

presentation times have changed have already received notification of these changes.

**Authority:** This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 6-96 (62 FR 111), and 29 CFR part 1911.

Signed at Washington, DC, this 5th day of April, 2000.

**Charles N. Jeffress,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 2

[FRL-6575-5]

### Revised Freedom of Information Act Regulations

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA or Agency) proposes to revise its regulations implementing the Freedom of Information Act (FOIA). EPA is streamlining and condensing its regulations, in accordance with the principles of the National Performance Review, and is using simpler language whenever possible. The regulations also reflect the principles established by President Clinton and Attorney General Reno in their FOIA Policy Memoranda dated October 4, 1993, as well as Attorney General Reno's recent restatement of those principles in a FOIA Policy Memorandum dated September 3, 1999. In addition, the regulations contain new provisions implementing the Electronic Freedom of Information Act Amendments of 1996, reflect developments in case law under the FOIA, and update cost figures for calculating and charging fees.

**DATES:** Comments must be received on or before May 12, 2000.

**ADDRESSES:** Please send any comments on this proposed rule to Jeralene B. Green, Office of Environmental Information (2822), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Public comments on this proposed rule will be available for review at

EPA's Air and Radiation Docket and Information Center (6102), Attention Docket Number FOIA-2000-01, 401 M Street, SW., Room M-1500, Waterside Mall (ground floor), Washington, DC 20460. This Docket is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, or by calling (202) 260-7548. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:**

Jeralene B. Green, (202) 260-1050.

**SUPPLEMENTARY INFORMATION:**

#### I. Description of Proposed Rule

EPA is proposing this comprehensive revision to 40 CFR part 2, subpart A, to add new provisions to implement the Electronic Freedom of Information Act Amendments of 1996, Public Law 104-231, to update the fee schedule, and to incorporate changes to the language and structure of the regulations. New provisions implementing the amendments are found at § 2.101(c) (electronic availability of records), § 2.104(b) (timing of responses), § 2.104(f) (expedited processing), § 2.104(g) (deletion marking), § 2.104(i)(3) (volume estimation), § 2.106(b)(3) (format of disclosure), and § 2.106(b)(8) (electronic searches).

Proposed changes to the Agency's fee schedule are found at § 2.106(c) and (d). The duplication charge will remain the same at fifteen (15) cents per page, while document search and review charges will increase to \$4.00, \$7.00, and \$10.25 per quarter hour for clerical, professional, and managerial time, respectively. The amount at or below which the Agency will not charge a fee will be \$14.00.

#### II. Statutory Authority

EPA is proposing this rule under the authority of 5 U.S.C. 301, 552 (as amended), and 553.

#### III. Regulatory Flexibility Act, as Amended

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

EPA has determined that this proposed rule will have only a small economic impact on the small entities that submit FOIA requests to EPA for records. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. EPA's proposed fees are nominal and have been calculated to recover only the direct costs of processing a FOIA request. The revision to the fee schedule is minimal and reflects a more specific breakdown of direct costs by the kind of EPA employee involved in processing a FOIA request. Therefore, under 5 U.S.C. 605(b), I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

#### IV. Paperwork Reduction Act

This proposed rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* It pertains solely to the dissemination of information under the FOIA.

#### V. Environmental Impact

This proposed rule is expected to have no environmental impact. It pertains solely to the dissemination of information under the FOIA.

#### VI. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), EPA must determine whether this proposed rule is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this proposed rule is not a "significant regulatory action" under the terms of

Executive Order 12866 and therefore is not subject to OMB review.

### VII. Executive Order 13132 on Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule simply revises EPA's regulations implementing the FOIA. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule.

### VIII. Executive Order 13084 on Consultation With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by

consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of Executive Order 13084 do not apply to this proposed rule.

### IX. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, EPA must prepare a budgetary impact statement to accompany any general notice of proposed rulemaking or final rule that includes a federal mandate which may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, for any rule subject to section 202, EPA generally must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Under section 203, before establishing any regulatory requirements that may significantly or uniquely affect small governments, EPA must take steps to inform and advise small governments of the requirements and enable them to provide input.

EPA has determined that this proposed rule does not include a federal mandate as defined in UMRA. This proposed rule does not include a federal mandate that may result in estimated annual costs to State, local or tribal governments in the aggregate, or to the private sector, of \$100 million or more, and does not establish regulatory requirements that may significantly or uniquely affect small governments.

### X. Executive Order 13045

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that (1) is determined to be "economically

significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned rule is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

EPA believes Executive Order 13045 applies only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

### XI. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when EPA decides not to use available and applicable voluntary consensus standards.

This proposed rule does not involve any technical standards, and EPA is not considering the use of any voluntary consensus standards. Accordingly, this proposed rule is not subject to the requirements of the NTTAA.

### List of Subjects 40 CFR Part 2

Environmental protection, Administrative practice and procedure, Confidential business information, Freedom of information, Government employees.

Dated: March 31, 2000.

**Margaret N. Schneider,**

*Principal Deputy Assistant Administrator.*

For the reasons set out above, EPA proposes to amend 40 CFR part 2 as follows:

### PART 2—PUBLIC INFORMATION

1. The authority citation for part 2 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 205, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C. 300j-4, 300j-9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 8(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136h, 136j, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1414(f), 1418); secs. 104 and 115, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9604 and 9615); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

2. Subpart A is revised to read as follows:

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act**

Sec.

- 2.100 General provisions.
- 2.101 Where requests for records are to be filed.
- 2.102 Procedures for making requests.
- 2.103 Responsibility for responding to requests.
- 2.104 Responses to requests.
- 2.105 Preservation of records.
- 2.106 Fees.
- 2.107 Other rights and services.

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act**

**§ 2.100 General provisions.**

(a) This subpart contains the rules that the Environmental Protection Agency (EPA or the Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Information routinely provided to the public as part of a regular EPA activity may be provided to the public without following this subpart. As a matter of policy, EPA makes discretionary disclosures of records or information exempt 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) As used in this subpart, the term "component" includes the offices of the Administrator, the Deputy Administrator, the Assistant Administrators, the Regional Administrators, the General Counsel, the Inspector General, the Chief Financial Officer, the Associate

Administrators, and the headquarters staff offices.

(c) When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, EPA will inform the requester of the steps necessary to obtain records from these sources.

**§ 2.101 Where requests for records are to be filed.**

(a) You may request records by writing to the Headquarters Freedom of Information Operations Staff (1105), Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 260-4048; FAX: (202) 260-4499. If you believe the records sought may be located in an EPA regional office, you should send your request to the appropriate regional Freedom of Information Officer as indicated in the following list:

(1) Region I (CT, ME, MA, NH, RI, VT): EPA, Freedom of Information Officer, One Congress Street, Suite 1100, Boston, MA 02114-2023; (617) 918-1103; FAX: (617) 918-1124.

(2) Region II (NJ, NY, PR, VI): EPA, Freedom of Information Officer, 290 Broadway, 26th Floor, New York, NY 10007-1866; (212) 637-3668; FAX: (212) 637-5046.

(3) Region III (DE, DC, MD, PA, VA, WV): EPA, Freedom of Information Officer, 1650 Arch Street, Philadelphia, PA 19103-2029; (215) 814-5553; FAX: (215) 814-5102.

(4) Region IV (AL, FL, GA, KY, MS, NC, SC, TN): EPA, Freedom of Information Officer, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303-3104; (404) 562-8034; FAX: (404) 562-8054.

(5) Region V (IL, IN, MI, MN, OH, WI): EPA, Freedom of Information Officer, 77 West Jackson Boulevard, Chicago, IL 60604-3507; (312) 886-2942; FAX: (312) 886-6686.

(6) Region VI (AR, LA, NM, OK, TX): EPA, Freedom of Information Officer, 1445 Ross Avenue, Dallas, TX 75202-2733; (214) 665-6597; FAX: (214) 665-2146.

(7) Region VII (IA, KS, MO, NE): EPA, Freedom of Information Officer, 901 North Fifth Street, Kansas City, KS 66101; (913) 551-7764; FAX: (913) 551-7066. Subpart A. Procedure

(8) Region VIII (CO, MT, ND, SD, UT, WY): EPA, Freedom of Information Officer, 999 18th Street, Suite 500, Denver, CO 80202-2466, (303) 312-6940; FAX: (303) 312-6961.

(9) Region IX (AZ, CA, HI, NV, AS, GU): EPA, Freedom of Information Officer, 75 Hawthorne Street, San Francisco, CA 94105; (415) 744-1593; FAX: (415) 744-1605.

(10) Region X (AK, ID, OR, WA): EPA, Freedom of Information Officer, 1200 Sixth Avenue, Seattle, WA 98101; (206) 553-8665; FAX: (206) 553-0149.

(b) EPA provides access to all records that the FOIA requires an agency to make regularly available for public inspection and copying. Each component is responsible for determining which of the records it generates are required to be made publicly available and for providing access by the public to them. Each component will also maintain and make available for public inspection and copying a current subject-matter index of such records. Each index will be updated regularly, at least quarterly, with respect to newly-included records.

(c) All records created by EPA on or after November 1, 1996, which the FOIA requires an agency to make regularly available for public inspection and copying, will be made available electronically through EPA's worldwide web site, located at <http://www.epa.gov>, or, upon request, through other electronic means. EPA will also include on its worldwide web site the current subject-matter index of all such records.

**§ 2.102 Procedures for making requests.**

(a) How made and addressed. You may make a request for EPA records by writing directly to the Freedom of Information Officer of the component as listed in § 2.101(a). Only written requests for records will be accepted for processing under this subpart. If you are making a request for records about yourself, see 40 CFR part 16, which implements the Privacy Act of 1974. 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 EPA to process your request. For records located at EPA headquarters, or in those instances when you cannot determine which EPA office to send your request, you may send it to the Headquarters Freedom of Information Operations Staff (1105), Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. That office will forward your request to the component(s) it believes most likely to have the records that you want. Your request will be considered received as of the date it is received by the FOIA

office. Misdirected requests will not be considered received by EPA until the appropriate FOIA office receives the request. For the quickest possible handling, you should mark both your request letter and its envelope "Freedom of Information Act Request."

(b) EPA officers and employees will attempt in good faith to comply with requests for inspection or disclosure of EPA records made orally, by telephone or otherwise, but such requests are not required to be processed in accordance with this subpart.

(c) Description of records sought. You must describe the records you are seeking in enough detail to enable EPA 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. 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 EPA will be able to locate those records in response to your request. If EPA determines that your request does not reasonably describe the records, it will tell you either what additional information you need to provide or why your request is otherwise insufficient. EPA will also give you an opportunity to discuss and modify your request to meet the requirements of this section. Should it be necessary for you to provide a revised description of the records you are seeking, the time necessary to do so will be excluded from the 20 working day period (or any extension of such period) that EPA has to respond to your request as discussed in § 2.104.

(d) Agreement to pay fees. If you make a FOIA request, EPA will consider your request to be an agreement that you will pay all applicable fees charged under § 2.106, up to \$25.00, unless you seek a waiver of fees. The EPA component responsible for responding to your request ordinarily will confirm this agreement in writing. When making a request, you may specify a willingness to pay a greater or lesser amount.

#### § 2.103 Responsibility for responding to requests.

(a) *In general.* Except as stated in paragraphs (c), (d), and (e) of this section, the Freedom of Information Office of the component that has possession of that record is the component responsible for responding to you. In determining which records are responsive to a request, a component will include only those records in its

possession as of the date the Freedom of Information Office of the component receives the request. If any other date is used, the component will inform you of that date.

(b) *Authority to grant or deny requests.* The head of a component, or the component head's designee, has been delegated authority to grant or deny any request for a record of that component.

(c) *Consultations and referrals.* When a component receives a request for a record in its possession, it will determine whether another component, or 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 receiving component determines that it is best able to process the record in response to the request, then it will do so. If the receiving component determines that it is not best able to process the record, then it will either:

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

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

(d) *Law enforcement information.* Whenever a request is made for a record containing information that relates to an investigation of a possible violation of law and was originated by another component or agency, the receiving component will either refer the responsibility for responding to the request regarding that information to that other component or agency or will consult with that other component or agency prior to making any release determination.

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

#### § 2.104 Responses to requests.

(a) The Deputy Administrator, Assistant Administrators, Regional Administrators, General Counsel, Inspector General, Chief Financial Officer, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations to release or deny the release of responsive records. The authority to issue initial determinations denying the release of records, except for records that have been claimed as confidential business information (CBI), may be redelegated to the division director level or equivalent, but not lower. The authority to issue initial determinations denying the release of records that have been claimed as CBI, as discussed in subpart B of this part 2, may be redelegated to levels below the division director level or equivalent.

(b) Components ordinarily will respond to requests no later than twenty (20) working days from the date the request is received. Requests ordinarily will be responded to according to their order of receipt.

(c) On receipt of a request, the Freedom of Information Office ordinarily will send an acknowledgment letter advising you of the date it was received and of the processing number assigned to the request for future reference.

(d) Multitrack processing. (1) A component may use two or more processing tracks by distinguishing between simple and complex requests based on the amount of work and/or time needed to process the request, including limits based on the number of pages involved. If a component does so, it will advise you of the processing track in which your request has been placed and of the limits of the different processing tracks.

(2) A component using multitrack processing may place your request in its slower track(s) while providing you the opportunity to limit the scope of your request in order to qualify for faster processing within the specified limits of the component's faster track(s). A component doing so will contact you either by telephone or by letter, whichever is most efficient in each case.

(e) Unusual circumstances. When the time limits for processing a request cannot be met because of unusual circumstances and the component determines to extend the time limits on that basis, the component will notify you in writing, as soon as practicable, of the unusual circumstances and of the date by which the component expects processing of the request to be completed. When the extension is for more than ten (10) working days, the

component will provide you with an opportunity either to modify the request so that it may be processed within the ten-day time limit extension or to arrange an alternative time period with the component for processing the original or modified request.

(f) Expedited processing. (1) Requests or appeals will be taken out of order and given expedited treatment whenever EPA determines that such requests or appeals 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; or

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

(2) A request for expedited processing may be made at the time of the initial request for records or before processing of the request has been completed. For a prompt determination, you must send a request for expedited processing to the proper component.

(3) If you are seeking expedited processing, you must submit a statement, certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for the request. For example, if you fit within the category described in paragraph (f)(1)(ii) of this section and are not a full-time member of the news media, you must establish that you are a person whose primary professional activity or occupation is information dissemination, although it need not be your sole occupation. If you fit within the category described in paragraph (f)(1)(ii) of this section, you must also 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.

(4) Within ten (10) working days from the date of your request for expedited processing, the proper component will decide whether to grant your request and will notify you of the decision. If your request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If your request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

(g) Grants of requests. Once a component makes a determination to grant a request in whole or in part, it will release the records or parts of records to you and notify you of any applicable fee charged under § 2.106.

Records released in part will be annotated, whenever technically feasible, with the applicable FOIA exemption(s) at that part of the record from which the exempt information was deleted.

(h) Adverse determinations of requests. Once a component makes an adverse determination of a request, it will notify you of that determination in writing. An adverse determination consists 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 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.

(i) The letter denying a request for records in whole or in part will be signed by the head of the component, or the component head's designee, and will 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 the component 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 annotated 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, and a description of the requirements of paragraph (j) of this section.

(j) Appeals of adverse determinations. If you are dissatisfied with any adverse determination of your request by a component, you may appeal that determination to the Headquarters Freedom of Information Operations Staff (1105), Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. The appeal must be made in writing, and it must be submitted to the Headquarters Freedom of Information Operations Staff no later than thirty (30) calendar days from the date of the letter denying the request. The appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number, if known). For quickest

possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal." Unless the Administrator directs otherwise, the General Counsel or his/her designee will act on behalf of the Administrator on all appeals under this section, except that:

(1) In the case of an adverse determination on an initial request by the General Counsel or his/her designee, the Administrator or his/her designee will act on the appeal;

(2) An adverse determination on an initial request by the Administrator will be the final action of the Agency; and

(3) An appeal will not be acted on if the request becomes a matter of FOIA litigation.

(k) The decision on an appeal will be made normally, in writing, within twenty (20) working days of its receipt by the Headquarters Freedom of Information Operations Staff. A decision affirming a component's adverse determination in whole or in part will contain a statement of the reason(s) for the decision, including any FOIA exemption(s) applied, and inform you of the FOIA provisions for judicial review of the decision. If the component's adverse determination is reversed or modified on appeal, you will be notified in a written decision. This written decision will either have the requested information that has been determined on appeal to be releasable attached to it, or your request will be returned to the component so that it may be reprocessed in accordance with the appeal decision.

(l) If you wish to seek judicial review of any adverse determination, you must first appeal that adverse determination under this section.

#### **§ 2.105 Preservation of records.**

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

#### **§ 2.106 Fees.**

(a) In general. Components will 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 (l) of this section. Requesters will pay fees by

check or money order made payable to the U.S. Environmental Protection Agency.

(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/her commercial, trade, or profit interests, which can include furthering those interests through litigation. Components will 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 a component has reasonable cause to doubt a requester's stated use, the component will provide the requester a reasonable opportunity to submit further clarification.

(2) "Direct costs" means those expenses that the Agency 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) and the cost of operating duplication equipment. 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. Components will 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, 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 a commercial 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 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 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 components will 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 use. However, a request for records supporting the news-dissemination function of the requester will 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 requesting confidential treatment, 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. Components will ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, components will not search line-by-line where duplicating an entire document would be quicker and less expensive.

(c) Fees to be charged. (1) There are four categories of requests. Fees for each of these categories will be charged as follows:

(i) Commercial use requests. A requester seeking access to records for a commercial use will be charged for the time spent searching for the records, reviewing the records for possible disclosure, and for the cost of each page of duplication. The charges for searching for and/or reviewing the records may be charged even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(ii) Educational or non-commercial scientific requests. Requesters from educational or scientific institutions, whose purpose is scholarly, noncommercial research, will be charged only for the cost of record duplication, except that the first 100 pages of duplication will be furnished at no charge.

(iii) News media requests. Requesters who are representatives of the news media, and whose purpose in seeking records is noncommercial, will be charged only for the cost of duplication, except that the first 100 pages of duplication will be furnished at no charge.

(iv) All other requests. Requesters not covered by one of the three categories in paragraphs (c)(1)(i) through (iii) of this section will be charged for the full cost of search and duplication, except that the first two hours of search time and the first 100 pages of duplication will be furnished without charge. The charges for searching for the records will be assessed even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(2) In responding to FOIA requests, components will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (l) of this section:

(i) Search. (A) Search fees will be charged for all requests except for those made by educational institutions, noncommercial scientific institutions, or representatives of the news media subject to the limitations of paragraph (d) of this section. Components will charge for time spent searching even if no responsive records are found or if the

records are located but are determined to be exempt from disclosure.

(B) For searches and retrievals of requested records, either manually or electronically, conducted by clerical personnel, the fee will be \$4.00 for each quarter hour of time. For searches and retrievals of requested records, either manually or electronically, requiring the use of professional personnel, the fee will be \$7.00 for each quarter hour of time. For searches and retrievals of requested records, either manually or electronically, requiring the use of managerial personnel, the fee will be \$10.25 for each quarter hour of time.

(C) When searches and retrievals are conducted by contractors, requesters will be charged for the actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search. The costs of actual computer resource usage in connection with such searches will also be charged, to the extent they can be determined.

(ii) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For either a photocopy or a computer-generated printout of a record (no more than one copy of which need be supplied), the fee will be fifteen cents per page. For electronic forms of duplication, other than a computer-generated printout, components will charge the direct costs of that duplication. Such direct costs will include the costs of the requested electronic medium on which the copy is to be made and the actual operator time and computer resource usage required to produce the copy, to the extent they can be determined.

(iii) Review. Review fees will be charged only to requesters who make a commercial use request. Review fees will be charged only for the initial record review (that is, the review done when a component is deciding whether an exemption applies to a particular record or portion of a record at the initial request level). No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review will be charged when 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)(i) of this section.

(d) Limitations on charging fees. (1) No search or review fees 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, components will provide without charge:

(i) The first 100 pages of duplication; and

(ii) The first two hours of search.

(4) Whenever a total fee calculated under paragraph (c) of this section is \$14.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (4) of this section are complementary. 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 totals more than \$14.00.

(e) Notice of anticipated fees in excess of \$25.00. When a component determines or estimates that the fees to be charged under this section will amount to more than \$25.00, the component will 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, the component will advise the requester that the estimated fee may be only a portion of the total fee. When a requester has been notified that actual or estimated fees will amount to more than \$25.00, EPA will do no further work on the request until the requester agrees to pay the anticipated total fee. EPA will memorialize any such agreement in writing. A notice under this paragraph will offer the requester an opportunity to discuss the matter with Agency 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 a component chooses as a matter of administrative discretion to provide a special service—such as certifying that records are true copies or sending records by other than ordinary mail—the direct costs of providing the service ordinarily will be charged.

(g) Charging interest. EPA 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 the Agency. EPA will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset. No penalty will be assessed against FOIA requesters for exercising their statutory right to ask that a fee be waived or reduced or to dispute a billing. If a fee is in dispute, penalties will be suspended.

(h) Delinquent requesters. If requesters fail to pay all fees within 60 calendar days of the fees assessment, they will be placed on a delinquency list. Subsequent FOIA requests will not be processed until payment of the overdue fees has first been made.

(i) Aggregating requests. When a component 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, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. When requests are separated by a longer period, components will aggregate them only if there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(j) Advance payments. (1) For requests other than those described in paragraphs (j)(2) and (3) of this section, a component will not require the requester to make an advance payment (that is, a payment made before EPA begins or continues work on a request). Payment owed for work already completed (that is, a prepayment before copies are sent to a requester) is not an advance payment.

(2) When a component 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 when it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) When a requester has previously failed to pay a properly charged FOIA fee to any component or agency within 30 calendar days of the date of billing, a component 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 the component begins to process a new

request or continues to process a pending request from that requester.

(4) When a component requires advance payment or payment due under paragraph (j)(3) of this section, the request will not be considered, and EPA will do no further work on the request until the required payment is made.

(k) Other statutes specifically providing for fees. The fee schedule of this section does not apply to fees charged under any other statute that specifically requires an agency to set and collect fees for particular types of records. When records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, components will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(l) 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 when a component determines, based on all available information, that 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 is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, components 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.

(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 when nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public is 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 will be considered. It will 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. Components will 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, components 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. Components will consider any commercial interest of the requester (with reference to the definition of "commercial use request" 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 will 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. Components ordinarily will presume that when 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 will not be presumed to primarily serve the public interest.

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

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (l) (2) and (3) of this section, insofar as they apply to each request. Components will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in deciding whether to grant waivers or reductions of fees. Requests for the waiver or reduction of fees must be submitted along with the request or before processing of the request has been completed.

#### **§ 2.107 Other rights and services.**

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

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## **FEDERAL EMERGENCY MANAGEMENT AGENCY**

### **44 CFR Part 67**

[Docket No. FEMA-7307]

#### **Proposed Flood Elevation Determinations**

**AGENCY:** Federal Emergency Management Agency, FEMA.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed base (1% annual chance) flood elevations and proposed base flood elevation modifications for the communities listed below. The base flood elevations are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

**ADDRESSES:** The proposed base flood elevations for each community are available for inspection at the office of