

## **REQUEST FOR BOARD ACTION**

**Title of Action Document:** Direct-Final Rule

**Complete Review By:**

**Brief Description of Purpose:** Pursuant to clauses 1.4(B)(5) and (28) of the Board Procedures, this Request for Board Action (RFBA) seeks Board approval of publication of the attached direct-final rule.

**Justification:** The attached rule is identical to the document that the General Counsel emailed to the Board on April 6, 2022. The rule would amend the agency's *Touhy* regulations (*i.e.*, its regulations pursuant to *United States ex rel. v. Touhy v. Ragen*, 340 U.S. 462 (1951)) to conform with *Touhy* case law, by clarifying that the regulations apply only when the United States or the Board is not a party to legal proceedings in which employee testimony or official records are sought.

**Relevant Background Information Attached (initial):** None

**Summarize any staff difference of opinion regarding the proposed action:** None

**Summarize any time sensitive considerations:** None

**Requester Signature:**

**Responsible Office Director Signature:**

**Executive Secretary Signature:**

**AGENCY:** Defense Nuclear Facilities Safety Board.

**10 CFR Part 1707**

**[Docket No. DNFSB-2022-0001]**

**Testimony by DNFSB Employees and Production of Official Records in Legal Proceedings**

**ACTION:** Direct final rule.

**SUMMARY:** The Touhy regulations of the Defense Nuclear Facilities Board (DNFSB or the Board) set forth procedures for responding to requests for information, documents, or testimony for use in legal proceedings. This direct final rule revises the regulations by clarifying that Touhy regulations only apply when the United States or the Board is not a party to the underlying legal proceedings.

**DATES:** This final rule is effective [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*] unless significant adverse comments are received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. If the direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the Federal Register.

**ADDRESSES:** You may submit comments at any time prior to the comment deadline by the following methods:

Email: Send an email to [comment@dnfsb.gov](mailto:comment@dnfsb.gov). Please include “Touhy Regulations Comments” in the subject line of your email.

Mail: Send hard copy comments to the Defense Nuclear Facilities Safety Board, Attn: Office of the General Counsel, 625 Indiana Avenue NW, Suite 700, Washington, DC 20004-2901.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Hargrave , Associate General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW, Suite 700, Washington, DC 20004-2901, (202) 694-7000.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Under 5 U.S.C. 301, the “Housekeeping Statute,” and in response to a demand for official information that arises out of a legal proceeding, many agencies have regulations governing the production of official information and employee testimony relating to official information. Known as *Touhy* regulations, after *United States ex rel. v. Touhy v. Ragen*, 340 U.S. 462 (1951), these regulations usually prohibit unauthorized disclosures of official information by employees. These regulations also establish procedures for agencies responding to subpoenas seeking official information or employee testimony relating to official information.

The Board’s *Touhy* regulations are located at 10 C.F.R. Part 1707, subpart B (§§ 1707.201 to 1707.210). Those regulations were established in 2001 and have not been amended previously. The Board is amending its *Touhy* regulations at this time to clarify the legal proceedings to which the regulations apply.

*Section 1707.102—Applicability*

This direct final rule revises the first paragraph to remove language suggesting that *Touhy* regulations apply when the Board is a party to the legal proceeding. This amendment clarifies that the regulations apply when the United States or the Board is not a party to the legal proceeding and will make the rule consistent with case law.

## **II. Regulatory Analysis**

### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, 5 U.S.C. 601-612, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations, and local governments) when publishing regulations subject to the notice and comment requirements of the Administrative Procedure Act. As noted below in section III.

Rulemaking Procedure, the Board has determined that notice and the opportunity to comment are unnecessary because this rulemaking constitutes a limited, routine change to clarify the type of litigation these regulations apply to. Therefore, no analysis is required by the Regulatory Flexibility Act.

### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, as amended, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### *Paperwork Reduction Act*

This rule contains no new reporting or recordkeeping requirements under the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 et seq. This update to the Board's *Touhy* regulations does not require or request information from members of the public.

Therefore, this rulemaking is not covered by the restrictions of the PRA.

### *Executive Order 12988 and Executive Order 13132 – Federalism*

According to Executive Orders 12988 and 13132, agencies must state in clear language the preemptive effect, if any, of new regulations. The amendments to the agency's *Touhy* regulations affect only how the Board responds to requests for information in legal proceedings, and therefore, have no effect on preemption of State, tribal, or local government laws or otherwise have federalism implications.

### *Congressional Review Act*

This action is not a "rule" as defined in the Congressional Review Act (5 U.S.C. 804(3)), which excludes any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

### *Finding of No Significant Environmental Impact*

The direct-final rule amends the Board's regulations for responding to requests for information in legal proceedings. The procedural change to the *Touhy* implementing regulations will not result in significant impacts affecting the quality of the human environment, unavoidable adverse environmental effects, rejection of reasonable alternatives to the proposed action, or irreversible or irretrievable commitments of environmental resources. The agency has not consulted with any other agencies in making this determination.

### **III. Rulemaking Procedure**

The Board is publishing this rule without a prior proposal because it is a limited, clarifying change, and the Board does not anticipate any significant adverse public comments. This amendment will become effective on [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. However, if the Board receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*], then the Board will publish a notice in the Federal Register withdrawing this rule and publishing the changes as a notice of proposed rulemaking. The Board will respond to the significant adverse comment(s) in that notice of proposed rulemaking and take an additional 30 days of comments before publishing any final rule. If no significant adverse comment is received, the Board will publish a notice that confirms the effective date of this direct final rule.

A significant adverse comment is a comment in which the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

- (1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:
  - (a) The comment causes the Board staff to reevaluate (or reconsider) its position or conduct additional analysis;
  - (b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the Board.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition; or

(3) The comment causes the Board to make a change (other than editorial) to the rule.

**List of Subjects in 10 CFR Part 1707**

- Administrative practice and procedure
- Conflict of interests
- Courts
- Government employees
- Records
- Subpoenas
- Testimony

For the reasons described in the preamble, the Board amends 10 C.F.R. Part 1707 as follows:

**PART 1707—TESTIMONY BY DNFSB EMPLOYEES AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS**

**Subpart A—General Provisions [Revised]**

Amend 10 C.F.R. § 1707.102 to revise the paragraph to read as follows:

**§ 1707.102**

**Applicability.**

This part applies to demands and requests to employees for factual, opinion, or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which the United States or the DNFSB is not a named party. However, it does not apply to:

Authority: 42 U.S.C. 2286b(c).

Dated: XXXX XX, 2022.

Joyce Connery,

Chairperson.



**AFFIRMATION OF BOARD VOTING RECORD**

**SUBJECT:** RFBA by General Counsel Kevin Lyskowski to Approve Publication of Direct-Final Rule

**Doc Control#:** 2022-300-0004

The Board acted on the above document on 04/11/2022. The document was Approved.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING	COMMENT	DATE
Joyce L. Connery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	04/10/2022
Thomas Summers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	04/08/2022
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	04/11/2022

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.

*Linda Plezo Hunter*

Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Joyce L. Connery

**SUBJECT:** RFBA by General Counsel Kevin Lyskowski to Approve Publication of Direct-Final Rule

**Doc Control#:** 2022-300-0004

**DATE:** 04/10/2022

**VOTE:** Approved

**COMMENTS:**

None

*Joyce L. Connery*

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Thomas Summers

**SUBJECT:** RFBA by General Counsel Kevin Lyskowski to Approve Publication of Direct-Final Rule

**Doc Control#:** 2022-300-0004

**DATE:** 04/08/2022

**VOTE:** Approved

**COMMENTS:**

None

*Thomas Summers*

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Jessie H. Roberson

**SUBJECT:** RFBA by General Counsel Kevin Lyskowski to Approve Publication of Direct-Final Rule

**Doc Control#:** 2022-300-0004

**DATE:** 04/11/2022

**VOTE:** Approved

**Member voted by email.**

**COMMENTS:**

None

*Jessie H. Roberson*