

fisheries and gear not be amended, that a proposed rule not be published, give reasons for its recommendation of a disapproval, and may request NMFS to publish emergency or interim regulations, and begin preparation of an FMP or amendment to an FMP, if appropriate.

(D) After considering information in the notification and Council's recommendation, NMFS will decide whether to publish a proposed rule. If information on the new gear or fishery being considered indicates it is likely that it will compromise conservation and management efforts under the Magnuson-Stevens Act, and no additional new information is likely to be gained from a public comment period, then a proposed rule will not be published and NMFS will notify the appropriate Council. In such an instance, NMFS will publish emergency or interim regulations to prohibit or restrict use of the gear or participation in the fishery. If NMFS determines that the proposed amendment is not likely to compromise conservation and management efforts under the Magnuson-Stevens Act, NMFS will publish a proposed rule in the **Federal Register** with a request for public comment.

(ii) *Atlantic Highly Migratory Species.* (A) Upon signing a return receipt of the notification by certified mail regarding an unlisted fishery or gear for Atlantic highly migratory species (HMS), NMFS will immediately begin consideration of the notification.

(B) Based on information in the notification and submitted by the Council, NMFS will make a determination whether the use of an unlisted gear or participation in an unlisted HMS fishery will compromise the effectiveness of conservation and management efforts under the Magnuson-Stevens Act. If it is determined that the proposed amendment will not compromise conservation and management efforts, NMFS will publish a proposed rule.

(C) If NMFS finds that the proposed gear or fishery will be detrimental to conservation and management efforts in this initial stage of review, it will not publish a proposed rule and notify the applicant of the negative determination with the reasons therefor.

(4) *Final determination and publication of a final rule.* Following public comment, NMFS will approve or disapprove the amendment to the list of gear and fisheries.

(i) If approved, NMFS will publish a final rule in the **Federal Register** and notify the applicant and the Council, if appropriate, of the final approval.

(ii) If disapproved, NMFS will withdraw the proposed rule, notify the applicant and the Council, if appropriate, of the disapproval; publish emergency or interim regulations, if necessary, to prohibit or restrict the use of gear or the participation in a fishery; and either notify the Council of the need to amend an FMP or prepare an amendment to an FMP in the case of Atlantic highly migratory species.

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## TENNESSEE VALLEY AUTHORITY

### 18 CFR Part 1301

#### Revision of Tennessee Valley Authority Freedom of Information Act Regulations and Implementation of Electronic Freedom of Information Act Amendments of 1996

**AGENCY:** Tennessee Valley Authority.  
**ACTION:** Final rule.

**SUMMARY:** This document amends TVA's regulations under the Freedom of Information Act (FOIA). The FOIA regulations contain new provisions implementing the Electronic Freedom of Information Act (EFOIA) of 1996. Additionally, the regulations include updated cost figures to be used in calculating and charging fees.

**EFFECTIVE DATE:** February 26, 1999.

**FOR FURTHER INFORMATION CONTACT:** Wilma H. McCauley, FOIA Officer, Tennessee Valley Authority, 1101 Market Street (WR 4Q), Chattanooga, Tennessee 37402-2801, telephone number (423) 751-2523.

#### SUPPLEMENTARY INFORMATION:

##### Background Information

On September 8, 1998, TVA published a proposed rule that revised its existing regulations under the FOIA and added new provisions implementing the Electronic FOIA Amendments. See 63 FR 47448, Sept. 8, 1998. Interested persons were afforded an opportunity to participate in the rulemaking through submission of written comments on the proposed rule. TVA received no comments to its proposed rule.

New provisions implementing the Electronic FOIA Amendments are found at Sec. 1301.2 (electronic reading room), Sec. 1301.5(b) (multitrack processing), Sec. 1301.5(c) (processing under unusual circumstances), Sec. 1301.5(d) (expedited processing), Section 1301.6(b) (deletion marking), Sec. 1301.6(c) (appeal of format

determinations), Sec. 1301.6(c)(3) (volume estimation), Sec. 1301.10(b)(3) (format of disclosure), and Sec. 1301.10(b)(8) (electronic searches). Revisions to TVA's fee schedule are found at Sec. 1301.10(c) and (d).

#### Regulatory Flexibility Act Certification

We certify that these rules will not have a significant economic impact on a substantial number of small entities because these rules affect primarily individuals, not small entities, and for the most part simply implement the language of the EFOIA amendments. There is no reason to believe that the revised rules will impose any costs on FOIA requesters beyond those nominal costs imposed under TVA's former rules. Further, the "small entities" that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

#### List of Subjects in 18 CFR Part 1301

Freedom of Information, Privacy, Sunshine Act.

For the reasons stated in the preamble, TVA amends 18 CFR Part 1301 to read as follows:

#### PART 1301—PROCEDURES

1. The authority citation for part 1301 Subpart A continues to read as follows:

**Authority:** 16 U.S.C. 831-831dd, 5 U.S.C. 552.

2. Subpart A of Part 1301 is revised to read as follows:

#### Subpart A—Freedom of Information Act

Sec.

- 1301.1 General provisions.
- 1301.2 Public reading rooms.
- 1301.3 Requirements for making requests.
- 1301.4 Responsibility for responding to requests.
- 1301.5 Timing of responses to requests.
- 1301.6 Responses to requests.
- 1301.7 Exempt records.
- 1301.8 Business information.
- 1301.9 Appeals.
- 1301.10 Fees.

#### § 1301.1 General provisions.

(a) This subpart contains the rules that TVA follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read together with the FOIA, which provides additional information about access to records maintained by TVA. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, which are processed under subpart B of this part, are processed under this subpart also. Information routinely provided to the

public as part of a regular TVA activity (for example, press releases) may be provided to the public without the need for a FOIA request under this subpart. As a matter of policy, TVA makes discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(b) Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

#### § 1301.2 Public reading rooms.

TVA maintains a public electronic reading room accessible in its Corporate Libraries at 400 Summit Hill Drive, Knoxville, TN 37902-1499 and 1101 Market Street, Chattanooga, TN 37402-2801. This electronic reading room contains the records that the FOIA requires to be made regularly available for public inspection and copying. Each TVA organization is responsible for determining which of the records it generates are required to be made available in this way and for ensuring that those records are available in TVA's reading room. TVA's FOIA Officer will maintain a current subject-matter index of TVA's reading room records. The index will be updated regularly, at least quarterly, with respect to newly included records.

#### § 1301.3 Requirements for making requests.

(a) *How made and addressed.* You may make a request for records of TVA by writing to the Tennessee Valley Authority, TVA FOIA Officer, Enterprise Document Management (EDM), 1101 Market Street (WR 4Q), Chattanooga, TN 37402-2801. You may find TVA's "Guide to Information About TVA"—which is available electronically at TVA's World Wide Web site, and is available in paper form as well—helpful in making your request. For additional information about the FOIA, you may refer directly to the statute. If you are making a request for records about yourself, see Subpart B Privacy Act for additional requirements. If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) will help the processing of your request. Your request will be considered received as of the date it is received by the FOIA Officer.

For the quickest possible handling, you should mark both your request letter and the envelope "Freedom of Information Act Request."

(b) *Descriptions of records sought.* You must describe the records that you seek in enough detail to enable TVA personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, you should include any file designations or descriptions for the records that you want. As a general rule, the more specific you are about the records or type of records that you want, the more likely TVA will be able to locate those records in response to your request. If TVA determines that your request does not reasonably describe records, it shall tell you either what additional information is needed or why your request is otherwise insufficient. TVA shall also give you an opportunity to discuss your request so that you may modify it to meet the requirements of this section. If your request does not reasonably describe the records you seek, the agency's response to your request may be delayed.

(c) *Agreement to pay fees.* If you make a FOIA request, it shall be considered an agreement by you to pay all applicable fees charged under § 1301.11, up to \$25.00, unless you seek a waiver of fees. TVA's FOIA Officer will confirm this agreement in an acknowledgement letter. When making a request, you may specify a willingness to pay a greater or lesser amount.

#### 1301.4 Responsibility for responding to requests.

(a) TVA's FOIA Officer, or the FOIA Officer's designee, is responsible for responding to all FOIA requests. In determining which records are responsive to a request, TVA will include only records in its possession as of the date the request is received by the FOIA Officer. If any other date is used, the FOIA Officer shall inform the requester of that date.

(b) *Authority to grant or deny requests.* TVA's FOIA Officer, or the FOIA Officer's designee, is authorized to grant or deny any request for a TVA record.

(c) *Consultations and referrals.* When the FOIA Officer receives a request for a record in TVA's possession, the FOIA Officer shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should

be disclosed as a matter of administrative discretion. If the FOIA Officer determines that TVA is not best able to process the record, the FOIA Officer shall either:

(1) Respond to the request regarding that record, after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(d) *Notice of referral.* Whenever TVA refers all or any part of the responsibility for responding to a request to another agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred and of the part of the request that has been referred.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals will be handled according to the date the FOIA request initially was received by the FOIA Officer, not any later date.

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

#### § 1301.5 Timing of responses to requests.

(a) In general, TVA ordinarily shall respond to requests according to their order of receipt and placement in an appropriate processing track, as follows:

(b) *Multi-track processing procedures.* TVA has established three tracks for handling requests and the track to which a request is assigned will depend on the nature of the request and the estimated processing time, including a consideration of the number of pages involved. If TVA places a request in a track other than Track 1, it will advise requesters of the limits of its faster track(s). TVA may provide requesters in its tracks 2 and 3 with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of TVA's faster track(s). When doing so, TVA may contact the requester either by telephone or by letter, whichever is most efficient in each case.

(1) Track 1. Requests that can be answered with readily available records or information. These are the fastest to process. These requests ordinarily will be responded to within 20 working days of receipt of a request by the FOIA

Officer. The 20 working day time limit provided in this paragraph may be extended by TVA for unusual circumstances, as defined in paragraph (c) of this section, upon written notice to the person requesting the records.

(2) Track 2. Requests where we need records or information from other offices throughout TVA, where we must consult with other Governmental agencies, or when we must process a submitter notice as described in § 1301.8(d), but we do not expect that the decision on disclosure will be as time consuming as for requests in Tract 3.

(3) Tract 3. Requests which require a decision or input from another office or agency, extensive submitter notifications because of the presence of Business Information as defined in § 1301.8(b)(1), and a considerable amount of time will be needed for that, or the request is complicated or involves a large number of records. Usually, these cases will take the longest to process.

(c) *Unusual circumstances.* (1) Where the time limits for processing a request cannot be met because of unusual circumstances and TVA determines to extend the time limits on that basis, TVA shall as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed. Where the extension is for more than ten working days, TVA shall provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period with TVA for processing the request or a modified request. As used in this paragraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular requests:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(2) When TVA reasonably believes that multiple requests submitted by a

requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated, as defined in § 1301.10(h). Multiple requests by a requester involving unrelated matters will not be aggregated.

(d) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever TVA determines that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

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

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. For a prompt determination, a request for expedited processing must be sent to and received by TVA's FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category in paragraph (d)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is informational dissemination, though it need not be his or her sole occupation. A requester within the category in paragraph (d)(1)(ii) of this section also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) Within ten calendar days of receipt of a request for expedited processing, TVA's FOIA Officer shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is

denied, any appeal of that decision shall be acted upon expeditiously.

#### § 1301.6 Responses to requests.

(a) *Acknowledgements of requests.* On receipt of a request, the FOIA Officer ordinarily shall send an acknowledgement letter to the requester which shall confirm the requester's agreement to pay fees under § 1301.10 and provide an assigned request number for further reference.

(b) *Grants of requests.* Ordinarily, TVA shall have twenty business days from when a request is received to determine whether to grant or deny the request. Once TVA makes a determination to grant a request in whole or in part, it shall notify the requester in writing. The FOIA Officer shall inform the requester in the notice of any fee charged under § 1301.10 and shall disclose records to the requester promptly on payment of any applicable fee, if the fee is equal to or more than \$100. If the fee is less than \$100, the FOIA officer shall disclose the records along with a statement of the fee. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record, if technically feasible.

(c) *Adverse determinations of requests.* If TVA makes an adverse determination denying a request in any respect, they shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited treatment. The denial letter shall be signed by the FOIA Officer or the FOIA Officer's designee, and shall include:

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

(2) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by TVA in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided

if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 1301.9 and a description of the requirements of § 1301.9.

#### § 1301.7 Exempt records.

(a) *Records available.* TVA's records will be made available for inspection and copying upon request as provided in this section, except that records are exempt and are not made available if they are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(ii) Are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of TVA;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from any person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with TVA, including without limitation records relating to control and accounting for special nuclear material and to the physical security plans for the protection of TVA's nuclear facilities;

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

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings,

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(iv) 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,

(v) 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

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

(8) Contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institution; or

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

(b) The availability of certain classes of nonexempt records is deferred for such time as TVA may determine is reasonably necessary to avoid interference with the accomplishment of its statutory responsibilities. Such records include bids and information concerning the identity and number of bids received prior to bid opening; all nonexempt records relating to bids between the time of bid opening and award; and all nonexempt records relating to negotiations in progress involving contracts or agreements for the acquisition or disposal of real or personal property by TVA prior to the conclusion of such negotiations. Any reasonably segregable portion of an available record shall be provided to any person requesting such record after deletion of the portions which are exempt under this paragraph.

#### § 1301.8 Business information.

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

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

(1) *Business information* means commercial or financial information obtained by TVA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) *Submitter* means any person or entity from whom TVA obtains business information, directly or indirectly. The term includes corporations; state and local governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter

requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* TVA shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification of submitters.

(e) *Where notice is required.* Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) TVA has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* TVA will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by TVA until after its disclosure decision has been made shall not be considered by TVA. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

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

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed, and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

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

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

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

(3) Disclosure of the information is required by statute (other than the FOIA) or by applicable regulation; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, the component shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, TVA shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever TVA provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, TVA shall also notify the requester(s). Whenever TVA notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, TVA shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, TVA shall notify the requester(s).

#### § 1301.9 Appeals.

(a) *Appeals of adverse determinations.* If you are dissatisfied with TVA's response to your request, you may appeal an adverse determination denying your request, in any respect, to TVA's FOIA Appeal Official, the Senior Manager, Administrative Services, Tennessee Valley Authority, 400 Summit Hill Drive (ET 6M), Knoxville, TN 37902-1499. You must make your appeal in writing and it must be received by the Senior Manager within 30 days of the date of the letter denying your request. Your appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the TVA determination (including the assigned request number, if known) that you are appealing. An adverse

determination by the TVA Appeal Official will be the final action of TVA.

(b) *Responses to appeals.* The decision on your appeal will be made in writing within 20 days (excluding Saturdays, Sundays, and legal holidays) after an appeal is received. A decision affirming an adverse determination in whole or in part shall contain a statement of the reason(s) for the affirmance, including any FOIA exemption(s) applied, and will inform you of the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination, you must first appeal it under this section.

#### § 1301.10 Fees.

(a) In general, TVA shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. If the applicable fees are \$100 or more, TVA ordinarily will collect all applicable fees before sending copies of requested records to a requester. If the applicable fees are less than \$100, TVA ordinarily will bill the requester for the fees in the letter responding to the request and enclosing the requested records. Requesters must pay fees by check or money order made payable to the Tennessee Valley Authority.

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

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. TVA shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because TVA has reasonable cause to doubt a requester's stated use, TVA shall provide the requester a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses that TVA actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the

salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits, unless the fee is a standard TVA fee as set forth in paragraph (c) of this section) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(3) *Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. TVA shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, or an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for commercial or private use, but are sought to further scholarly research.

(5) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial or private use but are sought to further scientific research.

(6) *Representative of the news media, or news media requester,* means 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 where they can qualify as disseminators of "news") who make

their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but TVA shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial or private use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure—for example, doing all that is necessary to redact it and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under § 1301.8, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. TVA shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, TVA shall not search line-by-line where duplicating an entire document would be quicker and less expensive.

(c) *Fees*. In responding to a FOIA request, TVA shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section:

(1) *Search time charges for other than computer searches*. For time spent by clerical employees in searching files, the charge is \$14.90 per hour. For time spent by supervisory and professional employees, the charge is \$34.30 per hour.

(2) *Duplication charges*. For photostatic reproduction of requested material which consists of sheets no larger than 8½ by 14 inches, the charge is 10 cents per page. For copies produced by computer, such as tapes or printouts, TVA will charge the direct costs, including operator time, of

producing the copy. For other forms of duplication, TVA will charge the direct cost of that duplication.

(3) *Review charges*. Review fees will be charged to requesters who make a commercial use request. Review fees will be charged only for the initial record review—in other words, the review done when TVA determines whether an exemption applies to a particular record or record portion at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, record or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable where it is made necessary by a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1) of this section.

(d) *Limitations on charging fees*. (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, TVA will provide the following without charge:

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

(ii) The first two hours of search (or the cost equivalent).

(4) No fee is charged to any requester if the cost of collecting the fee would be equal to or greater than the fee itself.

(5) The provisions of paragraphs (d)(3) and (4) of this section work together.

This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages is equal to or greater than the fee itself.

(e) *Notice of anticipated fees in excess of \$25.00*. When TVA determines or estimates that the fees to be charged under this section will amount to more than \$25.00, TVA shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, TVA shall advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more

than \$25.00, the request shall not be considered received and further work shall not be done on it until the requester agrees to pay the anticipated total fee. Any such agreement should be documented in writing. A notice under this paragraph will offer the requester an opportunity to discuss the matter with TVA personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services*. Apart from the other provisions of this section, when TVA chooses as a matter of administrative discretion to provide a special service—such as certifying that records are true copies or sending them by other than ordinary mail—the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest*. TVA may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by TVA.

(h) *Aggregating requests*. When TVA reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, TVA may aggregate those requests and charge accordingly. TVA may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, TVA will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all of the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(i) *Advance payments*. (1) For requests other than those described in paragraphs (i) (2) and (3) of this section, TVA shall not require the requester to make an advance payment—in other words, a payment made before work is begun or continued on a request. Payment owed for work already completed (i.e., a prepayment before copies are sent to a requester) is not an advance payment.

(2) Where TVA determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to TVA or another agency within 30 days of the date of billing, TVA may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before TVA begins to process a new request or continues to process a pending request from that requester.

(4) In cases in which TVA requires advance payment or payment due under paragraph (i) (2) or (3) of this section, the request shall not be considered received and further work will not be done on it until the required payment is received.

(j) *Other fees for TVA published materials.* The fee schedule of this section does not apply to fees charged by TVA for documents, including maps or reports and the like, which TVA sells to the public at established prices. Where records responsive to requests are maintained for distribution and sale by TVA at established prices. TVA will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(k) *Waiver or reduction of fees.* (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where TVA determines, based on all available information, that the requester has documented that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, TVA will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an

increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. TVA shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, TVA will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. TVA shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b) (1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure. Whether any 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." A fee waiver or

reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. TVA ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the requested records satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k) (2) and (3) of this section, insofar as they apply to each request. TVA will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decisionmaking process, however, in deciding to grant waivers or reductions of fees.

**William S. Moore,**

*Senior Manager, Administrative Services.*

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## DEPARTMENT OF JUSTICE

### 21 CFR Part 1308

[DEA-17F]

#### Schedules of Controlled Substances: Placement of Modafinil Into Schedule IV

**AGENCY:** Drug Enforcement Administration, Department of Justice.  
**ACTION:** Final rule.

**SUMMARY:** With the issuance of this final rule, the Deputy Administrator of the Drug Enforcement Administration (DEA) places the substance, modafinil, including its salts, isomers and salts of isomers, into Schedule IV of the Controlled Substances Act (CSA). As a result of this rule, the regulatory controls and criminal sanctions of Schedule IV will be applicable to the manufacture, distribution, importation and exportation of modafinil and products containing modafinil.

**EFFECTIVE DATE:** January 27, 1999.

**FOR FURTHER INFORMATION CONTACT:** Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration,