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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

Excepted Service—Schedule A Authority for Employment of Students

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is revising the Schedule A excepted service appointing authority used by agencies to hire student assistants. These regulations permit agencies to make appointments under the authority at grades up to GS–9, or equivalent. Previously, the top grade limit was GS–7, or equivalent.

EFFECTIVE DATE: June 7, 1991.

FOR FURTHER INFORMATION CONTACT: Tracy Spencer, (202) 606–0960.

SUPPLEMENTARY INFORMATION: The Schedule A authority for positions filled by student assistants allows Federal agencies to use the services of students in work related to their majors and to afford the students practical experience to supplement their education. The authority requires that appointees be full-time students and does not provide for either full-time employment or continued employment after the student leaves school. Exception is based on OPM's finding that examinations geared toward career employment may not produce candidates interested in part-time temporary employment or may do so only at excessive cost. Currently, the authority permits employment at grades GS–7, or equivalent, and below for up to 1,040 hours in a service year. These limits represent a break-even point above which examining would be appropriate and cost-effective.

On December 7, 1990 (55 FR 50560), OPM published proposed regulations to raise the grade limit to GS–9. This change was suggested by an agency. In addition to the agency that made the original suggestion, three agencies and an employee organization supported the proposed regulations. One employee organization opposed expanding the Schedule A authority, stating that the agencies could fill these positions through job-sharing and part-time employment programs in the competitive service. However, those programs are geared toward continuing part-time work, not toward work that is both part-time and temporary.

OPM is, therefore, adopting the proposed regulations as final. Only the grade level limit is changed. The 1,040-hour service limit and the requirement for appointees to meet the experience and training requirements of the applicable qualifications standard are still in place.

Executive Order 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only the procedures used to appoint certain employees in Federal agencies.

List of Subjects in 5 CFR Part 213

Government employees.

Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is amending 5 CFR part 213 as follows:

1. The authority citation for part 213 continues to read as follows:

Authority: 5 U.S.C. 3301 and 3302, E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; section 213.101 also issued under 5 U.S.C. 2103; section 213.102 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); section 213.3102 also issued under 5 U.S.C. 3301, 3302 (E.O. 12364, 47 FR 22931), 3307, 8337(h), and 8457.

2. In § 213.3102(q), the first sentence is revised to read as follows:

§ 213.3102 Entire Executive Civil Service

* * * * *

(q) Positions at grade GS–9, or equivalent, and below when appointees are to assist scientific, professional, or technical employees. * * *

* * * * *

[FR Doc. 91–10903 Filed 5–7–91; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1464

Tobacco

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule adopts as a final rule, with a minor correction, the proposed rule published in the Federal Register on February 21, 1991, (56 FR 6998). This rule amends the tobacco loan program regulations at 7 CFR part 1464 to: (1) Incorporate provisions implementing marketing assessments on the 1991 through 1995 crops of tobacco as set forth in the Omnibus Budget Reconciliation Act of 1990; (2) correct cross references to 7 CFR part 723 regulations published in the Federal Register on October 1, 1990; (3) delete obsolete material; and (4) make minor technical revisions. This final rule also amends 7 CFR part 1464 to incorporate an amendment which provides that a producer who is determined by the Agricultural Stabilization and Conservation Service (ASCS) to have erroneously represented any fact affecting a program determination shall not be entitled to price support with respect to which such representation was made, and shall refund to Commodity Credit Corporation (CCC) all payments received by the producer with respect to such farms and the tobacco program. This proposed amendment was erroneously published in the Federal Register on March 14, 1991, as a proposed revision to 7 CFR part 723.

EFFECTIVE DATE: May 8, 1991.

FOR FURTHER INFORMATION CONTACT: Gary W. Wheeler, Tobacco Marketing Specialist, Tobacco and Peanuts Division, USDA–ASCS, P.O. Box 2415, Washington, DC, 20013, telephone (202) 447–7562.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Department Regulation No. 1512-1 and has been classified as "not major."

It has been determined that this rule will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local governments, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises, to compete with foreign-based enterprises in domestic or export markets.

It has been determined that the Regulatory Flexibility Act is not applicable to this proposed rule since the CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

The title and number of the Federal Assistance Program to which this rule applies are: Commodity Loan and Purchases: 10.051, as found in the catalog of Federal Domestic Assistance.

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is needed.

This program/activity is not subject to the provision of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

The Omnibus Budget Reconciliation Act of 1990, enacted November 15, 1990, (Pub. L. 101-577), amended section 106 of the Agricultural Act of 1949 (7 U.S.C. 1445), "the Act", to require, effective for each of the 1991 through 1995 crops of tobacco for which price support is made available under the Act, that both producers and purchasers of such tobacco shall each remit to the CCC a nonrefundable marketing assessment in an amount equal to .5 percent of the national price support level for each such crop as otherwise provided for in the Act.

Annually, in accordance with the Act, the USDA determines and announces a national price support level for each kind of tobacco for which marketing quotas have not been disapproved by producers. For the 1991 through 1995 crops of such tobacco, both producers and purchasers of such tobacco will be required to remit to CCC an amount equivalent to .5 percent of the national price support level for such kind of tobacco on each pound of such tobacco marketed. Such remittance will be handled by CCC as a nonrefundable marketing assessment.

The CCC will determine and announce the marketing assessment for each of the 1991 through 1995 crops of the respective kinds of tobacco. The amount of the marketing assessment will be determined and rounded to the nearest hundredth of a cent. For example, if the national price support level for a kind of tobacco for the 1991 crop is $1.50 per pound, the marketing assessment due on each pound of tobacco marketed would be $.015 cents or $.0075 cent from both the producer and the purchaser.

The Act also provides for the collection and enforcement of the nonrefundable marketing assessment in a manner similar to the no-net-cost tobacco program assessments and contributions. The no-net-cost tobacco program assessments and contributions ensure, insofar as practicable, that the tobacco program operates at no-net-cost to the government.

The marketing assessment will be collected and remitted to CCC in accordance with 7 CFR 1464.10(i) which provides the procedures for collecting no-net-cost tobacco program assessments and contributions. For auction sales of tobacco, the marketing assessment will be collected through provisions in auction warehouse contracts between tobacco loan associations and auction warehouses. For non-auction sales of tobacco, dealers will be required to submit the marketing assessment collections on a weekly basis along with their weekly report of purchases.

A penalty for the failure to collect and remit any such marketing assessment will be determined in accordance with 7 CFR 1464.10(j) which provides the procedures for determining the penalty for failure to collect and remit no-net-cost tobacco contributions and assessments. Generally, any person who fails to collect and remit the nonrefundable marketing assessment in a timely manner would be liable for a marketing penalty at a rate equal to 75 percent of the average market price for the applicable kind of tobacco for the immediately preceding year on the quantity of tobacco as to which failure occurs. This marketing penalty would be in addition to any penalty imposed for failure to remit the no-net-cost tobacco program assessment or contribution.

In 7 CFR part 1464, all references to 7 CFR parts 724 through 726 are being changed to reference 7 CFR part 723. This action is necessary since USDA published a Final Rule in the **Federal Register** on October 1, 1990 (55 FR 39913), which removed 7 CFR parts 724, 725, and 726 and revised part 723 to include applicable portions of parts 724, 725, and 726.

Throughout 7 CFR part 1464 all references to "warehouseman" are being changed to "warehouse operator". This correction in terminology will be consistent with language contained in 7 CFR part 723.

All references in 7 CFR part 1464 to loans on farm-stored tobacco are being deleted since tobacco is no longer eligible for a farm-stored loan in accordance with 7 CFR part 1421.

No comments were received with respect to implementation of the tobacco marketing assessment published in the **Federal Register** on February 21, 1991 (56 FR 6998).

In a proposed rule to 7 CFR part 723, published in the **Federal Register** on March 14, 1991 (56 FR 10820), a new provision was added which provides that a producer who is determined by ASCS to have erroneously represented any fact affecting a program determination shall not be entitled to price support with respect to which such representation was made, and shall refund to CCC all payments received by the producer with respect to such farms and the tobacco program. This amendment was proposed since current regulations do not provide a scheme and device provision with respect to tobacco producers, warehouse operators, dealers, and other persons who intentionally act to defeat the purpose of the tobacco program regulations. This amendment provides for assessing penalties in such a manner as will correct and nullify any action in which a person or entity adopts any scheme or device to defeat the purpose of the tobacco regulations. No comments were received in response to this scheme and device provision being added to the tobacco program regulations. Both CCC and ASCS have determined that this scheme and device provision with respect to producers is more appropriately codified in 7 CFR part 1464 in lieu of 7 CFR part 723 since the monetary benefits which are affected by this action are issued pursuant to 7 CFR part 1464. This scheme and device provision with respect to warehouse operators, dealers, and other entities will remain at § 723.414(c) of this title.

List of Subjects in 7 CFR 1464

Tobacco; Tobacco loan program.

Final Rule

PART 1464—TOBACCO [AMENDED]

For the reasons set out in the preamble, title 7, chapter XIV, of the Code of Federal Regulations, is amended as follows:

1. The authority citation for part 1464 continues to read as follows:

Authority: 7 U.S.C. 1309, 1441, 1445, 1445–1, 1421, and 1423; 15 U.S.C. 714b, 714c.

2. In part 1464 all references to "warehouseman" throughout part 1464 are revised to read "warehouse operator".

§ 1464.2 [Amended]

3. Section 1464.2 is amended in paragraph (b)(2)(i) by removing the words "Part 725" and adding, in its place, the words "Part 723"; in paragraph (b)(3) by deleting the second and third sentences; and in paragraph (b)(4) by deleting the second sentence.

§ 1464.4 [Amended]

4. Section 1464.4 is amended in paragraph (b) by removing the words "Parts 723 through 726" and adding, in their place, the words "Part 723", and by removing the words "his/her" and adding, in their place, the word "their", and paragraph (c) is removed.

§ 1464.5 [Amended]

5. Section 1464.5 is amended by removing the second sentence.

6. Section 1464.7 is amended by adding paragraphs (b)(3), (b)(4), and (b)(5) to read as follows:

§ 1464.7 Eligible producer.

* * * * *

(b) * * *

(3) Erroneously represented any fact affecting a tobacco program determination.

(4) Adopted any scheme or device which tends to defeat the purpose of the tobacco program.

(5) Made any fraudulent representations with respect to the tobacco program.

* * * * *

§ 1464.8 [Amended]

7. Section 1464.8 is amended in paragraph (d)(2) by removing the words "Parts 724 through 726" and adding, in their place, the words "Part 723".

8. Section 1464.9 is amended by adding paragraph (c) to read as follows:

§ 1464.9 Refund of price support advance.

* * * * *

(c) Misrepresented any fact affecting a tobacco program determination, adopted any scheme or device which tends to defeat the purpose of the tobacco program, or made any fraudulent representation which tends to defeat the purpose of the tobacco program. The refund of CCC price support advance shall apply to all payments on all farms received by such producer.

§ 1464.10 [Amended]

9. Section 1464.10 is amended in paragraph (i)(5)(i) by removing the word "Warehousemen" and adding, in its place, the words "Warehouse operators", in paragraph (i)(5)(ii) by removing the words "Parts 724 through 726" and adding, in their place, the words "Part 723", and paragraph (j)(2) is amended by removing the word "warehouseman's" and adding, in its place, the words "warehouse operator's".

§ 1464.12 [Redesignated from 1464.11]

10. Section 1464.11 is redesignated as § 1464.12.

11. Section 1464.11 is added to read as follows:

§ 1464.11 Nonrefundable marketing assessment.

Effective only for each of the 1991 through 1995 crops of tobacco for which price support is made available according to § 1464.2 of this part, both the producer and purchaser of such tobacco shall each remit to the CCC a nonrefundable marketing assessment in an amount equal to .5 percent of the national price support level for each such kind and crop on each pound of tobacco marketed. The nonrefundable marketing assessment will be:

(a) Determined and announced by CCC at the time of announcing the national price support level for applicable kinds of tobacco or as soon thereafter as possible.

(b) Collected and remitted to CCC in accordance with § 1464.10(i) of this Part from producers and purchasers at the time of marketing.

(c) Collected by loan associations and remitted to CCC on all such tobacco pledged as loan collateral at the time such 1991 through 1995 crops of tobacco are sold from loan inventories.

(d) Subject to the same penalty for failure to be collected and remitted as provided for in § 1464.10(j) of this part.

(e) Enforceable in the courts of the United States by the Secretary.

Signed at Washington, DC on April 30, 1991.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 91–10665 Filed 5–7–91; 8:45 am]

BILLING CODE 3410–05–M

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

10 CFR Part 1703

[Docket No. RM–91–1]

Rules Implementing the Freedom of Information Act

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Final rule.

SUMMARY: The Defense Nuclear Facilities Safety Board (Board) is promulgating the following set of regulations to implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. These regulations provide procedures for public access to Board records. The Board is undertaking this rulemaking in response to the decision of the United States Court of Appeals for the District of Columbia Circuit that the Board is an "agency" covered by FOIA. *Energy Research Foundation* v. *Defense Nuclear Facilities Safety Board (ERF* v. *DNFSB)*, 917 F. 2d 581 (1990).

EFFECTIVE DATE: May 8, 1991.

FOR FURTHER INFORMATION CONTACT: Robert M. Andersen, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004, (202) 208–6387.

SUPPLEMENTARY INFORMATION:

I. Background

The Board is responsible for making recommendations to the Secretary of Energy and the President regarding health and safety issues at the nation's defense nuclear facilities. Since March of 1990 the Board has been voluntarily complying with the requirements of FOIA in the absence of implementing regulations. In *ERF* v. *DNSFB*, the D.C. Circuit held that the Board is an agency subject to the provisions of FOIA and generally covered by the Government in the Sunshine Act, 5 U.S.C. 552b. On March 8, 1991 (56 FR 9902) the Board published for comment its proposed regulations implementing FOIA. The Board received a single set of comments, which were filed jointly by the Energy Research Foundation and the Natural Resources Defense Council (ERF/NRDC). In addition, one of ERF/NRDC's comments filed with respect to the Board's proposed Sunshine Act regulations (since published as a final rule on March 7, 1991 (56 FR 9605)) related to FOIA and is treated in this notice. The Board has carefully considered the ERF/NRDC comments and has made some modifications to the proposed rule in response.

II. Board Consideration of Comments

Comment. The personal records exclusion from the proposed definition of "agency record" in § 1703.102 fails to take use of the record into consideration, as required under *Bureau of National Affairs* v. *U.S. Department of Justice*, 742 F. 2d 1484 (D.C. Cir. 1984) (BNA).

Response. The Board agrees that, in addition to the indicia of a personal record set forth in the proposed regulation, consideration must be given to whether, and to what extent, the author of the record used it to conduct agency business. *BNA; Kissinger* v. *Reporter's Committee for Freedom of the Press*, 445 U.S. 136 (1980). Section 1703.102 has been modified to note this additional factor to be considered in determining whether a document is a "personal" or an "agency" record.

Comment. ERF/NRDC assert that if it is the Board's intent that fee waivers not be applicable to the duplication costs of records made available in the Public Reading Room (PRR), such intent is "flatly inconsistent" with FOIA's fee waiver provision.

Response. The Board has made a distinction in § 1703.107 between records available for inspection and copying through the PRR and records not available in this manner. A "FOIA" request is not necessary for records available through the PRR, whereas it is necessary for other Board records. A member of the public seeking access to records that are available through the PRR simply has to reasonably describe the records sought (§ 1703.103(a)). The request does not have to be in writing, nor does the requesters have to state his willingness to pay fees or request a fee waiver or reduction (§ 1703.105(b)). As noted in § 1703.105(a), access to records through the PRR is intended to be a simplified process.

Consistent with this simplified procedure, the Board has provided that only duplication costs, and not search costs, will be passed on to requesters of PRR documents (§ 1703.107(a)). The Board has published for comment its Proposed FOIA Fee Schedule that establishes charges to requesters for various forms of document duplication based upon the Board's specific costs. 56 FR 11114 (March 15, 1991). For example, the cost for copying standard 8.5" by 11" paper would be five cents per page. ERF/NRDC are correct that, under this simplified procedure, the Board would not entertain waiver or reduction requests with respect to the duplication costs for PRR documents.

The distinction in the Board's proposed regulations between fee treatment of PRR records and other Board records is consistent with FOIA. 5 U.S.C. 552(a)(2) establishes a requirement that certain basic agency records shall be made easily available to the public for inspection and copying. 5 U.S.C. 552(a)(3) then states that requests for other agency records must be made in accordance with agency regulations, mentioning fees as one of the matters to be addressed in such a request. The Board reads 5 U.S.C. 552(a)(4), the FOIA section on fees, as implementing 5 U.S.C. 552(a)(3) and not 5 U.S.C. 552(a)(2). Documents in the PRR are in the "public domain" and are readily available to anyone who wants to review them. Section 1703.103(a) has been supplemented with a statement to this effect.

An agency satisfies FOIA when it has already made records available for inspection and copying in its public reading room and does not additionally have to provide those records directly to a requester in response to a FOIA request. *Tax Analysts* v. *Dep't of Justice*, 845 F.2d 1060, 1065, 1066–67 and n.15 (D.C. Cir. 1988), *aff'd* 109 S. Ct. 2841, 2851 n.12 (1989); *Oglesby* v. *Dep't of the Army*, 920 F. 2d 57, 70 (D.C. Cir. 1990); *Blakey* v. *Dep't of Justice*, 549 F. Supp. 362, 364–65 (D.D.C. 1982), *aff'd mem.*, 720 F. 2d 215 (D.C. Cir. 1983), cited in ERF/NRDC's comments.

This same reasoning has been applied in holding that the denial of a fee waiver is appropriate if requested information is already in the public domain, particularly in an agency's public reading room. *Blakey, supra.*[1]

The Board's treatment of fees for records available through the PRR is similar to the practices of other federal agencies. The Nuclear Regulatory Commission (NRC) distinguishes between duplication charges for records made available through its Public Document Rooms (PDRs) and other NRC records (10 CFR 9.35). The NRC has not made its provisions for fee waiver or reduction (10 CFR 9.41) applicable to duplication costs for PDR records.[2]

The Federal Energy Regulatory Commission (FERC) makes the same distinction. 18 CFR 388.106 provides for certain documents to be maintained in the Public Reference Room (PRR) and 18 CFR 388.109 distinguishes between (a) fees for records available through the PRR and (b) fees for other FERC records. 18 CFR 388.109(b)(6) states that fee reduction or waiver only applies to fees for other records.

As a final part of this comment, ERF/NRDC assert that if the Board does not have to apply fee waivers or reductions to documents made available through its PRR, it would be able to "shield" agency records from an applicable provision of FOIA. On the contrary, making documents available through the PRR is intended to speed and facilitate public access to Board records. The Board believes that the simplified process of access to Board records through the PRR will benefit members of the public.

Comment. The Board impermissibly proposes to include associated labor costs in charges for duplication of agency records by commercial contractors.

Response. This comment is based upon a statement by the Board in proposed § 1703.107(a)(1) that the Board will not charge for associated labor costs when *it* duplicates the agency records requested. ERF/NRDC assert that some requesters may be charged considerably more than others depending upon whether the Board finds it necessary to make use of a contractor to perform the duplication. This concern is laid to rest in the Board's proposed fee schedule. The Board currently expects to perform duplication of requested records by its own personnel. However, should it become necessary to use a commercial copying service, the Board does not expect the cost to be higher than the per-page rate to be

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[1] ERF/NRDC suggest that in order for a document to be in the public domain, it must have been obtained by a member of the public and widely disseminated. ERF/NRDC imply that this is the position of the Department of Justice (DOJ) in its New FOIA Fee Waiver Policy Guidance (April 2, 1987). That guidance document does not address the question of whether availability through a public reading room places a document in the public domain. However, earlier DOJ guidance on the same subject expressly stated that availability of a document in an agency's public reading room constitutes placing that document in the public domain. Memorandum to Heads of All Federal Departments and Agencies from Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Subject: Freedom of Information Act Fee Waivers (January 7, 1983, p. 3). *But compare Blakey, supra, with Fitzgibbon* v. *Agency for International Development, et. al.*, 724 F. Supp. 1048 (D.D.C. 1989), holding that under FOIA implementing regulations of the Departments of Justice and Defense, availability of certain documents in their public reading rooms did not establish that those documents were in the public domain and that a fee waiver request should, therefore, be denied.

[2] 10 CFR 9.41(a) provides that: "The NRC shall collect fees for searching for, reviewing, and duplicating agency records, . . . unless a requester submits a request in writing for a waiver or reduction of fees." In contrast, 10 CFR 9.35(a) prescribes the charges for duplication of PDR records by the contractor performing that service without provision for fee waiver or reduction.

charged when Board personnel perform the duplication. 56 FR 11114, n.2.[3]

Comment. Proposed § 1703.108(b) provides: "In the event of a request for a fee waiver or reduction, the period for action under this paragraph [*i.e.*, on the records request] begins to run from the date that the designated FOIA Officer grants the waiver or reduction request." ERF/NRDC assert that this provision would delay inappropriately the processing of FOIA requests that are accompanied by requests for fee waiver or reduction. They suggest that if persons seeking fee waiver or reduction also indicate a willingness to pay reasonable fees in the event the fee waiver or reduction is denied, the processing of the FOIA request should commence without awaiting a determination on the waiver/reduction request.

Response. The Board substantially adopts ERF/NRDC's suggestion and has modified §§ 1703.105(b)(4) and 1703.108(b) to reflect that a FOIA requester may avail itself of the option of stating a willingness to pay the fee anticipated to be incurred in processing its request, or to pay that fee not to exceed a certain amount, should its request for fee waiver or reduction be denied. In that event, the Board will commence processing of the records request without awaiting a determination by the Designated FOIA Officer on the waiver/reduction request. This modification makes proposed §§ 1703.105(b)(4) and 1703.108(b) consistent with the practices of other agencies. See, e.g., 10 CFR 1004.3(e) (DOE); 28 CFR 16.10(e) (DOJ).[4]

Comment. In their comments on the Board's proposed Government in the Sunshine regulations, ERF/NRDC requested modification of 10 CFR 1704.9 to state that the Board will only charge requesters for the actual cost of duplication of transcripts or recordings of closed meetings that are subsequently determined to be releasable. They further requested that the Board's regulations state that the fee waiver provisions of FOIA shall apply to requests for copies of such documents. The Board stated that it would address these comments in its promulgation of a final rule at FOIA. 56 FR 9605, at 9608 (March 7, 1991).

Response. The documents to which ERF/NRDC refer are recordings (the method that the Board intends to use) or transcripts of Board meetings that have been closed pursuant to 5 U.S.C. 552b(c)–(d) and which the Board subsequently determines may be released. 5 U.S.C. 552b(f)(2) requires the Board to make copies of such documents available to the public, except for such matters contained in the recordings or transcripts that may continue to be withheld under 5 U.S.C. 552b(c), and that copies of the documents be furnished to a requester at the actual cost of duplication or transcription. Consistent with this requirement and FOIA, the Board has proposed to charge $3.00 per cassette for audio cassette recordings of Board meetings. 56 FR 11114. This charge represents the actual cost to the Board for cassettes and is, therefore, responsive to part of ERF/NRDC's comment.

When the Board determines that such recordings may be publicly released, it will make them available through the PRR without the need for a request under § 1703.105. Section 1703.103 has been supplemented to reflect this intended practice. As noted above, the Board does not consider the fee waiver/reduction provisions of the FOIA to be applicable to documents made publicly available in this manner. If, however, a FOIA request is made for a recording that has not yet been placed in the PRR, the requester would be entitled to consideration for fee waiver or reduction even though the recording might subsequently be placed in the PRR.

List of Subjects in 10 CFR Part 1703

Freedom of information.

Accordingly, chapter XVII of title 10 of the Code of Federal Regulations is amended by adding a new part 1703 to read as follows:

PART 1703—PUBLIC INFORMATION AND REQUESTS

Authority: 5 U.S.C. 552; Executive Order 12600, 3 CFR, 1987 Comp., p. 235; 42 U.S.C. 2286, 2286b(c).

§ 1703.101 Scope.

This part contains the Board's regulations implementing the Freedom of Information Act, 5 U.S.C. 552.

§ 1703.102 Definitions; words denoting number, gender and tense.

Agency record is a record in the possession and control of the Board that is associated with Board business. Agency records do not include records such as:

(1) Publicly available books, periodicals, or other publications that are owned or copyrighted by non-federal sources;

(2) Records solely in the possession and control of Board contractors;

(3) Personal records in the possession of Board personnel that have not been circulated, were not required by the Board to be created or retained, and may be retained or discarded at the author's sole discretion. In determining whether such records are agency records the Board shall consider whether, and to what extent, the records were used in agency business;

(4) Records of a personal nature that are not associated with any Board business; or

(5) Non-substantive information in the calendar or schedule books of the Chairman or Members, uncirculated except for typing or recording purposes.

Board means the Defense Nuclear Facilities Safety Board.

Chairman means the Chairman of the Board.

Designated FOIA Officer means the person designated by the Board to administer the Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody of or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

[3] OMB encourages the use of private sector services to locate, reproduce, and disseminate records in response to FOIA requests where the cost to the requester is no greater than it would be if the agency itself had performed the tasks. 52 FR 10018 (March 27, 1987). The charges of a commercial contractor are clearly going to include its labor costs.

[4] 28 CFR 16.10(e), providing that a FOIA request would not be deemed to have been received until the requester had agreed to pay the anticipated total fee (where the fee was estimated to be more than $25.00, the requester had been so advised, and fee waiver or reduction had not been requested), was upheld in *Irons* v. *FBI*, 571 F. Supp. 1241, at 1243 (D. Mass. 1983).

General Counsel means the chief legal officer of the Board.

General Manager means the chief administrative officer of the Board.

Member means a Member of the Board.

In determining the meaning of any provision of this Part, unless the context indicates otherwise: the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1703.103 Requests for board records available through the public reading room.

(a) A Public Reading Room will be maintained at the Board's headquarters and will be open between 8:30 a.m. and 4:30 p.m. Mondays through Fridays, with the exception of legal holidays. Documents may be obtained in person or by written or telephonic request from the Public Reading Room by reasonably describing the records sought. The purpose of the Public Reading Room is to provide easy accessibility to a substantial portion of the Board's records. The Board considers that documents available through the Public Reading Room have been placed in the public domain.

(b) The public records of the Board that are available for inspection and copying upon request in the Public Reading Room include:

(1) The Board's rules and regulations;

(2) Statements of policy adopted by the Board.

(3) Board recommendations; the Secretary of Energy's response, any final decision, and implementation plans regarding Board recommendations; and interested person's comments, data, views, or arguments to the Board concerning its recommendations and the Secretary of Energy's response and final decision;

(4) Transcripts of public hearings and any Board correspondence related thereto;

(5) Recordings or transcripts of Board meetings that were closed under 10 CFR part 1704, where the Board subsequently determines under 10 CFR 1704.9 that the recordings or transcripts may be made publicly available;

(6) Board orders, decisions, notices, and other actions in a public hearing;

(7) Board correspondence, except that which is exempt from mandatory public disclosure under § 1703.104;

(8) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Board is a party and the correspondence with the courts or clerks of court;

(9) Those of the Board's Administrative Directives that affect members of the public;

(10) Index of the documents identified in this section, but not including drafts thereof; and

(11) Annual reports to Congress in which the Board's operations during a past fiscal year are described.

§ 1703.104 Board records exempt from public disclosure.

The following records are exempt from public disclosure:

(a)(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(2) Which are in fact properly classified pursuant to such Executive Order;

(b) Records related solely to the internal personnel rules and practices of an agency;

(c) Records specifically exempted from disclosure by statute, provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular 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 intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Board;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or 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 a 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 authority in the course of a criminal investigation, or by an agency conducting a lawful national 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;

§ 1703.105 Requests for board records not available through the public reading room (FOIA Requests).

(a) Upon the request of any person, the Board shall make available for public inspection and copying any reasonably described agency record in the possession and control of the Board, but not available through the Public Reading Room, subject to the provisions of this part. If a member of the public files a request with the Board under the FOIA for records that the Board determines are available through the Public Reading Room, the Board will treat the request under the simplified procedures of § 1703.103.

(b)(1) A person may request access to Board records that are not available through the Public Reading Room by using the following procedures:

(i) The request must be in writing and must describe the records requested to enable Board personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any Board personnel who have been contacted regarding the request prior to the submission of the written request.

(ii) A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described. The request must enable the Board to identify and locate the records by a process that is not unreasonably burdensome or disruptive of Board operations.

(2) The request should be addressed to the Designated FOIA Officer and clearly marked "Freedom of Information Act Request." The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. For purposes of calculating the time for response to the request under § 1703.108, the request

shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or his designee.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under § 1703.107(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

(4) No request shall be deemed to have been received until the Board has:

(i) Received a statement of willingness to pay, as indicated in § 1703.105(b)(3)(i), or

(ii) Received and approved a request for waiver or reduction of fees. However, the FOIA request shall be deemed to have been received if the request for waiver or reduction of fees includes a statement of willingness to pay the fee anticipated to be incurred in processing the request under this section, or to pay that fee not to exceed a specific amount, should the request for fee waiver or reduction be denied.

(c) with respect to records in the files of the Board that have been obtained from other federal agencies:

(1) Where the record originated in another federal agency, the Designated FOIA Officer shall refer the request to that agency and so inform the requester, unless the originating agency agrees to direct release by the Board.

(2) Requests for Board records containing information received from another agency, or records prepared jointly by the Board and other agencies, shall be treated as requests for Board records. The Designated FOIA Officer shall, however, coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, shall cite the other agency Denying Official as well as the Designated FOIA Officer if a denial by the Board is also involved.

(d) If a request does not reasonably describe the records sought, as provided in paragraph (b) of this section, the Board response shall specify the reasons why the request failed to meet those requirements and shall offer the requester the opportunity to confer with knowledgeable Board personnel in an attempt to restate the request. If additional information is needed from the requester to render records reasonably described, any restated request submitted by the requester shall be treated as an initial request for purposes of calculating the time for response under § 1703.108.

§ 1703.106 Requests for waiver or reduction of fees.

(a) The Board shall collect fees for record requests made under § 1703.105, as provided in § 1703.107(b), unless a requester submits a request in writing for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduction request within five working days of the request coming into his possession. No determination shall be made that a fee waiver or reduction request should be denied, until the Designated FOIA Officer has consulted with the General Counsel's Office. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth his appeal rights under § 1703.109.

(b) A person requesting the board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact of disclosure of the requested records on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the agency records sought.

(c) The Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records made under § 1703.105, it can determine that disclosure of the information in the agency records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Board shall consider the following factors:

(1) Whether the subject of the requested agency records concerns the operations or activities of the Government;

(2) Whether disclosure of the information is likely to contribute significantly to public understanding of Government operations or activities;

(3) Whether, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(4) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

§ 1703.107 Fees for record requests.

(a) Fees for records available through the Public Reading Room.

(1) With the exception of copies of transcripts of Board public hearings addressed in paragraph (a)(2) of this section, the fees charged shall be limited to costs of duplication of the requested records. The Board shall either duplicate the requested records or have them duplicated by a commercial contractor. If the Board duplicates the records, it shall not charge the requester for the associated labor costs. A schedule of fees for this duplication service shall be prescribed in accordance with paragraph (b)(6) of this section. A person may obtain a copy of the schedule of fees in person or by mail from the Public Reading Room. There shall be no charge for responses consisting of ten or fewer pages.

(2) Transcripts of Board public hearings are made by private contractors. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the duplication service noted in paragraph (a) of this section, if the particular contract so permits. Copies of the contracts shall be available for public inspection in the Public Reading Room.

(3) Requests for certification of copies of official Board records must be accompanied by a fee of $5.00 per document. Inquiries and orders may be made to the Public Reading Room in person or by mail.

(b) Fees for records not available through the Public Reading Room (FOIA requests).

(1) *Definitions.* For the purpose of paragraph (b) of this section:

Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the FOIA;

Direct costs means those expenditures which the Board incurs in search, review and duplication, as applicable to different categories of requesters, to respond to requests under § 1703.105. Direct costs include, for example, the average hourly salary and projected benefits costs of Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Board records are stored.

Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research;

Noncommercial scientific institution refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry;

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media may be included in this category. A "freelance" journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination.

(2) *Fees.* (i) If documents are requested for commercial use, the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time and for document review time, and the costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

(ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Board's charges shall be limited to the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for the first 100 pages of duplication.

(iii) For a request not described in paragraphs (b)(2) (i) or (ii) of this section the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time, and the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) If documents are mailed, requesters shall be charged fees based on the current postage or express delivery service rates.

(v) The Board, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Board for a FOIA request would be less than the appropriate threshold, the Board shall not charge the requesters.

(vi) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, the Board may aggregate any such requests and charge the requester accordingly. The Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

(viii) Whenever the Board estimates that duplication or search costs are likely to exceed $25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request to meet the requester's needs at a lower cost.

(3) *Fees for unsuccessful search.* The Board may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure.

(4) *Advance payments.* (i) If the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250, the Board shall notify such requester of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(ii) If a requester has previously failed to pay a fee charged in a timely fashion, the Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Board will begin to process a new request or a pending request from that requester.

(iii) When the Board requires advance payment under this paragraph, the administrative time limits prescribed in § 1703.108(b) will begin only after the Board has received the fee payments.

(5) *Debt collection.* The Board itself may endeavor to collect unpaid FOIA fees, or may refer unpaid FOIA invoices to the General Services Administration, or other federal agency performing financial management services for the Board, for collection.

(6) *Annual adjustment of fees.*—(i) *Update and publication.* The Board, by its designee, the General Manager, shall promulgate a schedule of fees and the average hourly pay rates and average hourly projected benefits cost and will update that schedule once every twelve months. The General Manager shall publish the schedule for public comment in the **Federal Register.**

(ii) *Payment of updated fees.* The fee applicable to a particular FOIA request will be the fee in effect on the date that the request is received.

§ 1703.108 Processing of FOIA requests

(a) Where a request complies with § 1703.105 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

(1) Granting the request,

(2) Denying the request,

(3) Granting or denying it in part,

(4) Stating that the request has been referred to another agency under § 1703.105, or

(5) Informing the requester that responsive records cannot be located or do not exist.

(b) Action pursuant to this section to provide access to requested records shall be taken within ten working days of receipt of a request for Board records, as defined in § 1703.105, except that, if unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Designated FOIA Officer of the reasons for such extension and the date on which a determination is expected to be made, the Designated FOIA Officer may take an extension not to exceed ten working days. In the event of a request for fee waiver or reduction, unless the requester has stated a willingness to pay the fee anticipated to be incurred in processing its request under § 1703.105, or to pay that fee not to exceed a specific amount, should his request for fee waiver or reduction be denied, the period for action under this paragraph shall begin to run from the date that the Designated FOIA Officer grants the waiver or reduction request.

(c) For purposes of this section and § 1703.109, the term "unusual circumstances" may include but is not limited to the following:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Board's Washington, DC offices:

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which may be responsive to a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency pursuant to § 1703.105(d).

(d) If no determination has been made at the end of the ten day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and that the requester can seek remedy through the courts, but shall ask the requester to forgo such action until a determination is made.

(e) Nothing in this part shall preclude the Designated FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement shall be confirmed in writing and shall clearly specify the total time agreed upon.

(f) The procedure for appeal of denial of a request for Board records is set forth in § 1703.109.

§ 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.

(a)(1) A person whose request for access to records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the General Counsel within 30 days of the determination. Appeals filed pursuant to this section must be in writing, directed to the General Counsel at the address indicated in § 1703.105(b)(2) and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Board not addressed and marked as indicated in this paragraph will be so addressed and marked by Board personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in § 1703.108(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the reasons for such extension and the expected determination date.

§ 1703.110 Requests for classified records.

The Board may at any time be in possession of classified records and Unclassified Controlled Nuclear Information (UCNI) received from the Department of Energy or other federal agencies. The Board shall refer requests under § 1703.105 for such records or information to the Department of Energy or other originating agency without making an independent determination as to the releasability of such documents. The Board shall refer requests for classified records in a manner consistent with Executive Order 12356, "National Security Information," 3 CFR, 1982 Comp., p. 166, or any superseding Executive Order. The Board shall refer requests for UCNI in a manner consistent with 42 U.S.C. 2168 and the Department of Energy's implementing regulations in 10 CFR part 1017 or any successor regulations.

§ 1703.111 Requests for privileged treatment of documents submitted to the board.

(a) *Scope.* Any person submitting a document to the Board may request privileged treatment by claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of FOIA and should otherwise be withheld from public disclosure.

(b) *Procedures.* A person claiming that information is privileged under paragraph (a) of this section must file:

(1) An application, accompanied by an affidavit, requesting privileged treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information and addressing the factors set forth in paragraph (e) of this section;

(2) The original document, boldly indicating on the front page "Contains Privileged Information—Do Not Release" and identifying within the document the information for which the privileged treatment is sought;

(3) Three copies of the redacted document (*i.e.*, without the information for which privileged treatment is sought) and with a statement indicating that information has been removed for privileged treatment; and

(4) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Board.

(c) *Effect of privilege claim.* (1) The Designated FOIA Officer shall place documents for which privileged treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege. The Board retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) *Factors to be considered by Board.* In determining whether to grant the document privileged status and to deny the request for the document the Board shall consider:

(1) Whether the information has been held in confidence by its owner;

(2) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(3) Whether the information was transmitted to and received by the Board in confidence;

(4) Whether the information is available in public sources; and

(5) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(f) *Notification before release.* Notice of a decision by the Designated FOIA Officer to deny a claim of privilege, in whole or in part, shall be given to any person claiming that information is privileged no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(g) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Board shall notify the person who submitted documents containing such confidential commercial information of the suit.

§ 1703.112 Computation of time.

In computing any period of time under this Part, the day of the Board's action is not included. The last day of the period is included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the end of the next working day. Whenever a person has the right or is required to take some action within a prescribed period after notification by the Board and the notification is made by mail, five days shall be added to the prescribed period. Only two days shall be added when a notification is made by express mail.

Dated: May 1, 1991.

John T. Conway,

Chairman.

[FR Doc. 91-10851 Filed 5-7-91; 8:45 am]

BILLING CODE 6820-KD-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 90-NM-256-AD; Amdt. 39-6990]

Airworthiness Directives; McDonnell Douglas Model DC-9-80 Series Airplanes and Model MD-88 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC-9-80 and MD-88 series airplanes, which requires inspections and modification of the electrical connectors containing sidewall fluorescent lighting wires to preclude overheating the connectors and damaging the associated wiring located above the forward cabin ceiling panel. This amendment is prompted by two reports of smoke emanating from the passenger forward cabin ceiling area. This condition, if not corrected, could result in damage to the associated systems wires and possible in-flight fire in the passenger forward cabin ceiling area.

EFFECTIVE DATE: June 11, 1991.

ADDRESSES: The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Business Unit Manager, Technical Publications, C1-HCW (54-60). This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. Kirk Baker, Aerospace Engineer, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5345.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive, applicable to McDonnell Douglas Model DC-9-80 Series Airplanes and Model MD-88 airplanes, which requires inspections and modification of the electrical connectors containing sidewall fluorescent lighting wires to preclude overheating the connectors and damaging the associated wiring located above the forward cabin ceiling panel, was published in the **Federal Register** on December 14, 1990 (55 FR 51427).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One operator stated that a longer compliance time was justified since it had not experienced fires due to overheated connectors in the wiring above the forward cabin ceiling panel on any of its aircraft. Further, this commenter stated that a lead time of 16 to 18 weeks is required for availability of this specific connector. Another commenter asserted that the requirement to modify the airplane, prior to further flight, would impose an undue burden on its fleet, which comprises 46 percent of the Model DC-9-80 airplanes on the U.S. registry. The FAA does not concur. Data from the manufacturer indicate that the required parts will be available to modify the fleet within the proposed compliance time. Furthermore, due to the severe consequences of an in-flight fire in the passenger forward cabin ceiling area, the FAA has determined that the 90-day compliance time is appropriate.