

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**10 CFR Part 1704**

**[Docket No. DNFSB-2021-0001]**

**RIN XXXX-XXXX**

**Government in the Sunshine Act**

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

**ACTION:** Direct final rule.

**SUMMARY:** The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA) amended the Atomic Energy Act of 1954 (AEA) to grant the Defense Nuclear Facilities Safety Board (Board or DNFSB) relief from certain limitations under the Government in the Sunshine Act (Sunshine Act). The Sunshine Act generally requires all Board meetings to be open to public observation unless certain exemptions apply. The NDAA added a provision to the AEA that permits the Board to hold nonpublic collaborative discussions without following the requirements of the Sunshine Act, so long as certain requirements are met. The Board is publishing this direct final rule to revise the Board's Sunshine Act regulations consistent with the new AEA provisions for nonpublic collaborative discussions.

**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 If the direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the Federal Register.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 “Sunshine Act 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:** Eric Fox, 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**

The NDAA became law on January 1, 2021. The NDAA contained an amendment to the AEA that granted the Board relief from certain requirements of the Sunshine Act. Under the revised section 313 of the AEA (42 U.S.C. 2286b(k)), a quorum of the Board may hold meetings to deliberate on official agency business without public observation so long as it conducts the meeting in compliance with the following requirements: (1) no formal or informal vote may be taken at the meeting; (2) each individual present at the meeting must be a member or an employee of the Board; (3) at least one member from each political party represented on the Board must be present; and (4) the Board’s General Counsel or his or her designee must be present.

In addition to the requirements governing the conduct of the meeting, the AEA requires the Board to publish a summary of the matters discussed, including key issues, no later

than two business days following the meeting. In circumstances where the matters discussed are covered by the exemptions to the open meetings requirements of the Sunshine Act, the Board must publish as much general information as possible without disclosing the exempt material. Unlike closed meetings held under the Sunshine Act, no transcript or advanced public notice is required.

## **II. Section by Section Analysis**

### *Section 1704.11 Nonpublic Collaborative Discussions*

This new section contains the requirements for the conduct of nonpublic collaborative discussions as well as disclosure after they are held. These requirements are simply restating the language of the AEA, and do not expand or diminish the Board's obligations when holding a nonpublic collaborative discussion.

## **III. 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 in section IV Rulemaking Procedure below, the Board has determined that notice and the opportunity to comment are unnecessary because this rulemaking constitutes a limited, routine change to implement the recent amendment to the AEA. 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*

The Paperwork Reduction Act (PRA) establishes certain requirements when an agency conducts or sponsors a “collection of information.” 44 U.S.C. §§ 3501–3520. This update to the Board’s Sunshine Act 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 Sunshine Act implementing regulations affect only how the Board conducts nonpublic meetings, and therefore, have no effect on preemption of State, tribal, or local government laws or otherwise have federalism implications.

### *Congressional Review Act*

This rule will not result in and is not likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. As such, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act. To comply with the Congressional Review Act, the Board will submit the required information each House of the Congress and the Comptroller General.

### *Finding of No Significant Environmental Impact*

The proposed regulations amend the Board procedures for holding meetings pursuant to the Government in the Sunshine Act. The procedural changes to the Sunshine Act 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.

### **IV. Rulemaking Procedure**

In light of the amendments made to the AEA at 42 U.S.C. 2286b(k), this rulemaking makes limited conforming changes to the Board's rules implementing the Sunshine Act (10 CFR part 1704). The Board is using the "direct final rule" procedure because this rulemaking represents a limited, routine change to implement the new provisions of the

AEA. 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 where 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 1704**

Sunshine Act.

For the reasons stated in the preamble, the Defense Nuclear Facilities Safety Board amends 10 CFR chapter 17, part 1704 as follows:

### **PART 1704—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT**

Sec.

1704.1 Applicability.

1704.2 Definitions.

1704.3 Open meetings requirement.

1704.4 Grounds on which meetings may be closed or information may be withheld.

1704.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

1704.6 Procedures for public announcement of meetings.

1704.7 Changes following public announcement.

1704.8 Transcripts, recordings, or minutes of closed meetings.

1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

1704.10 Severability.

1704.11 Nonpublic collaborative discussions.

Authority: 5 U.S.C. 552b; 42 U.S.C. 2286, 2286b(c), (k).

■ 1. Add section 1704.11 to read as follows:

**§ 1704.11 Nonpublic collaborative discussions.**

(a) Notwithstanding the other requirements of this part, a quorum of Members may hold a meeting that is not open to public observation to discuss official business of the Board if—

(1) no formal or informal vote or other official action is taken at the meeting;

(2) each individual present at the meeting is a Member or an employee of the Board;

(3) at least one Member from each political party is present at the meeting, unless all Members are of the same political party at the time of the meeting; and

(4) the general counsel of the Board, or a designee of the general counsel, is present at the meeting.

(b) Disclosure of nonpublic collaborative discussions.

(1) Except as provided by paragraph (2), not later than two business days after the conclusion of a meeting described in subsection (a), the Board shall make available to the public, in a place easily accessible to the public—

(i) a list of the individuals present at the meeting; and

(ii) a summary of the matters, including key issues, discussed at the meeting, except for any matter the Board properly determines may be withheld from the public under section 1704.4 of this part.



(2) Information about matters withheld from the public. If the Board properly determines under subparagraph (b)(1)(ii) that a matter may be withheld from the public under section 1704.4 of this part, the Board shall include in the summary required by that subparagraph as much general information as possible with respect to the matter.

**Dated: June X, 2021.**

**Joyce Connery,**  
Chair.

DRAFT

**AFFIRMATION OF BOARD VOTING RECORD**

**SUBJECT:** RFBA by Kevin Lyskowski to Approve Direct-Final Rule re NCDs

**Doc Control#:** 2021-100-0027

The Board acted on the above document on 07/23/2021. 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"/>	07/23/2021
Thomas Summers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	07/23/2021
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	07/23/2021

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

*Shelby Qualls*

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 Kevin Lyskowski to Approve Direct-Final Rule re NCDs

**Doc Control#:** 2021-100-0027

**DATE:** 07/23/2021

**VOTE:** Approved

**COMMENTS:**

None

*Joyce L. Connery*

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Thomas Summers

**SUBJECT:** RFBA by Kevin Lyskowski to Approve Direct-Final Rule re NCDs

**Doc Control#:** 2021-100-0027

**DATE:** 07/23/2021

**VOTE:** Approved

**COMMENTS:**

None

*Thomas Summers*

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Jessie H. Roberson

**SUBJECT:** RFBA by Kevin Lyskowski to Approve Direct-Final Rule re NCDs

**Doc Control#:** 2021-100-0027

**DATE:** 07/23/2021

**VOTE:** Approved

**Member voted by email.**

**COMMENTS:**

None

*Jessie H. Roberson*