agency records in the possession of the Board.

(2) The Board officer having responsibility for authorizing or denying

production of records from requests filed under the Freedom of Information Act.

(e) *Executive Director*—The chief operating officer of the Board.

(f) *Member*—An individual appointed to serve on the Board by the President of the United States.

(g) *Days*—Standard working days, excluding weekends and Federal holidays.

§ 1303.103 Public reading area.

(a) A public reading area is available at the Board office located at 2300 Clarendon Blvd., Suite 1300, Arlington, Virginia 22201. To use the reading area, contact the Director of Administration by:

(1) Letter to the address in this paragraph (a);

(2) Telephone: 703-235-4473;

(3) A request at the Board's Web site at <http://www.nwtrb.gov>; or.

(4) Fax: 703-532-4495.

(b) Documents also may be requested through the Board's Web site or by letter or fax. Please ensure that the records sought are clearly described. Materials produced by the Board are in the public domain unless otherwise noted.

(c) Many Board records are available electronically at the Board's Web site (<http://www.nwtrb.gov>).

(d) Records of the Board available for inspection and copying include:

(1) The rules and regulations of the Board.

(2) Statements of policy adopted by the Board.

(3) Board reports to the U.S. Congress and the U.S. Secretary of Energy.

(4) Board correspondence with Congress and the Department of Energy (DOE).

(5) Transcripts of Board meetings.

(6) Biographical information about current Board members.

(7) Copies of records released in response to FOIA requests.

(e) The cost of copying information available in the Board office shall be imposed in accordance with the provisions of § 1303.108.

§ 1303.104 Board records exempt from public disclosure.

5 U.S.C. 552 provides that the requirements of the FOIA do not apply to matters that are:

(a) Specifically authorized under the criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact are properly classified pursuant to such an executive order.

(b) Related solely to the internal personnel rules and practices of the Board.

(c) Specifically exempted from disclosure by another Federal statute, provided that such statute:

(1) Requires that records withheld from the public in such a manner that leaves no discretion on the issue; or

(2) Establishes criteria for withholding or refers to particular types of matters to be withheld.

(d) Trade secrets, and commercial or financial information obtained from a person and privileged or confidential.

(e) Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the Board.

(f) Personnel, medical, or similar files that disclosing would constitute a clearly unwarranted invasion of personal privacy.

(g) Records or information compiled for law enforcement purposes. But only to extent that the production of such law enforcement records of information:

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of any confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement agency in the course of a criminal investigation or by an agency conducting a lawful security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition reports, prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) Geological and geophysical information and data, including maps, concerning wells.

§ 1303.105 Requests for Board records.

(a) A written FOIA request must be submitted. You may:

(1) Write: NWTRB Designated FOIA Officer, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(2) Send a request via the Board's Web site at <http://www.nwtrb.gov>; or

(3) Fax: 703-235-4495.

(b) When making a request for records about a person, Privacy Act regulations also may apply. Please check the regulations for additional requirements before submitting a request. When making a request for records about someone other than yourself, you must include either:

(1) Written authorization signed by the person permitting you to see the records; or

(2) Proof that the individual is deceased (e.g., a death certificate or an obituary).

(c) A request will be considered received for purposes of § 1303.107 on the date that it is received by the Board's FOIA office. For prompt handling, write "Freedom of Information Act Request" on the letter and envelope or in the subject line of the Web request or fax.

(d) Each request must clearly describe the desired records in sufficient detail to enable Board personnel to locate them with reasonable effort. Response to requests may be delayed if the records are not clearly described.

(e) Whenever possible, requests should include specific information about each record sought, such as date, title or name, author, recipient, and subject.

(f) If the FOIA Officer determines that the request does not clearly describe the records sought, he or she will either advise you of the additional information needed to locate the record or otherwise state why the request is insufficient. The requestor will then be given the opportunity to provide additional information or to modify their request.

(g) Submitting a FOIA request shall be considered a commitment by the requestor to pay applicable fees required under § 1303.108 unless the requestor seeks a waiver of fees. When making a request, you may specify a willingness to pay fees up to a specific amount.

(h) The FOIA does not require the Board to:

(1) Compile or create records solely for the purpose of satisfying a request for records.

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some time in the future.

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requestor that the records have been destroyed or otherwise disposed of.

§ 1303.106 Responsibility, form, and content of responses.

The Board's Executive Director or his/her designated FOIA Officer is authorized to grant or deny any request for a record and determine appropriate fees. When determining which records are responsive to a request, the Board will include only records in its possession as of the date of the request.

(a) If no records are responsive to the request, the FOIA Officer will notify the requestor in writing.

(b) When a FOIA Officer denies a request in whole or in part he/she will notify the requestor in writing. The response will be signed by the FOIA Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reasons for the denial, including the FOIA exemption(s) that the FOIA Officer has relied on in denying the request; and

(3) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of that section.

(c) *Consultations and referrals.* When a request for a record not produced by the Board is received, the Board shall refer the requestor to the issuing agency in writing.

(d) *Notice of referral.* When the Board refers all or part of a request to another agency, it shall give the requestor the address of the agency contact and the section(s) referred.

(e) *Timing of responses to requests sent to other agencies.* The Board shall provide, within the FOIA deadline, responses only to those parts of the request not referred. Requests will be referred to other agencies and the requestor notified as soon as it is determined that a referral is appropriate.

(f) *Agreements on consultations and referrals.* The Board may make agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

§ 1303.107 Timing of responses to requests.

(a) *General.* The Board shall normally respond to requests in the order of their receipt.

(b) *Acknowledgment of requests.* On receipt of a request, the Board shall send an acknowledgement letter or an e-mail confirming the requestor's agreement to pay fees under § 1303.108 and providing a request number for further reference.

(c) *Granting requests.* The Board shall have 20 business days from when a request is received to determine whether to grant or deny it. Once the Board determines whether it can grant a request entirely or in part, it shall

notify the requestor in writing. The Board shall advise the requestor of any fees to be charged under § 1303.108 and shall disclose records promptly on payment of the fees. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record when technically feasible.

(d) *Unusual circumstances.* (1) If the statutory time limits for processing a request cannot be met because of "unusual circumstances" as defined in the FOIA, the Board shall promptly notify the requestor in writing, explaining the circumstances and giving the date by which the request can be completed or if the Board cannot complete the request. If the extension is for more than 10 working days, the Board shall provide the requestor with an opportunity either to:

(i) Modify the request so that it can be processed within the time limits; or

(ii) Arrange an alternative time period for processing the original request.

(2) If the Board believes that multiple requests submitted by a requestor or by requestors acting in concert constitute a single request that would otherwise involve unusual circumstances, and if the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing.* (1) Requests and appeals shall be taken out of order and given expedited processing whenever it is determined that they involve:

(i) Circumstances that could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged activity if made by a person primarily engaged in disseminating information.

(2) Requests for expedited processing may be made either at the time of the initial request or at a later time.

(3) Requests for expedited processing must include a statement explaining in detail the basis for requesting expedited processing. For example, a requestor under § 1303.108 must establish that his/her professional activity is news reporting, although it need not be their sole occupation. The requestor also must establish a particular urgency to inform the public about government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days of receipt of a request for expedited processing,

the Board shall decide whether to grant the request and notify the requestor of its decision. If a request for expedited treatment is granted, the request shall be processed as soon as practicable. If a request for expedited processing is denied, an appeal of that decision shall be acted on expeditiously.

§ 1303.108 Fees.

(a) *General.* The Board shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under § 1303.109 or where a waiver or reduction of fees is granted under § 1303.111. Fees must be paid before the copies of records are sent. Fees may be paid by check or money order payable to the Treasury of the United States.

(b) *Definitions for this section.* (1) *Commercial use request*—A request from, or on behalf of, a person who seeks information for a purpose that furthers their commercial, trade, or profit interests including furthering those interests through litigation. The Board shall try to determine the use to which a record will be put. When the Board believes that a request is for commercial use either because of the nature of the request or because the Board has cause to doubt the stated use, the Board shall ask the requestor for clarification.

(2) *Direct costs*—Expenses that the Board incurs in searching for, duplicating, and, for some requests, reviewing records in response to a FOIA. Direct costs include the full salary of the employee performing the work and the cost of duplication of the records. Overhead expenses, such as the costs of space, heating, and lighting, are not included.

(3) *Duplication*—Making a copy of a record or the information in the record, to respond to a FOIA. Copies can be in paper, microform, electronic, or other format. The Board shall honor a requestor's preference for format if the record is readily reproducible in that format at a reasonable cost.

(4) *Educational institution*—A public or private school, an undergraduate, graduate, professional or vocational school, that has a program of scholarly research. For a request to be in this category, a requestor must show that request is authorized by and made under the auspices of the qualifying institution and that the records will be used for scholarly research.

(5) *Noncommercial scientific institution*—An institution that is not operated on a commercial basis, as defined in paragraph (b)(1) of this section and is operated solely for conducting scientific research that does

not promote any particular product or industry. For a request to be in this category, the requestor must show that the request is authorized and made under the auspices of the qualifying institution and that the records will be used to further scientific research.

(6) Representative of the new media—Any person actively reporting for an entity that provides news to the public. The term “news” means information about current events or of current interest to the public. Examples include: television and radio stations broadcasting to the public; and publishers of periodicals who make their news products available to the general public. For freelance journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. The Board may use a publication contract or past publication records to make this determination. The requestor must not be seeking records for a commercial use; however, a request solely supporting the news-dissemination function is not considered a commercial use.

(7) Review—Examining a record to determine whether any part of it is exempt from disclosure, and processing a record for disclosure. Review costs are recoverable even if a record is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(3) of this section but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) Search—The process of looking for and retrieving records, including page-by-page or line-by-line identification of information within records and reasonable efforts to locate and retrieve information from records maintained in electronic form. The Board shall ensure that searches are done in the most efficient and least expensive way that is reasonably possible.

(c) *Fees.* In responding to FOIA requests, the Board shall charge the following fees unless a waiver or a reduction of fees has been granted under § 1303.111:

(1) *Search.* (i) Search fees shall be charged for all requests subject to the limitations of § 1303.109. The Board may charge for time spent searching even if no responsive record is located, or if the record(s) located are withheld as exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$5. If a search and retrieval requires the use of professional personnel the fee will be \$8 for each

quarter hour. If the time of managerial personnel is required, the fee will be \$10 for each quarter hour.

(iii) For computer searches of records, requestors will be charged the direct costs of conducting the search, although certain requestors (*see* § 1303.109(a)) will be charged no search fee and certain other requestors (*see* § 1303.109(b)) will be entitled to two hours of manual search time without charge. Direct costs include the cost of operating a computer for the search time for requested records and the operator salary for the search.

(2) *Duplication.* Duplication fees for paper copies of a record will be 10 cents per page for black and white and 20 cents per page for color. For all other forms of duplication, the Board shall charge the direct costs of producing the copy. All charges are subject to the limitations of §§ 1303.109 and 1303.111.

(3) *Review.* When a commercial-use request is made, review fees shall be charged as stated in paragraph (c)(1) of this section. These fees apply only to the initial record review, when the Board determines whether an exemption applies to a particular record. Charges shall not be imposed for review at the administrative appeal level if an exemption is applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The costs of that review shall be charged. All review fees shall be charged at the same rates as those charged in paragraph (c)(1) of this section.

§ 1303.109 Restrictions on charging fees.

(a) When determining search or review fees:

(1) No search fee shall be charged for requests by educational institutions, noncommercial scientific institutions, and representatives of the news media.

(2) The Board shall provide without charge, to all but commercial users:

(i) The first 100 pages of black and white duplication (or the cost equivalent); and

(ii) The first two hours of search by a clerical staff member (or the cost equivalent).

(3) When the total fee for a request will be \$14.00 or less for any request, no fee shall be charged.

(b) The provisions of paragraphs (a)(2) and (a)(3) of this section work together. All requestors seeking records for a non-commercial use shall not be charged unless the total cost for the request exceeds by more than \$14.00, the cost of a two hour clerical search, plus the

cost of duplication over the 100 page exemption.

§ 1303.110 Notice of anticipated fees.

(a) *General.* The Board shall advise the requestor in writing of any applicable fees. If only a part of the fee can be estimated readily, the Board shall advise the requestor that this may be only a part of the total fee. After the requestor has been sent a fee estimate, the request shall not be considered received until the requestor makes a firm commitment to pay the anticipated total fee. Any such agreement must be made by the requestor in writing and must be received within 60 days of the Board's notice. If the requestor does not provide a firm commitment to pay the anticipated fee within 60 days of the notice, the request shall be closed. The requestor may be given an opportunity to work with the Board to change the request and lower the cost.

(b) *Charges for other services.* When the Board chooses as a matter of administrative discretion to provide a special service, such as certifying that records are true copies or sending them by other than ordinary mail, the Board shall pay the costs of providing the service unless previous arrangements have been made with the requestor.

(c) *Charging interest.* The Board may charge interest on any unpaid bill starting on the 31st day following the date of billing. Interest charges shall be assessed as the rate provided in 31 U.S.C. 3717 and shall accrue from the date of the billing until payment is received by the Board. The Board shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended.

(d) *Aggregating requests.* If the Board reasonably believes that a requestor or a group of requestors acting together is trying to divide a request into a series of smaller requests for the purpose of avoiding fees, the Board may aggregate the requests and charge accordingly. The Board shall assume that multiple requests of the same type made within a 30-day period have been made in order to avoid fees. If requests are separated by a longer period, the Board shall aggregate them only if there is a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters shall not be aggregated.

(e) *Advance payments.* When a requestor has previously failed to pay promptly a properly charged FOIA fee to the Board or another agency, the Board shall require proof that full payment has been made to that agency before it begins to process that requestor's FOIA. The Board shall also

require advance payment of the full amount of the anticipated fee. When advance payment is required, the request is not considered received until payment has been made.

§ 1303.111 Requirements for waiver or reduction of fees.

(a) Records shall be furnished without charge or at a reduced charge if the Board determines that:

(1) Disclosure is in the public interest and the information is likely to contribute significantly to public understanding of the activities of the government; and

(2) Disclosure is not primarily in the commercial interest of the requestor.

(b) In determining whether the first requirement is met, the Board shall consider:

(1) Subject: Do the requested records concern identifiable activities of the federal government?

(2) Informative value: Will the disclosure contribute to an understanding of government activities? Do records contain information on activities "likely to contribute" to an increased public understanding? If the information or similar information is already in the public domain, the record(s) would not increase the public's understanding.

(3) Would the disclosure contribute to the understanding of a reasonably broad audience, as opposed to the individual understanding of the requestor? A requestor's expertise in the subject and intention to convey information to the public shall be considered. Being a valid representative of the news media shall satisfy this consideration.

(4) Is the disclosure likely to contribute significantly to public understanding of government activities? The level of understanding after the disclosure versus that before the disclosure must be enhanced to a significant extent. However, the Board shall not make value judgments about whether information contributing to public understanding of government activities is important enough to release.

(c) In determining whether the second requirement is met, the Board shall consider:

(1) The existence and extent of the commercial interest: Would a commercial interest be substantially furthered by the disclosure? The Board shall consider the commercial interest (*see* paragraph (a)(2) of this section) of either the requestor or of any person on whose behalf they may be acting that would be furthered by the disclosure. During the administrative process, requestors shall be given an opportunity

to provide additional information about this concern.

(2) The primary interest for disclosure: Whether the commercial interest of the requestor is sufficiently large in comparison to the public interest, that disclosure is "primarily in the commercial interest of the requestor." A fee waiver is justified if the public interest standard under paragraph (b) of this section is satisfied and if that public interest is greater than any commercial interest. The Board shall presume that when news media requestors satisfy this standard, primarily the public interest is served.

(d) If only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted only for those records.

(e) Requests for a waiver or a reduction of fees must address the factors listed in paragraphs (a) and (b) of this section only as they apply to each request. The Board also shall consider their administrative resources when responding to requests and may negotiate with the requestor to find the best way to optimize their resources in responding to the request when deciding whether to grant waivers or reductions of fees.

§ 1303.112 Denials.

(a) When denying a request in any respect, the Board shall notify the requestor of that determination in writing. The types of denials include:

(1) Denials of requests, consisting of a determination:

(i) To withhold any requested record in whole or in part;

(ii) That a requested record does not exist or cannot be located;

(iii) That a record is not readily reproducible in the form or format sought;

(iv) That what has been requested is not a record subject to the FOIA; and

(v) That the material requested is not a Board record (*e.g.*, material produced by another agency or organization).

(2) A determination on any disputed fee matter, including a denial of a request for a fee waiver.

(3) A denial of a request for expedited processing.

(b) The denial letter shall be signed by the Director of Administration, the Deputy Director, or their designee, and shall include all of the following:

(1) The name and title of the person responsible for the denial.

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied in denying the request.

(3) An estimate of the volume of records withheld, in number of pages or

in some other reasonable form of estimation. This estimate does not need to be provided if it would harm an interest protected by an applicable exemption.

(4) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of § 1303.114.

§ 1303.113 Business information.

(a) *In general.* Business information obtained by the Board from a submitter shall be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information—commercial or financial records obtained by the Board that may be protected from disclosure under Exemption 4 of the Freedom of Information Act (FOIA).

(2) Submitter—any person or entity from which the Board obtains business records, either directly or indirectly. The term includes, but is not limited to, corporations, and state, local, tribal, and foreign governments.

(c) *Designation of business information.* Submitters of business information shall designate any part of the record considered to be protected from disclosure under Exemption 4 of the FOIA by appropriately marking the material. This may be done either at the time the record is submitted or at a reasonable time thereafter. This designation lasts for 10 years after submittal unless the submitter requests and provides justification for a longer period.

(d) *Notice to submitters.* The Board shall provide a business submitter with prompt written notice of any FOIA request or appeal that seeks its business information under paragraph (e) of this section, except as provided in paragraph (h) of this section, to give the submitter an opportunity to object to that disclosure under paragraph (f) of this section. The notice shall either describe the records requested or include copies of the records.

(e) *Required notice.* Notice shall be given to a submitter when:

(1) The submitter has designated that the information is considered protected from disclosure under Exemption 4 of the FOIA; or

(2) The Board has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(f)(1) *Objecting to disclosure.* A submitter shall have 30 days to respond to the notice described in paragraph (d) of this section. If a submitter has an objection to disclosure, they are

required to submit a detailed written statement including:

(i) All grounds for withholding any of the information under any exemption of the FOIA, and

(ii) In the case of Exemption 4, the reason why the information is a trade secret, commercial, or financial information that is privileged or confidential.

(2) If a submitter fails to respond to the notice in paragraph (d) of the section within 30 days, the Board shall assume that the submitter has no objection to disclosure. The Board shall not consider information not received by the Board until after a disclosure decision has been made. Information provided by a submitter under this paragraph might itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* The Board shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the business records. Whenever the Board decides to disclose business records over the objection of a submitter, it shall give the submitter written notice, that will include:

(1) A statement of the reason(s) the submitter's objections were not sustained;

(2) A description of the business records to be disclosed; and

(3) A specified disclosure date at a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements in paragraphs (d) and (g) of this section shall not apply if:

(1) The Board determines that the information should not be disclosed;

(2) The information has been published legally or has been officially made available to the public;

(3) Disclosure of the information is required by another statute or by a regulation issued in accordance with Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The objection made by the submitter under paragraph (f) of this section appears frivolous. In such a case, the Board shall promptly notify the submitter of its decision using the guidelines in paragraph (g) of this section.

(i) *Notice of FOIA lawsuit.* When a requestor files a lawsuit seeking to compel the disclosure of business information, the Board shall promptly notify the submitter.

(j) *Corresponding notice to requestors.* When the Board provides a submitter with either notice and an opportunity to object to disclosure under paragraph (d) of this section or with its intent to

disclose requested information under paragraph (g) of this section, the Board also shall notify the requestor(s). When a submitter files a lawsuit seeking to prevent the disclosure of business information, the Board shall notify the requestor(s).

§ 1303.114 Appeals.

(a)(1) *Appeals of adverse determinations.* If you are dissatisfied with the Board's response to your request, you may appeal to the Board's Executive Director:

(i) By mail to: U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(ii) By e-mail to: FOIA@nwtrb.gov; or

(iii) By fax to: 703-235-4495.

(2) The appeal must be in writing and must be received within 30 days of the date of the Board's response. The appeal letter, e-mail, or fax may include as much or as little related information as you wish, as long as it clearly identifies the Board determination that you are appealing, including the assigned request number, if known. For prompt handling, please mark your appeal "Freedom of Information Act Appeal."

(b) *Responses to appeals.* Requestors shall be notified in writing of the decision on the appeal. A decision affirming an adverse determination shall include a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and shall include the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, the request shall be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If a review by a court of any adverse determination is desired, the determination must first be appealed under this section.

(d) *Denial of appeal.* An adverse determination by the Executive Director shall be the final action of the Board.

(e) *Unacceptable appeals.* An appeal will not be acted on if the request becomes a matter of FOIA litigation.

§ 1303.115 Preservation of records.

The Board shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit.

§ 1303.116 Other rights and services.

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is entitled under the FOIA.

Dated: December 21, 2004.

William D. Barnard,

Executive Director, U.S. Nuclear Waste Technical Review Board.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2004-19955; Directorate Identifier 2004-NE-17-AD]

RIN 2120-AA64

Airworthiness Directives; Hartzell Propeller Inc. Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Hartzell Propeller Inc. propellers. This proposed AD would require inspecting the propeller blades and other critical propeller parts for corrosion and mechanical damage. This proposed AD results from two events where a "Z-shank" blade failed and separated and the results of teardown inspections that detected corrosion in the blade bore. We are proposing this AD to detect corrosion and mechanical damage that can cause failure of a propeller, which could result in loss of control of the airplane.

DATES: We must receive any comments on this proposed AD by February 28, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- *DOT Docket Web site:* Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

- *Fax:* (202) 493-2251.